to assist in making the industry more competitive in worldwide marine transportation. The meeting will be open to the public on a space available basis.

By Order of the Maritime Administrator.

Date: October 21, 1983.

Georgia P. Stamas,

Secretary.

[FR Doc. 83-29177 Filed 10-26-83; 8:45 am]

BILLING CODE 4910-81-M

National Highway Traffic Safety Administration

Safety Defect Investigations of Volkswagen Brake Lines and Fuel Pump Electrical Circuits; Public Proceeding Cancelled

The National Highway Traffic Safety Administration has cancelled the public proceeding announced in the **Federal Register** of September 16, 1983 (44 FR 41669) regarding its initial determination of safety-related defects in certain vehicles manufactured or imported by Volkswagen of America, Inc. One initial determination covered the service braking systems in 1975–1980 Volkswagen Rabbits and Sciroccos manufactured in Germany by Volkswagen AG. The other intitial determination covered certain components of the fuel pump electrical circuit in 1977–1980 Rabbits; 1976–1982 Sciroccos; 1980–1982 Jettas; 1976–1980 Dashers; 1980 Volkswagen pick-up trucks; 1980–1982 Volkswagen covertibles; 1976–1979 Audi Fox; and 1980–1981 Audi 4000 vehicles manufactured or imported by Volkswagen of America, Inc. and equipped with gasoline-powered fuel injected engines. The meeting was to be held at 10:00 a.m. on October 24, 1983 in Room 2230 of the Department of Transportation Building, 400 Seventh Street, SW., Washington, DC 20590.

(Sec. 152, Pub. L. 93-492, 88 Stat. 1470 (15 U.S.C. 1412); delegation of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on October 20, 1983.

George L. Parker,

Acting Associate Administrator for Enforcement.

[FR Doc. 83-29179 Filed 10-24-83; 12:30 pm]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Supplement to Department Circular Public Debt Series—No. 31-83]

Notes of Series 2-1985; Interest Rate

October 20, 1983.

The Secretary announced on October 19, 1983, that the interest rate on the notes designated Series Z-1985, described in Department Circular—Public Debt Series—No. 31-83 dated October 13, 1983, will be 10½ percent. Interest on the notes will be payable at the rate of 10½ percent per annum.

Carole J. Dineen,

Fiscal Assistant Secretary.

[FR Doc. 83-29185 Filed 10-26-83; 8:45 am]

BILLING CODE 4810-40-M

Customs Service

Application for Recordation of Trade Name: "Zahnradfabrik Friedrichshafen, AG."

AGENCY: U.S. Cusoms Service, Department of the Treasury.

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "Zahnradfabrik Friedrichshafen, AG.," used by Zahnradfabrik Friedrichshafen, AG., a corporation organized under the laws of the West Germany, located at D-7990 Friedrichshafen 1, West Germany.

The application states that the trade name is used in connection with the following merchandise manufactured and distributed throughout the world: gear units for machines; machine parts; brake testing stands; testing instruments and parts for land vehicles.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the **Federal Register**.

DATE: Comments must be received on or before December 27, 1983.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Room 2417, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229; (202-566-5765).

Dated: October 21, 1983.

Marilyn G. Morrison,

Acting Director, Entry Procedures and Penalties Division.

[FR Doc. 83-29184 Filed 10-26-83; 8:45 am]

BILLING CODE 4820-02-M

Sunshine Act Meetings

Federal Register
Vol. 48, No. 209
Thursday, October 27, 1983

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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1

CONSUMER PRODUCT SAFETY COMMISSION

Commission Meeting

TIME AND DATE: 10 a.m. Wednesday, November 2, 1983.

LOCATION: Third Floor Hearing Room, 1111 18th Street NW., Washington, D.C. 20207.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

Complaint Handling Process: FY 83 Report

The staff will brief the Commission on the results of a study of Consumer Complaint Processing in FY 83.

For a recorded message containing the latest agenda information: call 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Avenue, Bethesda, Md. 20207; 301-492-6800.

[S-1511-83 Filed 10-25-83; 4:06 pm]

BILLING CODE 6355-01-M

2

FEDERAL COMMUNICATIONS COMMISSION

Deletion of Agenda Item From October 19th Open Meeting

October 18, 1983.

The following item has been deleted at the request of the Office of Commissioner Dawson from the list of agenda items scheduled for consideration at the October 19, 1983 Open Meeting and previously listed in the Commission's Notice of October 12, 1983.

Agenda, Item No., and Subject

Audio—1—*Title:* License Renewal Applications of Pacifica Foundation for Station WPFW (FM), Washington, D.C. *Summary:* The Commission considers a petition to deny filed by the American Legal Foundation.

William J. Tricarico,

Secretary, Federal Communications Commission.

[S-1504-83 Filed 10-25-83; 10:25 am]

BILLING CODE 6712-01-M

3

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, November 1, 1983, 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED: Compliance. Litigation. Audits. Personnel.

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Information Officer, telephone: 202-523-4065.

Marjorie W. Emmons,

Secretary of the Commission.

[S-1506-83 Filed 10-25-83; 1:41 pm]

BILLING CODE 6715-01-M

4

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

October 19, 1983.

TIME AND DATE: 10 a.m., Wednesday, October 26, 1983.

PLACE: Room 600, 1730 K Street NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. U.S. Steel Mining Co., Inc., Docket No. PENN 82-337; Petition for Discretionary Review. (Issues include whether the administrative law judge properly concluded that the operator violated 30 CFR 75.1105, which deals in part with the ventilation of underground battery-charging stations, and that the violation was significant and substantial.)

2. Ralph Yates v. Cedar Coal Co., Docket No. WEVA 82-360-D; Petition for Discretionary Review. (Issues include whether the administrative law judge erred in dismissing the discrimination complaint.)

3. Youghiogheny & Ohio Coal Co., Docket No. LAKE 83-36; Petition for Discretionary Review. (Issues include whether the administrative law judge properly concluded that the operator violated 30 CFR 75.308, which deals with methane accumulations in face areas, and whether the judge appropriately assessed the penalty.)

4. David Hollis v. Consolidation Coal Company, Docket No. WEVA 81-480-D. (Issues include whether the judge erred in dismissing the discrimination complaint.)

5. Mid-Continent Resources, Inc., Docket No. WEST 82-174. (Issues include whether the judge properly concluded that the operator violated 30 CFR 75.511, which deals with safe performance of electrical work on equipment.)

6. Energy Fuels Nuclear, Inc., Docket No. WEST 81-385-M. (Issues include whether the judge erred in concluding that the operator did not violate 30 CFR 57.6-116, which deals with safe ignition of fuses.)

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653-5632.

Jean Ellen,

Agenda Clerk.

[S-1502-83 Filed 10-25-83; 10:26 am]

BILLING CODE 6735-01-M

5

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

October 19, 1983.

TIME AND DATE: 10 a.m., Wednesday, November 2, 1983.

PLACE: Room 600, 1730 K Street NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the following case:

1. Secretary of Labor, Mine Safety and Health Administration v. Metric Constructors, Inc., Docket No. SE 80-31-DM. (Issues include whether the administrative law judge properly concluded that the operator discriminatorily discharged miners, and whether he awarded the miners appropriate relief.)

TIME AND DATE: Following oral argument.

STATUS: Closed (Pursuant to 5 U.S.C. 552b(c)(10)).

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the above case. It was determined by a majority vote of Commissioners that this meeting be closed.

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 653-5632.

Jean Ellen,

Agenda Clerk.

[S-1503-83 Filed 10-25-83; 10:27 am]

BILLING CODE 6735-01-M

6

FEDERAL TRADE COMMISSION

TIME AND DATES: 10 a.m., Tuesday, October 25, 1983.

PLACE: Room 432, Federal Trade Commission Building, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580.

STATUS: Open.

MATTERS TO BE CONSIDERED: Meeting with Delegation from Japan Fair Trade Commission led by its Chairman to consider enforcement policies.

CONTACT PERSON FOR MORE INFORMATION: Susan B. Ticknor, Office of Public Information (202) 523–1892; recorded message (202) 523–3806.

[S-1505-83 Filed 10-25-83; 11:55 am]

BILLING CODE 6750-01-M

7

NATIONAL LABOR RELATIONS BOARD

TIME AND DATE: 10 a.m., Wednesday, 26 October 1983.

PLACE: Board Conference Room, sixth floor, 1717 Pennsylvania Avenue NW.

STATUS: Closed to public observation pursuant to 5 U.S.C. 552b(c)(9)(B) (disclose information the premature disclosure of which would * * * be likely to significantly frustrate implementation of a proposed agency action * * *.)

MATTERS TO BE CONSIDERED: Internal case-handling procedures.

CONTACT PERSON FOR MORE INFORMATION: John C. Truesdale, Executive Secretary, Washington, D.C. 20570, telephone (202) 254–9430.

Dated at Washington, D.C., October 25, 1983.

By direction of the Board.

John C. Truesdale,

Executive Secretary, National Labor Relations Board.

[S-1507-83 Filed 10-25-83; 3:21 pm]

BILLING CODE 7545-01-M

8

NATIONAL MEDIATION BOARD

TIME AND DATE: 2 p.m., Wednesday, November 2, 1983.

PLACE: Board Hearing Room, Eighth floor, 1425 K Street NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Ratification of the Board actions taken by notation voting during the month of October, 1983.
2. Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

SUPPLEMENTARY INFORMATION: Copies of the monthly report of the Board's notation voting actions will be available from the Executive Secretary's office following the meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Rowland K. Quinn, Jr., Executive Secretary, telephone (202) 523–5920.

Dated: October 25, 1983.

[S-1509-83 Filed 10-25-83; 3:25 pm]

BILLING CODE 7550-01-M

federal register

Thursday
October 27, 1983

Part II

Department of Labor

Wage and Hour Division, Employment Standards Administration

Service Contract Act; Labor Standards for Federal Service Contracts

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 4

Service Contract Act; Labor Standards for Federal Service Contracts

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

ACTION: Final rule

SUMMARY: This document provides the final text of regulations on Labor Standards for Federal Sevice Contracts, 29 CFR Part 4, issued under the Service Contract Act. Major revisions to the stayed January 1981 regulations include a two-step determination procedure where the geographic place of contract performance is unknown; elimination of the provisions that made bid specifications principally for services subject to the Act when the principal purpose of the contract as a whole is not for services, and the related provision that made separate janitorial and maintenance specifications on contracts for lease of building space subject to the Act; guidelines indicating when contracts for major overhaul or modification of equipment are subject to the Service Contract Act or Walsh-Healey Act; an exemption for certain contracts for the maintenance and repair of automated data processing equipment including office information systems, and certain scientific and medical apparatus, and for maintenance and repair of office/business machines when such work is performed by the manufacturer or supplier of the equipment; modification of the provisions that covered many timber sales contracts to provide that generally their principal purpose is sale and they are not subject to the Act; modification of the provisions that covered demolition/sales contracts to provide that they are covered if the principal purpose is service but not if it is sale; revisions to ease the procedure for obtaining additional classifications when such actions have been taken in the past; and a limitation of the application of section 4(c) of the Act to situations where the successor contractor performs the contract in the same locality as the predecessor contactor. It has been determined that proposed revisions to cover only contracts performed principally by service employees, and to exempt research and development contracts, should not be made. In addition, significant revisions have been made to the proposed regulations to apply the limitation on section 4(c) where contracts are reconfigured only to situations where the predecessor contracts were for the same or similar work functions performed by substantially the same job classifications; to eliminate the exemption for visitor information services from the exemption for certain concessions serving the general public; and, in the proposal concerning maintenance of wash-and-wear uniforms, to clarify that a requirement of daily washing is special treatment requiring compensation and further, that with respect to section 4(c) wage determinations, the amount negotiated for uniform maintenance is deemed to be the cost thereof.

DATES: Effective date: December 27, 1983. However, also see the **SUPPLEMENTARY INFORMATION** below for dates of applicability.

FOR FURTHER INFORMATION CONTACT: William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210 (telephone: 202-523-8305).

SUPPLEMENTARY INFORMATION: On December 28, 1979, and December 12, 1980, proposals were published in the **Federal Register** (44 FR 77036, 45 FR 81785) to make certain revisions to 29 CFR Part 4, Service Contract Act; Labor Standards for Federal Service Contracts. The purpose of these changes was to revise, update, and clarify this regulation.

On January 16 and 19, 1981, revised Part 4 was published in the **Federal Register** (46 FR 4320; 46 FR 4886) as a final rule. However, pursuant to the President's Memorandum of January 29, 1981, the Department published a notice in the **Federal Register** on February 12, 1981 (46 FR 11971), delaying implementation of this regulation until April 17, 1981. The Department further delayed its implementation until August 15, 1981, in order to permit reconsideration pursuant to Executive Order 12291. See 46 FR 18973 (March 27, 1981); 46 FR 23739 (April 28, 1981); 46 FR 33515 (June 30, 1981); 46 FR 36140 (July 14, 1981). This executive order required the Department to postpone the effective date of major rules promulgated in final form which had not yet become effective; the order required the Department to reconsider those rules to ensure, *inter alia*, that the rules maximize the net benefits to society at the least net cost, that the rules are clearly within the authority delegated by law and consistent with congressional intent, and that any factual conclusions upon which the rule is based have substantial support in the agency record, with full attention to comments of the public in general and of persons directly affected in particular.

On August 14, 1981, after reconsideration in accordance with Executive Order 12291, a new regulatory proposal substantially revising several provisions of the January 1981 regulation, was published in the **Federal Register** (46 FR 41380) and the previously published rule was further postponed until action could be taken on the new proposal (46 FR 41044).

Interested persons were affored the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the proposal in the **Federal Register**. Subsequently, on October 13, 1981, a notice was published in the **Federal Register** (46 FR 50397) extending the time for public comment until December 1, 1981, in order to leave the record open while public hearings were conducted on the proposed rule at Merritt Island, Florida, on November 19 and 20, 1981. *See* 45 FR 51405 (October 20, 1981).

Comments were received from approximately 1,600 interested parties, including Members of Congress, contracting agencies, contractor associations, contractors, labor organizations, universities, business organizations, and many individuals, particularly employees covered by the Act. Contractor associations and business organizations submitting comments included the Computer and Business Equipment Manufacturers Association (CBEMA), the Scientific Apparatus Makers Association (SAMA), the Natonal Council of Technical Service Industries (NCTSI), the Council of Defense and Space Industry Associations (CODSIA), the United States Chamber of Commerce (C of C), the American Electronics Association (AEA), and the National Forest Products Association (NFPA).

Among the individual firms who commented were International Business Machines Corporation, Texas Instruments Incorporated, Hewlett-Packard Company, Honeywell Information Systems, Inc., Eastman Kodak Company, Sperry Corporation, and Xerox Corporation.

A number of colleges and universities submitted comments, including Yale University, the University of Chicago, Harvard University, and Princeton University.

Labor organizations commenting on the proposal included the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), the

International Association of Machinists and Aerospace Workers (IAM), the Laborers' International Union of North America (LIUNA), the United Brotherhood of Carpenters and Joiners of America (UBC), the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada-Motion Picture Laboratory Technicians Local 780 (IATSE), the International Brotherhood of Electrical Workers (IBEW), the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), the Service Empolyees International Union (SEIU), the Seafarers International Union (SIU), the United Plant Guard Workers of America (UPGWA), and others. Among those Federal agencies submitting comments were the Department of Defense (DOD), the Department of Energy (DOE), the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA), the Office of Advocacy of the Small Business Administration (SBA), and the Department of the Interior.

The following is an analysis of the provisions for which substantive changes were proposed in the final regulations published on January 16, and 19, 1981, as well as discussion of any additional provisions on which major comments were received and suggestions for revisions made. The analysis includes an outline of the history of the provision, including (a) its contemporaneous construction, (b) a description of the corresponding provision (if any) in the existing regulations, (c) current practice, (d) a description of the corresponding provision (if any) in the January 1981 regulations, and (e) a description of the provision proposed on August 14, 1981. This is followed by a description of the major comments received. Finally, the analysis explains the final decision made. With respect to each issue involving statutory interpretation, we have taken into consideration the principle that the Service Contract Act is remedial legislation which should be broadly construed to effectuate its purpose, but at the same time recognizing that this rule cannot defeat the intent of Congress or the evident meaning of the Act. 3 Sutherland ¶60.01 (1974) ed.).

Sections 4.1b(a), 4.10(b)(2), 4.163(c)—Effective Date of Variance Decisions

Section 4(c) of the Act provides generally that every contractor under a contract which succeeds a contract for substantially the same services is required to pay its service employees at least the wages and fringe benefits provided in the collective bargaining agreement, if any, which were applicable to the preceding contract. An exception is provided, however, if the collective bargaining agreement was not reached as a result of arm's-length negotiations or if the Secretary finds after a hearing that the negotiated wages and benefits are substantially at variance with those prevailing in the locality. On occasion, a decision that there is a substantial variance is not reached and a new wage determination issued until after contract award and commencement of performance. The question which arises is whether that wage determination should be retroactive to commencement of performance.

History of Provision

(a) Contemporaneous construction—It has generally been the Department's practice, on the rare occasions when this issue has arisen, to issue wage determinations retroactive to commencement of performance where the result is to increase the wages which otherwise would have been required, but to issue wage determinations prospectively only where there is a decrease in wages so as not to recoup wages from the workers.

(b) Existing regulations—There is no corresponding provision.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Provided that all wage determinations issued after a finding of substantial variance would be effective as of the date of the decision of the administrative law judge or, if appealed, the Board of Service Contract Appeals.

(e) Proposed regulations—Same as (d).

Comments

DOE and NASA expressed concern over the timeliness of substantial variance decisions under section 4(c) of the Act if, as proposed, a new wage determination issued as the result of a finding of a substantial variance does not become applicable until the date of the decision of the Administrative Law Judge, or if appealed, the decision of the Board of Service Contract Appeals. They commented that, unless the decision is made retroactive to the start of the contract, the regulations needed to provide some time limits to insure the expeditious handling of substantial variance proceedings so that the process would be effective in rectifying serious imbalances between collective bargaining agreements and locally prevailing wage rates and fringe benefits.

Discussion of Final Rule

As section 4.163(c) explains, 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). Therefore, it is the Department's view that retroactive wage determinations, as suggested by the agencies and as practiced by the Department in the past in some circumstances, are not consistent with the Act. It is also our view that a uniform rule (unlike that observed in the past) is appropriate, and that neither the contractor nor the workers should be penalized by retroactive application of the new wage determination. Accordingly, sections 4.1b(a) and 4.163(c) are adopted as proposed with minor clarification.

With respect to the comments regarding time limits for the handling of substantial variance hearings, we note that certain time limits are provided in this regulation as well as in 29 CFR Parts 6 and 8 in order to facilitate the expeditious handling of substantial variance hearings. It appears that the imposition of stricter time limits on the hearings themselves would not be practical because of great variations in the scope and complexity of the issues which often need to be considered. In response to this concern, however, we are amending section 4.10(b)(2) to provide that, within 30 days, the Administrator will respond to a request for a substantial variance hearing or notify the requesting party of a delay if additional time is necessary to consider the matter.

Sections 4.3, 4.4, and 4.53—Locality Basis of Wage Determinations When Place of Contract Performance Is Unknown at Time of Bid Solicitation

Section 2 (a) of the Act requires that the minimum monetary wages and fringe benefits specified in a wage determination be "in accordance with prevailing rates * * * in the locality." Since the Act does not define "locality", a problem arises with respect to those contracts where, due to the nature of the procurement, the place of contract performance (usually a contractor's plant) cannot be established at the time of bid solicitation.

History of Provision

(a) Contemporaneous construction—Initially, following the recognition of the problem, the locality of the government installation or facility issuing the bid solicitation was the preferred locality, regardless of where the contract would be performed. This approach was overturned in *Descomp* v. *Sampson*, 377 F. Supp. 254, 266 (D. Del 1974), in which the court concluded that the term "locality" as used in the Act "refers to the area where the services are actually performed." The Department then adopted a composite approach under which the locality encompassed the entire geographic area in which, based on the nature of the procurement, the contract would likely be performed. Thus, the composite "locality" might encompass several states or even be nationwide in scope. However, in *Southern Packaging and Storage Co., Inc.* v. *United States*, 618 F.2d 1088 (4th Cir. 1980), the Fourth Circuit held that nationwide composite wage determinations normally are not permissible and required in that case that DOL issue separate wage determinations for each potential contractor's locality. The court further postulated that nationwide wage determinations might be permissible "in the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition."

(b) Existing regulations—A general discussion of locality is set forth at section 4.163, but there is no specific provision concerning locality where place of performance is unknown.

(c) Current practice—As a result of *Southern Packaging*, when the place of performance is unknown at the time of bid solicitation, separate wage determinations are generally issued whenever prospective bidders are identified in advance by the contracting agency. When no such information is provided, or the number of prospective bidders is too numerous, a composite wage determination is issued.

(d) January 1981 regulations—Provided generally at section 4.53 that the proper locality shall be "defined in each such [wage] determination upon the basis of all the facts and circumstances pertaining to that determination," ordinarily limited to a particular county or metropolitan area, but in some circumstances a State or a region. In addition, the regulation noted that the court in *Southern Packaging* held that normally a nationwide wage determination would not be permissible. There was no specific provision in these regulations concerning the appropriate locality where the place of performance cannot be ascertained at the time of bid advertisement.

(e) Proposed regulations—Provided the same general provision concerning locality as the January 1981 regulations. In addition, specified at section 4.4(b) that where the place of performance is unknown at time of bid advertisement, "wage determinations will generally be issued for each locality identified by the [contracting] agency" under a two-step procedure, the first step being identification by the agency of prospective bidders and their localities, and the second, issuance of wage determinations for the locality of each bidder. The proposal provides that in "extraordinary circumstances," where the two-step procedure is not practicable, the procedure may be altered upon the request of the contracting agency and wage determinations for one or more composite localities may be issued.

Comments

The concept of a two-step procurement procedure was supported generally by DOD, GSA, NCTSI, and the C of C. DOD suggested that the former one-step procedure should be available at the contracting agency's option, utilizing the locality of the procuring agency. NCTSI, on the other hand, stated that exceptions should never be allowed.

The proposal was opposed by IAM, LIUNA, and SEIU, which asserted that a two-step procurement procedure would grant a competitive advantage to bidders in "low wage" areas and channel contract awards to those areas. The unions cited legislative history which they interpreted as being contrary to a two-step procurement procedure. They also cited the rejection by a House oversight subcommittee in 1974 and 1975 of a two-step procedure, as well as DOL's 1976 withdrawal of proposed regulations which would have established such a procedure. The SEIU suggested that instead of the two-step procedure, the Department should utilize the locality of the procuring agency or the predecessor contractor.

The Department of Interior objected to a two-step procedure for advertised solicitations on the ground that excessive delays would occur. It recommended the procedure be limited to negotiated procurements only.

Discussion of Final Rule

The Department continues to be of the view that the proposed two-step procedure is the best means of addressing the problem of procurements where the place of performance is unknown. This new procedure is designed to insure that the successful bidder will be required to pay at a minimum the rates prevailing in the geographic location where the work is performed. Such a process is consistent with the purpose of the Act to prevent the importation of wage rates from other areas and disruption of labor markets which would occur under other methods, such as the locality of the procuring agency or the predecessor contractor.

Central to the unions' contention that a two-step procedure is not in accord with the Act's remedial purpose is their belief that the proposal would tend to channel contract awards to low wage areas. However, while the legislative history reflects an intent to apply a flexible and realistic definition of the term "locality", Congress did not consider the problem of defining "locality" in situations where the place of performance is unknown. Certainly there is nothing in the legislative history to suggest that Congress intended that service contracts would not be awarded and employees would not perform work on contracts in areas where lower wages prevail. Nor does the legislative history evidence a congressional intent that potential bidders in widely divergent locations should be subject to a single "prevailing" wage standard for all communities across the country, each of which has its own distinct wage patterns. Rather, the concept that wage determinations should reflect wages being paid in the area where the work is performed is basic to prevailing wage legislation, to prevent Government contracts from disrupting local wage standards.

Furthermore, the House subcommittee oversight hearings cited by the unions are not considered to be evidence of the intent of Congress at the time of enactment, since they transpired well after the passage of the original Act and the 1972 amendments, and did not even purport to reflect the views of that entire, subsequent session of Congress. In addition, DOL's 1976 decision not to adopt a two-step procedure does not preclude it from reviewing the matter and reaching a different conclusion at this time, particularly in light of the subsequent decision in *Southern Packaging*, discussed above. That decision not only required issuance of two-step wage determinations in that case, but also necessitated a reexamination of the Department's policies.

While the Department recognizes that the two-step procedure will place an administrative burden on contracting agencies and DOL because of the need

to issue two solicitations and the possible issuance of multiple wage determinations, the Department is of the view that this increased workload burden would normally be manageable. The problem of the proper locality to utilize when it is not known in advance where a service contract will be performed arises in relatively few procurements per year. For example, in fiscal year 1979, out of a total of about 36,000 contracts for which wage determinations were issued by the Department, some 700 involved unknown places of performance. See *Southern Packaging, supra* at 1091. Careful advance planning should avoid long delays in procurements. Moreover, the regulations provide that if situations arise where a two-step procurement procedure is impracticable, other appropriate methods of issuing wage determinations can be used.

Althouth recommended modifications to the two-step procedure were closely reviewed, the Department has concluded that the proposed language provides the most appropriate regulatory procedure. It is accordingly adopted with a clarification that in situations where the two-step procedure is not practicable, the Department may use a modified procedure after consultation with the contracting agency.

Section 4.6(b)(2)—Conformance of Wage Rates for Classifications of Employees Not Listed on a Wage Determination

Since the SCA requires the issuance of prevailing wage rates for the various classes of employees performing on a contract, a method of establishing rates is needed for those classes of employees which are not listed on an applicable wage determination (WD) because no wage data regarding such classes are available or because the contracting agency did not request a rate for such classes.

History of Provision

(a) Contemporaneous construction—The Act has always been interpreted to permit such a procedure. The method initially chosen is in the existing regulations (paragraph (b) below).

(b) Existing regulations—Provide that any class of employee to be employed on the contract which is not listed on the applicable WD must be classified (i.e., "conformed") by the contractor so as to provide a reasonable relationship between the wage rate of that class and the listed classes. Further, the contractor must pay such conformed classes the wage rates and fringe benefits agreed to by the interested parties, who are the contractor, the employees or their representative (normally a collective bargaining agent) and the contracting agency. Such wage rates and fringe benefits become an enforceable part of the WD. In case of disagreement among the interested parties, the matter is submitted to DOL for resolution.

(c) Current practice—Same as (b).

(d) January 1981 regulations—Provided clearer rules for the conformance process, including a requirement that the procedure be completed within 30 days of initial work on the contract by the unlisted class of workers. In addition, these rules required that all conformance actions be submitted to DOL for review, accompanied by evidence in writing of the agreement of the employees (where the action is not submitted as a dispute).

(e) Proposed regulations—Revised the January 1981 regulations to provide an indexing procedure to simplify the conformance procedure where the rates were previously conformed, allowing a contractor to apply a mathematical formula to the previously conformed rate (increasing the previously conformed rate by an amount equal to the average percentage increase between the rates in the previous WD and those in the current WD) without obtaining DOL approval or the agreement of the workers involved. In addition, under section 4.51(c) of the proposal, the Department would establish rates by the increased use of "slotting" techniques for many classifications which previously required conformance, thereby reducing the need for conformance in the first place. Under this technique, wage rates for classifications for which survey data do not exist would generally be determined by a comparison with classifications of similar job duties or skill for which data are available.

Comments

NCTSI maintained that an employee's acceptance of employment of a contract should be conclusive evidence of employee assent to a wage rate. NCTSI and DOD argued that a written agreement regarding a conformed rate should be unnecessary. DOD, NCTSI, and CODSIA commented that the provision providing for DOL review of conformances agreed to by the interested parties is unnecesary. The IAM, the Teamsters, LIUNA, and IATSE contended that the revised procedures deemphasize employee participation in the conformance process.

Dissussion of Final Rule

We have carefully reviewed the proposed conformance procedure concerning required written employee agreement of the conformed rates. The Department continues to believe that the participation of affected employees in the conformance process is necessary to avoid problems which have occurred when contractors have not considered them part of the process. We have concluded, however, that requiring specific written evidence of employees' agreement is not necessary to achieve that purpose, so long as the position of the employees is made clear. In view of the conclusion, it would be contrary to the Department's mandate under the Paperwork Reduction Act to impose a new and unnecessary paperwork burden on the public. Instead, the producer is simplified to require the employer to supply general information regarding the agreement or disagreement of the employees to the conformed rate.

The Department disagrees with the union' comments that indexing procedures will fail to protect employee rights. Although the procedure provides for the unilateral application of a mathematical formula by the contractor, its utilization will ensure that unlisted classes will receive the same wage rate adjustment as the listed classes of workers. Since employees' rights are therefore protected, it is unnecessary to impose the burden of reporting or to go through the conformance procedure. It is also the Department's view that the use of both slotting and indexing should reduce the delays and disputes occuring under the current conformance procedures.

However, in order to ensure that appropriate conformance action is taken, the proposal providing for DOL review of all conformances except those accomplished by indexing will be adopted. Such review, together with the clarifications in the process contained in the regulation, should rectify significant past enforcement problems, and assure observance of the contract conforming requirements. In the past, serious compliance problems where conformance actions were not taken or were not appropriate were frequently not discovered until an investigation was already underway, with the result that the compliance review was unduly protracted.

Section 4.6(r) and 4.187(f)—Resolution of Disputes Arising Under the Act

From time to time, questions have arisen concerning the extent of the Department's authority vis a vis the contracting agencies to resolve disputes concerning SCA labor standards.

History of Provision

(a) Contemporaneous construction—It has always been the Department's position that by virtue of its authority under section 4 of the Act, its procedures are the exclusive procedures for resolution of disputes arising under the Act, and that the agency boards of contract appeals have no such authority.

(b) Existing regulations—Provide procedures for resolution of disputes concerning violations of the Act in 29 CFR Part 6. See also existing section 4.189.

(c) Current practice—Same as (a) and (b) above.

(d) January 1981 regulations—Section 4.187 stated that contractor appellate rights concerning violations are contained in Part 6, and explicity provided that appeals in such matters have not been delegated to the contracting agencies and cannot be appealed under the contract disputes clause.

(e) Proposed regulations—Same as January 1981.

Comments

The DOD questioned whether the Department's procedures pertaining to disputes regarding violations of the Act in this section may be in conflict with the requirements of the Contract Disputes Act of 1978.

Discussion of Final Rule

Section 14 of the Contract Disputes Act of 1978 sets forth specific amendments made by Congress to existing statutes. Significantly, no change, repeal, amendment, or reference was made to the SCA. Therefore, in our view, the Department's statutory authority to resolve disputes, pursuant to section 4(a) of the SCA, is not diminished by section 14 of the Contract Disputes Act. This conclusion is corroborated by section 6(a) of the Contract Disputes Act, which states in pertinent part that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine."

To ensure effective and consistent administration, the authority to resolve disputes under SCA has always resided in the Department of Labor, the agency which has, in addition to the statutory enforcement authority, the expertise in the law and the regulations. In the Department's view, no change in its exercise of authority would be appropriate without an explicit statutory provision or statement of Congressional intent.

Accordingly, § 4.187(f) is adopted as proposed with minor clarification. Furthermore, to avoid any confusion or misunderstanding by contractors in this regard, a new § 4.6(r) has been added to the contract clause to provide that all labor standards disputes under the contract will be resolved pursuant to DOL procedures.

Section 4.8—Notice of Awards

In the past, a mechanism has been considered necessary to advise DOL of contract awards to assist in its enforcement program.

History of Provision

(a) Contemporaneous construction—A provision that agencies notify DOL of contract award has been considered within DOL's regulatory authority.

(b) Existing regulations—Require notification to DOL of contracts subject to the Act in excess of $2500.

(c) Current practice—Same as (b).

(d) January 1981 regulations—Same as (b).

(e) Proposed regulations—Same as (b).

Comments

None received.

Discussion of Final Rule

The Wage and Hour Division is now receiving data identifying contract awards subject to the SCA directly from the Federal Procurement Data System (FPDS).

It will therefore be unnecessary for those contracting agencies which submit data on the award of contracts subject to the SCA into the FPDS to continue to furnish Standard Form 99, Notice of Award of Contract, to DOL.

Accordingly, section 4.8 is amended to provide that a Standard Form 99 need not be submitted to DOL for contract awards subject to the SCA if the agency submits Standard Form 279, FPDS Individual Contract Action Report (or its equivalent) to the FPDS, or if the contracting agency makes other arrangements with the Wage and Hour Division for notifying it of such contract awards.

In the interest of reducing the paperwork and reporting burdens further, the regulations is also revised to require the submission of Standard Form 99 only for contracts in excess of $10,000. This regulatory action in no way alters the statutory requirement that contracting agencies incorporate the proper stipulations in all contracts exceeding the coverage threshold of $2,500.

We encourage those agencies which do not submit contract award data to FPDS to contact the Wage and Hour Division for making such other arrangements so that we may ultimately discontinue the use of Standard Form 99 in its entirety. We estimate the elimination of Standard Form 99 will result in an annual cost savings to the Federal Government of approximately $410,000, without loss of employee protection.

Section 4.11—Arms's Length Proceedings

Section 4(c) of the Act provides that a successor contractor would not be bound by the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement if that agreement was not reached "as a result of arm's-length negotiations."

History of Provision

(a) Contemporaneous construction—The provision has rarely been construed, but has been interpreted to refer to collusive agreements intended to take advantage of the SCA scheme.

(b) Existing regulations—Contain only passing references to this provision.

(c) Current practice—Same as contemporaneous construction. Although no explicit hearing procedures exist, cases on this issue have been referred to administrative law judges for hearing.

(d) January 1981 regulations—Provided a procedure for determination of whether arm's length negotiations occurred and interpreted the provision to exclude arrangements with an intent to take advantage of the scheme, as well as situations where the NLRB has determined that "good faith" bargaining did not occur.

(e) Proposed regulations—Similar to January 1981 regulations, but also provided NLRB decisions on "good faith" bargaining may be used as guidance.

Comments

IBEW, SEIU, IAM, and NCTSI objected to the provision in the proposed regulations that decisions under the National Labor Relations Act (NLRA) regarding "good faith" bargaining may be used as guidance in determining whether "arm's length" negotiations have occurred. These commentators asserted that standards of "good faith" bargaining under the NLRA are not proper criteria for deciding questions of "arm's length" negotiations under the SCA.

IBEW presented a detailed analysis of the legislative history of the 1972

Amendments which added section 4(c) to the Act. The union noted that the original bill to amend the Act (H.R. 11884) included a "negotiations in good faith" standard. However, IBEW also pointed out that in subsequent testimony before a House Subcommittee, the Department of Labor stated that the "good faith" standard used under the NLRA assumed a situation where adversity between the parties is normal and difficulties can be expected in getting them to bargain in good faith, whereas section 4(c) of the SCA would foster exactly the opposite atmosphere, with difficulties in assuring that the parties *will* bargain at arm's length. Following this testimony, a substitute bill (H.R. 15376) which contained an "arm's length" standard instead of a "good faith" standard was introduced, and ultimately enacted.

Discussion of Final Rule

There does not appear to be any dispute that a mechanism is needed to determine whether arm's length negotiations have occurred.

After further consideration, however, it has been determined that the comments that decisions under the NLRA regarding "good faith bargaining" are inappropriate to determinations of whether "arm's length" bargaining occurred under the SCA are well taken. As the IBEW comments indicate, the "good faith" requirement under the NLRA is useful to prevent overly antagonistic relationships between bargaining parties, and does not address the potential problems under section 4(c) of the SCA, whereas an "arm's length" requirement is necessary to prevent so-called "sweetheart" agreements conferring benefits not in the public interest.

Accordingly, the final regulation is modified to remove the reference to "good faith" determinations under the NLRA.

Section 4.51(b)—Determination of Prevailing Rates

Except in situations where the predecessor contractor's employees were covered by a collective bargaining agreement, the Act requires payment of those rates determined by the Secretary to be prevailing for the various classes of service employees in the locality.

History of Provision

(a) Contemporaneous construction—In practice, DOL has interpreted the prevailing wage as the wage paid the majority of employees in the class, and if there in no majority, then the median or mean wage.

(b) Existing regulations—No definition of prevailing wage is set forth in the regulations. A general provision is set forth at section 4.164.

(c) Current practice—Same as (a). Most wage determinations are derived from surveys conducted by the Bureau of Labor Statistics.

(d) January 1981 regulations—Provided that wages would be determined as set forth in (a) above, stating that the "median" is the preferred rule over the average.

(e) Proposed regulations—Same as (d), but also provided for "slotting" of wage rates for classifications where there is not sufficient wage data. See discussion of § 4.6(b)(2), Above.

Comments

NASA, DOE, and the C of C suggested that wage determinations should provide for the payment of a range of rates to the various employees within a given classification. These commentators argued that the issuance of a single prevailing wage rate for each classification does not reflect actual industry pay practices. The C of C also recommended as an alternative that wage determination rates be based on the average of the lower 50 percent of the wages paid. The SBA Office of Advocacy commented that single rate paid to a majority of workers in a classification should not be adopted as prevailing, and that the weighted average rate should be used in all cases.

Discussion of Final Rule

After consideration of the comments, the Department has concluded that the rate range and similar proposals would be contrary to the statutory intent and, therefore, could not be adopted through regulation. Establishment of a wage determination with a rate range would have the practical result of permitting contractors to pay the lowest wage, and not the "prevailing" wage. Although Congress was obviously aware that different employers compensate their employees at various rates of pay, it nevertheless established under the SCA (as it had previously under the Davis-Bacon Act) the principle that a single prevailing wage rate established for each particular classification is the minimum rate permitted to be paid to all employees working in that classification on a Government contract.

Regarding the SBA comment on the use of a "majority" rate and that a weighted average should be used in all cases, the Department believes that the term "prevailing" contemplates that wage determination rates mirror, to the extent possible, those actually paid in appropriate localities. Thus, the Department has concluded that its longstanding policy of designating a "majority" rate as the "prevailing" rate is appropriate as a definition of first choice under the SCA. In the absence of a majority rate, it is the Department's view that the median or mean (weighted average) is appropriate; however, it is the Department's view that generally the median is a more reliabe indicator of central tendency and therefore the preferred rule. On the other hand, the mean may be more appropriate where the wage distribution is skewed, or where there are statistical reliability and consistency problems associated with the wage sample.

Similarly, to use the average of the lower 50 percent of the wages paid as suggested by the C of C would arbitrarily exclude the upper 50 percent and therefore would not be consistent with the prevailing wage concept in the Act.

Accordingly, § 4.51(b) is adopted as proposed.

Section 4.55(a)—Review and Reconsideration of Wage Determination—Review by the Administrator

History of Provision

(a) Contemporary Construction—An informal procedure has always been available to seek review of wage determinations.

(b) Existing regulations—No review procedure is set forth in the rules.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Specifically provided for review of wage determinations by the Administrator, to be accomplished within 30 days unless the Administrator advised that more time was necessary. However, no request for review would be considered after bid opening or commencement of a negotiated contract. Additional appeal was provided to the Secretary.

(e) Proposed regulations—Same as (d) except that appeal would be to the Board of Service Contract Appeals pursuant to 29 CFR Part 8, separately issued concurrently with this rule.

Comments

Several contracting agencies recommended more stringent time limits for requests for reveiw of wage determinations, in order to assure that procurement schedules are not disrupted.

Discussion of Final Rule

The Department has an obligation to ensure the issuance of proper wage determinations. Since requests for proposals or commencement of

negotiations often occur many months before contract award or commencement, tying the cut-off date for requests for review of a wage determination to such actions, as several agencies proposed, would provide too severe a limitation on the time available for interested parties to request such reviews. However, the Department recognizes the need to minimize disruption of procurements. Therefore, this paragraph is revised to clarify that there will be no review of wage determinations after bid opening or later than 10 days before commencement of performance of a negotiated procurement. Interested parties will need to submit requests for review in sufficient time for the Administrator to accomplish the review to the wage determination by that date.

Sections 4.110, 4.132—Coverage of Separate Contract Specifications Principally for Services

Section 2(a) of the Service Contract Act provides as follows: "Every contract (and any bid specification therefor) entered into by the United States * * *, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following: * * *."

In interpreting the coverage of the Act, the issue arises whether the Act applies to separate service requirements in contracts principally for some other purpose, such as supply or construction. More specifically, the issue is whether the parenthetical language, "(and any bid specification therefor)," should be interpreted as referring to individual line items which are principally for services in a contract, or to the bid solicitation documents and the resulting contract as a whole. Under the first interpretation the Act would apply to any line item for services in a contract, even if the contract as a whole were not principally for services. Under the second interpretation, the Act would apply only to contracts (and their solicitation documents) which as a whole were principally for services.

History of Provision

(a) Contemporaneous construction—As a general matter the Department's contemporaneous rulings under SCA provided that contracts were covered if they were principally or "chiefly" for services and that if any work under those contracts was subject to the Walsh-Healey Act, it was exempt. However, for contracts of a hybrid nature involving separate service and non-service requirements or specifications, SCA was considered to apply to the separate specifications principally for services without regard to the purpose of the contract as a whole.

(b) Existing regulations—The pertinent sections addressing coverage are 29 CFR §§ 4.110, 4.111, 4.122, 4.131(a), 4.116(c), 4.132, and 4.134(b). As a general matter, nearly all of these sections refer to "contracts" and their principal purpose. For example, section 4.111 states that, "[i]f 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." Only §§ 4.116(c) and 4.132 use the term "specification." Section 4.132, entitled "Services and other items to be furnished under single contract," provides that "[i]f the principal purpose of a contract specification 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, it is combined in a single contract document with specifications for the procurement of different or unrelated items." It then provides as an example a situation where bids are invited separately for supply of new typewriters and repair of existing typewriters, under separate bid specifications, and because one company is the successful bidder on both, the specifications for each are then combined in one contract for convenience. In such a case the regulation provides that the "principal purpose" test would be applicable to the specifications for maintenance and repair, rather than the combined contract. A similar provision in § 4.116(c) concerns separate specifications for services and construction, combined in one contract for the convenience of the Government.

(c) Current practice—Separate line items or specifications for services in contracts which are not otherwise principally for the purpose of furnishing services are considered covered by the Act. However, that interpretation is not clearly articulated in the current interpretative regulations (see § 4.132). Therefore, many contracting officers did not include SCA requirements in contracts which were principally for the purpose of purchasing or leasing equipment, but which include the maintenance and repair of that equipment; this was particularly true of GSA contracts for ADP equipment. When the issue of the correctness of the Department's interpretation surfaced publicly for the first time in 1977, GSA and the ADP industry strongly disagreed with the Department's position, claiming that it was contrary to the statutory language, congressional intent, and the Department's regulations. See the discussion of the Department's special treatment of such contracts below at § 4.123(e) (1), (2), and (3). Subsequently, the General Accounting Office issued a report to Congress on application of the SCA to the ADP industry which strongly attacked the merits of the Department's position on its interpretation of the "bid specification" language of the act. See Comp. Gen. Rept. Nos. HRD-80-102, Sept. 16, 1980 and HRD-80-102(A), March 25, 1981.

(d) January 1981 regulations—New section 4.110(b) stated that the Act applied to separate contract specifications for services, even where the contract as a whole was not principally for services, and that the term "contract" included separate line items for service specifications. Similar provisions were included in other sections, particularly in §§ 4.1a(e) and 4.132.

(e) Proposed regulations—Section 4.110(b) of the January 1981 regulations was eliminated from the proposal, and § 4.132 was revised to make provide that the Act applies only if services are the principal purpose of the contract as a whole. Conforming amendments were made to other sections.

Comments

The Department of the Interior, CBEMA, the NFPA, and others favored the proposed legal interpretation which would apply the Act only where the contract *as a whole* is principally for the furnishing of services. They commented that there is nothing in the legislative history of the Act to indicate the Act is intended to apply to anything but entire contracts whose principal purpose is to provide services. The NFPA asserted that the statutory phrase "(and any bid specification therefore)" refers to the inclusion of wage determinations in bid solicitations and not to the coverage of separate line items or work requirements within a contract.

The AFL-CIO, SEIU, LIUNA, IAM, UPGWA, SIU, and IATSE argued that the proposal was offered without any rational and ignores the statutory language and intent of section 2(a) of the Act, as well as §§ 4.116(c) and 4.132 of the current regulations. Therefore, they state that the proposal would in effect, repeal the provision of the Act regarding "any bid specification therefor." LIUNA and IAM argued that the proposed

interpretation allows contracting agencies to evade their responsibilities under the Act by merging various unrelated activities into one contract.

Discussion of Final Rule

The Department has carefully reexamined its position regarding the scope of coverage of the Service Contract Act. After consideration of the question, the Department has concluded that the reference in the Act to "bid specification" did not extend the Act's coverage to individual specifications principally for services within contracts principally for another purpose.

It is the Department's view that, like the reference in the Davis-Bacon Act to "advertised specifications," the reference to "bid specification" is not a coverage provision, but was intended to mean only that the advertised specifications on which contractors bid, as well as the resultant awarded contract, shall contain the required wage determination provisions. This interpretation is consistent with the Act's statutory language and its legislative history.

First, the language of the parenthetical phrase "(and any bid specification therefor)" on its face refers to a *bid* specification for a contract, rather than to individual specifications within the contract itself; to interpret the phrase as referring only to line items of a contract simply reads the word "bid" out of the statute.

In addition, other provisions of the Act are inconsistent with the theory that the Act applies to individual specifications of the contract. Thus section 2(b)(1), which provides for minimum wage payments on covered contracts, applies only to "any contract with the federal government the principal purpose of which is to furnish services through the use of service employees * * *." No mention is made of separate specifications or provisions within a contract whose principal purpose as a whole is not "to furnish services." Similarly, section 8(b) of the Act defines a "service employee" as "any person engaged in the performance of a contract * * * the principal purpose of which is to furnish services * * *." Again, no reference is made to specifications or line items of a contract. Moreover, subsections (1), (2), and (4) of section 2(a) refer to "the contract" without reference to specifications of line items.

The legislative history of the statute supports this interpretation (which had been explicit in the 1963 bill, not enacted, H.R. 1678, 88th Cong., 2d Sess.). Thus the Act's sponsor, Congressman O'Hara, explained in floor debate on the bill enacted: "The bill is aplicable to advertised or negotiated contracts, in excess of $2,500, the principal purpose of which is for the furnishing of services through the use of service employees, as defined in the bill. * * * *Provisions regarding wages and working conditions must be included in these contracts and bid specifications.* (Cong. Rec. (Daily) H-24387 (September 20, 1965). (Emphasis added.)

Furthermore, the House report on the Service Contract Act, House Report No. 948, 89th Cong., 1st Sess. (1965), confirms that the Act was intended to cover entire contracts the principal purpose of which was to supply services. The House Report on the bill states at p. 3 that "[t]he bill is applicable to advertised or negotiated *contracts, in excess of $2,500, the principal purpose of which is for the furnishing of services through the use of service employees*, as defined in the bill." (Emphasis added.) This is fully consistent with the statements by Congressman O'Hara and by the Solicitor of Labor during the 1965 hearings that janitorial services performed under a contract primarily for lease of a building would not be covered by the Act. See 1965 House Hearings on H.R. 10238 at 9–10; 1965 Senate Hearings on H.R. 10238 at 20.

Finally, the Department does not believe, as some of the labor organizations suggest, that the proposed regulation would encourage the contracting agencies to evade their responsibilities under the Act. We cannot presume that the agencies will in bad faith attempt to evade the spirit, if not the letter, of the careful and comprehensive reevaluation of these regulations. Rather, we presume that they will structure their contracts on the basis of their legitimate procurement needs. However, if such evasion in fact occurs in the future, the Department will look into the situation and determine what corrective measures can be taken.

Accordingly, it is the Department's view that the interpretation that SCA covers separate service specifications when the principal purpose of the contract as a whole is for supply or some purpose other than the furnishing of services, is overly broad. This interpretation is without support in the legislative history and is inconsistent with other provisions of the Act. Furthermore, it renders the principal purpose provision of the Act virtually a nullity, since if every individual contract specification principally for services were subject to the Act, the effect theoretically would be coverage of all service requirements under any contract, whether principally for construction, supply, or services. Therefore, the Department has determined that the Act is intended to apply only to contracts whose principal purpose is the furnishing of services. Thus, the proposal is adopted with a minor, clarifying change.

Section 4.110–4.113—Interpretation of Statutory "Principal Purpose" Test for Coverage Under SCA

Section 2(a) of the Act requires that wage determinations be incorporated in all contracts in excess of $2,500, "the principal purpose of which is to furnish services in the United States through the use of service employees."

History of Provision

(a) Contemporaneous Construction—The Department's contemporaneous construction is expressed in the existing regulations. See paragraph (b) below.

(b) Existing regulations—In deciding questions of coverage, the current regulations provide that if a contract is principally for services (as opposed to some other purpose such as manufacturing or construction), it is subject to the Act if it is performed at least in part in the United States and if it is performed "through the use of service employees". The current regulations define this phrase to mean the use of any service employees or, where the services are performed in part by bona fide, noncovered executive, administrative or professional employees (as defined in 29 CFR Part 541 issued under the Fair Labor Standards Act), more than a minor or incidental use of service employees.

(c) Current practice—Same as (b). In practice a 10 to 20 percent guideline has been used to determine whether there is more than a minor use of service employees.

(d) January 1981 regulations—Same as (c) except that the exception from coverage for minor use of service employees was treated as a tolerance under secion 4(b) and the regulations set forth specifically the 10 to 20 percent guideline.

(e) Proposed regulations—Sections 4.110 and 4.113 of the proposed regulations would have altered the scheme for determining coverage by providing a dual principal purpose test, under which a contract would be subject to the Act only if it is principally for services and is also performed principally (i.e., in the majority) by service employees. The proposed regulations continued to provide, as set forth in the existing regulations, that if a contract is performed in part within and in part outside the United States, any

portion performed "in the United States" is covered by the Act.

Comments

The SAMA, NCTSI, C of C, the National Society of Professional Engineers, several individual contractors, and the SBA commented in favor of the proposed revision of the principal purpose test, without any detailed rationale in support of their position. DOD, on the other hand, favored a more subjective approach, applying SCA to a contract only if the most important contract services are performed by service employees, as distinguished from professionals. The CBEMA comments reflected the view that the proper interpretation of the statutory "principal purpose" language would require a tripartite coverage test, under which a contract would be covered only if it is principally for services, to be performed prinicipally in the United States and principally through the use of service employees.

The dual principal purpose test contained in the proposed regulations was vigorously opposed by the AFL-CIO, IAM, LIUNA, SEIU, Teamsters, IATSE, SIU, and UPGWA. The labor organizations argued generally that on its face the statutory "principal purpose" language refers only to the nature of the contract work, meant only to distinguish among contracts according to their procurement purpose, and does not refer to the level of use of service employees. Thus, they asserted, the current regulations are correct in providing that a contract principally for services is subject to the Act if it is performed "through the use of service employees."

Many of the labor commentators cited portions of the Act's legislative history as evidence of a Congressional intent to "close the gap" in labor standards protections for Government contract employees by covering under the SCA all employees (other than bona fide executive, administrative, and professional employees) not employed on construction contracts covered by the Davis-Bacon Act or supply contracts covered by the Walsh-Healey Public Contracts Act. These commentators also stressed the remedial nature of the original legislation and stated that the 1972 and 1976 amendments expanded those protections by increasing the scope of the Act's coverage, thereby supporting a board interpretation of the statutory coverage provisions.

IAM and LIUNA asserted that in light of the legislative history, if Congress had intended to cover only service contracts performed "pricipally by service employees," it would have put such language in the statute. IAM and LIUNA also stated that in the preamble to the proposed regulations the Department did not offer any justification for the revision of the principal purpose test.

The SIU opposed the position in section 4.112(b) of both the current and proposed regulations that only those portions of contracts for transportation by marine vessels which are performed within U.S. waters are subject to the Act. SIU recommended that the regulations be revised to provide that all contracts on American flag ships are deemed to be performed entirely within the United States, regardless of the actual place of contract performance.

DOD commented that vessels contracted to carry cargo to U.S. installations overseas, with minimal time spent in U.S. ports and waters, should not be subject to the Act while within the United States, terming such coverage inappropriate and unnecessary since the services are not performed principally in the United States

Discussion of Final Rule

After a thorough review, the Department has concluded that the interpretation expressed in the existing regulations is the correct interpretation of the Act's "principal purpose" provision.

In deciding the application of the principal purpose test, it is necessary to consider the Act's legislative history as the best indicator of Congressional intent in the matter. The 1965 legislative history contains no definitive guidance, but reveals only, as provided in the Department's existing regulations, that contracts would not be covered if service employees perform only incidental functions. H.R. Rep. No. 948, 89th Con., 1st Sess. 3 (1965). Throughout the subsequent history, and in particular when Congress amended the Act in 1976, it is evident that Congress considered that all employees who performed services on contracts principally for services were covered by the Act, except bona fide administrative, executive and professional employees, and that this was explicitly accomplished by the 1976 amendments. See, *e.g.*, Cong. Rec. (Daily) H. 10626-28 (Sept. 21, 1976). Significantly, the 1976 amendment to the definition of "service employee" as a person engaged in contracts "the principal purpose of which is to furnish services in the United States," omitted any reference to "through the use of service employees."

Finally, it is our view that a plain reading of the phrase "through the use of service employees" requires only some use of service employees, i.e., where there is more than a minor use of service employees (as distinguished from executive, administrative and professional employees) to perform services under a contract principally for services, the contract is subject to the Act.

With respect to the reference in the Act to "in the United States," it is the Department's view that it is intended to be only a routine provision regarding the geographic scope of the Act. Thus whenever contract services are performed "in the United States" as defined in section 8(d) of the Act, those services are covered. The alternative of making it an element of coverage would lead to the anomalous result that all services, *wherever* performed, are covered if most of the contract services are performed in the United States.

Furthermore, the legislative history, in describing the Act's applicability, contains no reference to "in the United States" as a limitation on coverage. Thus, early drafts of the SCA unambiguously provided coverage of all service contracts in which work was performed in the United States. Significantly, in explaining the changes in the final version of the SCA, which represented a consensus among the government agencies, the Solicitor of Labor did not mention any coverage changes other than raising the threshold from $2,000 to $2,500. 1965 House Hearings on H.R. 10238 at 6-7.

The Department has decided, however, that it would be proper to establish a "significant or substantial" standard to determine whether a contract is performed "in the United States". This would be consistent with the longstanding interpretation in the current regulations of the term "through the use of service employees". Excluded from coverage would be contracts under whch only a minor or incidential portion of the services is performed within the United States as defined in section 8(d) of the Act. Thus, this revision will address the administrative difficulties raised by the DOD if SCA is applied to those contracts involving minimal time in domestic waters. Appropriate changes are made in § 4.112 of the final regulations.

With regard to the recommendation by SIU regarding the geographic scope of the Act's coverage, the recommendation contradicts the explicit language of the statute, contains no support in the legislative history, and cannot be adopted.

Section 4.114(b)—Liability of Prime Contractor for Violations by Subcontractors

History of Provision

(a) Contemporaneous construction—The Department has always taken the position that the prime contractor, as the party who contracts with the Government, is responsible for all violations of the Act, including those of its subcontractors.

(b) Existing regulations—Section 4.114 explains that under the Act and the regulations (see the contract clauses at section 4.6), the prime contractor agrees that the labor standards will be observed by subcontractors as well as itself, that the prescribed clauses will be incorported in all subcontracts, and that the Act's sanctions may be invoked against it for any failure to comply.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Explicitly provided that the prime contractor is jointly and severally liable with any subcontractor for any acts, omissions or underpayments which would constitute a violation of the prime contract, and that the Act's sanctions may be invoked against both the prime and the subcontractors.

(e) Proposed regulations—Same as (d) but clarified that the sanctions may be invoked "where appropriate" under the circumstances of the case.

Comments

NASA, DOE, and CODSIA argued that there was no statutory or judicial basis for placing liability for SCA violations committed by subcontractors on the prime contractor. NCTSI stated that the prime contractor should not be responsible for violations beyond its control, while the C of C commented that the prime contractor should not be liable except where fraud occurs or the subcontractor cannot be located.

IAM and SEIU objected to the differences between the language of this section and the language of the corresponding section in the stayed regulations of January 1981, implying that the proposed regulation limits the liability of prime contractors only to monetary violations by their subcontractors

Discussion of Final Rule

As explained, the provision that the prime contractor is liable in the event its subcontractors violate the Act and thus breach the contract clauses by failing to pay the required contract wages and fringe benefits has been in the regulations since 1968. It follows established case law under both the Service Contract Act and the Davis-Bacon Act. See, *e.g., Robert C. Johnson Trucking Co.*, SCA–1160, Administrator (January 4, 1982); *Ernest Simpson Constr. Co.*, 79–DB–181, ALJ, 24 WH Cases 484 (October 18, 1979).

The prime contractor's liability arises from the fact that by contracting with the Government, the prime contractor agrees as a term of the contract that the prescribed labor standards will be observed with respect to all employees on the contract. See 41 U.S.C. 351; 29 CFR § 4.6. Furthermore, liability is apparent from section 3 of the Act, which provides for witholding of contract funds in the case of violation; the Government can only withhold funds from the prime contractor, not from a subcontractor.

The union comments appear to reflect a misunderstanding of the intent of the regulatory revision. The language of this section is simply a clarification of existing practice. In addition to the withholding of contract funds, any other enforcement sanction, including debarment, will be invoked when appropriate under the circumstances of a particular case. For example, when a prime contractor fails to ensure that SCA provisions are incorporated in the subcontract or directs or condones violations made by a subcontractor, unusual circumstances justifying relief from debarment would likely be found not to exist.

Accordingly, no changes are made in this section.

Sections 4.116(b) and 4.131(f)—Coverage of Contracts for Property Demolition, Dismantling and Removal

When the Department reexamined its position on timber sales contracts, discussed below at §§ 4.130(a), 4.131(f), the issue was also raised of the principal purpose of property demolition, dismantling and removal contracts where the contractor obtains the salvage material removed.

History of Provision

(a) Contemporaneous Construction—It has been the Department's position that such contracts, even if labeled as a sale, are principally for removal services and covered by the Act.

(b) Existing regulations—§ 4.116(b) provides that contracts for demolition or dismantling of buildings are subjects to the Act, if not followed by construction (and therefore subject to the Davis-Bacon Act). The provision is silent concerning contracts where the contractor obtains the salvage material removed, but coverage of such contracts is implicit in § 4.141(a).

(c) Current practice—Same as (a). However, the office responsible for most such contracts at GSA has advised that it did not apply the Act to such contracts.

(d) January 1981 regulations—Specifically provided that such contracts are subject to the Act.

(e) Proposed regulations—Provided that such contracts are covered by the Act if the facts show that their principal purpose is to furnish services through the use of service employees, but not if their principal purpose is sales.

Comments

The AFL–CIO, IAM and LIUNA opposed the proposed revision. LIUNA and IAM contended that it is misleading to characterize demolition contracts as contracts for sales, noting that, while a contractor's primary interest may be the acquisition of salvaged materials, the Government's primary concern is to clear land or remove a building, and that the sale of any material, although it may be a substantial portion of the contract, is only of secondary interest.

Discussion of Final Rule

As stated above, the reexamination of the issue of coverage of timber sales contracts, as well as the issue of the interpretation of the principal purpose provisions of the Act, necessitated a review of coverage of demolition/sales contracts because of the apparent similarity of these types of contracts. Consistency requires that a determination be made as to whether the principal purpose of such demolition/sales contracts is services or sales. If the facts show that the Government's principal purpose in the contract is the obtaining of dismantling and removal services, where no further construction is contemplated (in which case the contract would be subject to the Davis-Bacon Act), such a contract is covered by SCA even though the contract or receives salvaged materials. However, if the principal purpose of the contract is in fact the sale of material and the services provided under such a contract are only incidental to the sale, then the contract is not subject to the Act. This approach is required by our view that the Act only applies if the principal purpose of the contract is services.

Accordingly, the proposed revision is adopted.

Section 4.117—Work Subject to the Walsh-Healey Act: Overhaul and Modification of Equipment

SCA, as discussed above, applies to employees on federal contracts, the principal purpose of which is the furnishing of services, while the Walsh-

Healey Public Contracts Act (41 U.S.C. 35, et seq.) ("PCA") provides labor standards protections for employees on federal contracts in excess of $10,000 for the manufacture or furnishing of materials, supplies or equipment. Over the years many disputes have arisen concerning whether SCA or PCA or both should be applied to contracts for the overhaul and modification of aircraft engines and other equipment.

History of Provision

(a) Contemporaneous construction—In the 27 years prior to the enactment of SCA, it was the position of the Department that contracts for equipment reconditioning, involving complete teardown and reassembly, constituted "manufacture" and were therefore within the scope of PCA. With the enactment of the SCA in 1965, such contracts generally were considered to be covered by both Acts. This "dualism" position was based upon the view that the contracts were principally for services but contained a significant manufacture or supply requirement as well. To eliminate problems implementing dualism, administrative exemptions from PCA of contracts deemed principally for services, and thus subject to SCA, were proposed in 1966 and 1973, but the proposals were never adopted.

(b) Existing regulations—§4.122 of the existing SCA regulations (29 CFR Part 4) sets forth the general principle of dual coverage. The regulation states that where a contract principally for services exceeds $10,000, and also has as a significant purpose the furnishing of equipment or materials, part of the work under such a contract is exempted by section 7(2) of the SCA since it is work required to be done pursuant to PCA labor standards. The regulation goes on to specify that those service employees who are "engaged in or connected with the manufacture, fabrication, assembling, handling, supervision or shipment" under the contract are subject only to the PCA. Other contract employees such as guards or clericals, are not subject to PCA and are therefore outside the scope of the exemption and covered by SCA labor standards.

(c) Current practice—It is the position of the Wage and Hour Division that dual coverage generally is applicable to major overhaul and modification contracts in accordance with the guidelines set forth in the 1974 opinion of the Administrator regarding engine overhaul, issued in connection with the decision in *Curtiss-Wright Corp.* v. *McLucas*, 364 F. Supp. 750 (D.N.J. 1973). Under these guidelines, SCA is applicable to the disassembly and overhaul portions of the contract work and PCA to the rebuilding of the equipment, including the supply of new parts. In 1978, however, the Department issued to DOD and subsequently extended indefinitely an exemption from SCA coverage for engine overhaul and modification contracts, pending the development of the criteria herein for delineating SCA and PCA coverage. Therefore, SCA currently is not applied to these contracts. In practice, there is considerable variation among the contracting agencies and confusion regarding whether and how to apply SCA and/or PCA to other equipment overhaul contracts.

(d) January 1981 regulations—This issue was reserved from inclusion in the 1981 regulations, pending finalization of these guidelines.

(e) Proposed regulations—The proposed regulation would eliminate dual coverage of overhaul and modification contracts by establishing guidelines designed to determine at what point the work on equipment is so extensive as to constitute "remanufacturing" subject to PCA only; where the work does not meet these guidelines, it is subject to SCA only.

Comments

The AEA, SAMA, NASA and DOE, as well as some individual contractors, criticized the proposed guidelines for delineating "remanufacturing" subject to the PCA. The contracting agencies (NASA and DOE) commented that the guidelines were too stringent and proposed a more relaxed standard. The AEA and SAMA generally approved the proposed regulation but stated that the guidelines were too detailed and complex. The C of C supported the proposed regulation without reservation.

The AFL–CIO, IAM, and LIUNA acknowledged that the current dual coverage position was unworkable, but disagreed that aircraft engine overhaul could be "remanufacturing" and opposed the guidelines as arbitrary and unjustified by the language and history of both SCA and PCA. They asserted that under the proposed guidelines, it could not be determined before contract award whether proposed work would be extensive enough to be exempt as "remanufacturing," stating that this is determinable only after teardown and inspection of the equipment. It is their view that our regulation should distinguish between "manufacturing" and "service" on the basis of a two-part test, derived from cited tax law cases.

Discussion of Final Rule

Section 7(2) of the SCA exempts from its coverage "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act," demonstrating Congressional intent to eliminate overlapping of the labor standards provisions of the two acts. This regulation serves that purpose by establishing for the first time proposed guidelines to distinguish between SCA and PCA and to resolve the complex administrative problems of the Department's "dual coverage" position.

As the above discussion of the history of this regulation indicates, the Department has varied in its treatment of the question of coverage of overhaul and modification contracts. Prior to SCA there were no labor standards applicable to services rendered under government contracts, and service contracts were regarded as outside the scope of PCA coverage. However, although some services are involved in contracts for overhaul and modification, as in all manufacturing contracts, these contracts were viewed as essentially for the procurement of tangibles, with contractors furnishing supplies or materials (parts) or an end product (rebuilt equipment). Thus, a 1943 opinion concluding that a War Department contract for overhauling and "rebuilding" motors was within the purview of the PCA domonstrates the recognition of the concept of "remanufacturing" under the PCA.

When Congress enacted the SCA, it recognized the overlap between manufacture and service, and it treated this situation in the section 7(2) exemption from SCA coverage for PCA work. Because the exemption was for "work" rather than "contracts," the Department developed a position of dual coverage of these overhaul and modification contracts. This interpretation has proved to be impracticable for separating SCA and PCA work, and is especially problematic where a contractor utilizes the same employee(s) to perform both the tear down and rebuilding functions. In addition, the problem of where to draw the line between SCA and PCA work has made enforcement of the acts difficult for the Department, and has generated confusion as to the issuance of wage determinations.

Consequently, in 1978 the Secretary determined that a change was necessary and issued a temporary exemption from SCA coverage to DOD for engine overhaul contracts, pending the promulgation of new guidelines. During this period the Department consulted with labor representatives and with the major contracting agencies in order to draw upon their experience in this area:

the new section 4.117 represents the product of these efforts.

As discussed, *supra*, under "dualism," overhaul and modification contracts were generally viewed as contracts principally for services but with a significant manufacturing component. The Secretary's experience and expertise in the administration of these two Acts, and consultations with the contracting agencies made clear that when the work involved on these contracts is so substantial as to constitute "remanufacture," the principal purpose of the contract can no longer be considered to be service. Furthermore, it was concluded that it was inappropriate to break down work which was done on a piece of equipment and consider it to be part manufacturing and part services when all of the work in fact is part of the "remanufacturing" activity. The specific guidelines in the new regulation constitute the determination of the Secretary of Labor as to when the threshold between repair services and remanufacturing is reached.

The new § 4.117 for the first time provides viable and appropriate criteria for distinguishing between SCA and PCA coverage. The Department has determined that the degree of specificity in the proposed guidelines is necessary for this coverage determination, in order (1) to eliminate confusion and possible overlap between the different labor standards statutes, and (2) to ensure that only overhaul or modification which in fact is in the nature of manufacturing activity and which is so extensive as to constitute "remanufacturing" is subject to Walsh-Healey. Contracts for maintenance or repair, in contrast, are within the purview of the SCA.

With respect to the comments that it cannot be determined before contract award which statute applies to proposed work, we note that the criteria were developed after consultations with the major contracting agencies, utilizing their practical experience and special expertise in this area. Agencies should be able to anticipate the needs of a particular contract, initially determine whether the proposed work principally involves "remanufacturing" based on the guidelines, and incorporate the appropriate labor standards (SCA *or* PCA) prior to soliciting bids.

It was suggested in the comments that the proposed guidelines are contrary to case law because they fail to distinguish coverage between the two Acts by a conjunctive "functional character" and "proprietary interest" test. However, the commentators cited no relevant rulings under SCA pr PCA for this proposition; in fact, the proprietary interest test is clearly inconsistent with precedent under PCA. Court decisions identifying a manufacturer under federal tax law would not, in our view, be determinative of SCA and PCA coverage, given the different focus and purpose of the tax code from that of the prevailing wage statutes. Furthermore, to the extent that tax law cases are relevant, they do not clearly establish such a conjunctive test. They do, however, support the principle of this regualtion, that rebuilding equipment within the specified guidelines constitutes manufacturing rather than furnishing services. *E.g., Hartley* v. *United States*, 252 F.2d 262, 266 (5th Cir. 1958); *Hackendorf* v. *United States*, 243 F.2d 760, 762–63 (10th Cir. 1957).

Accordingly, § 4.117 is adopted as proposed with minor editorial changes.

Section 4.118—Contracts for Carriage Subject to Published Tariff Rates

Section 7(3) of the Act exempts from the Act "any contract for the carriage of freight or personnel * * * where published tariff rates are in effect." Clarification is considered necessary, particularly regarding the application of this exemption to Government packing and crating contracts.

History of Provision

(a) Contemporaneous construction—Packing and crating contracts have been considered subject to the Act since their principal purpose is the furnishing of packing and crating services and the transportation is considered incidental thereto.

(b) Existing regulations.—The provisions regarding the statutory exemption provide at section 4.6(m)(3) an administrative exemption for such carriage subject to the rates covered by section 22 (recodified as section 10721) of the Interstate Commerce Act. Section 4.118 explains that the service contracted for must be "actually governed" by published tariff rates for such carriage; and that typically for such contracts, there is on file with the ICC or state body a tariff rate applicable to the transportation, and the transportation contract with the Government is evidenced by a bill of lading citing the published tariff rate.

(c) Current practice—same as (a).

(d) January 1981 regulations—Substantively the same as (b). Instead of § 4.6, the statutory exemption was set forth at § 4.115(b) and the administrative exemption was set forth at § 4.123(d).

(e) Proposed regulations—Same as (d).

Comments

None received.

Discussion of Final Rule

A clarifying revision has been made in this section to provide that carriage subject to section 10721 of the ICA must be in accordance with applicable regulations governing such rates. Consistent with our view that SCA coverage, and likewise exemptions, are determined by the principal purpose of a contract, the regulation also clarifies that only contracts principally for the "carriage of freight or personnel" are exempt. Thus, the exemption does not 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 to the ultimate destination. 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 (i.e., the Government's purpose and need) is other than the carriage of freight. See *Williams Moving Co.* v. *United States*, 697 F.2d 842 (8th Cir. 1983).

This section is so revised.

Section 4.123(e) (1), (2), and (3)—Exemption for Contracts for Maintenance and Repair of Certain ADP, Scientific and Medical, and Office and Business Equipment

Section 4(b) of the Act provides the Secretary general authority to exempt contracts from the Act where he determines that such 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 the Act to protect prevailing labor standards. The issue has arisen concerning the appropriateness of application of SCA to contracts for repair or maintenance of ADP, high technology, and other equipment, and therefore whether an exemption should be granted for such contracts.

History of Provision

(a) Contemporaneous construction—The Department has, since 1966, consistently held the maintenance and repair of all types of equipment, including automated data processing (ADP) equipment, scientific and medical apparatus, and office and business machines to be covered by the Service Contract Act.

(b) Existing regulations—Under current regulations, there is no provision exempting the contracts at issue from the Act. Electronic equipment

maintenance and operation is listed at § 4.130(h) as a type of covered contract.

(c) Current practice—A question arose publicly in 1977, when the Department formally advised GSA for the first time that, pursuant to its policy on bid specifications, provisions for maintenance and repair in GSA's contracts for the purchase or lease of ADP equipment were subject to SCA. Up until this time, such GSA contracts did not contain SCA provisions because of its belief that the contracts were not subject to the Act. In view of the sharp disagreement by GSA and the industry, which also claimed that compliance with SCA's requirements would be so disruptive as to prevent it from doing business with the Government, the Department, in August 1979, issued a short-term exemption from the Act for such ADP lease/purchase contracts, in order to permit GSA to complete its FY 1980 procurements. Subsequently, although the exemption was not extended (specific exemptions were issued, however, for a few national security contracts), the Department issued interim wage determinations for maintenance and repair of ADP equipment and scientific and medical equipment with high technology as an essential element, and for GSA supply schedule contracts for business machines which included requirements for maintenance and repair of the equipment. These interim wage determinations, issued pursuant to section 4(b) of the Act, permitted contractors to pursue their normal wage policies by allowing them to pay the same wages they paid their employees on private contracts.

In the meantime, GAO issued a report examining the issue of application of SCA to maintenance and repair of ADP and other high technology equipment, and strongly recommend that the Secretary exempt such contracts. Comp. Gen. Report Nos. HRD–80–102 (Sept. 16, 1980) and HRD–80–102(A) (March 25, 1981). Although this recommendation was not adopted at the time, the special interim wage determinations issued pursuant to section 4(b) of the Act have remained in effect pending action on the proposed exemptions.

(d) January 1981 regulations—Specifically provided, at section 4.130(a)(34), that maintenance and repair of all types of equipment, including ADP and office equipment, is covered by the Act. The Department did not deal with a requested exemption from the Act for contracts for maintenance or repair of ADP, medical and scientific equipment, and office and business machines. 46 FR 4329 (Jan. 16, 1981).

(e) Proposed regulations—Exempted from all the provisions of the Service Contract Act contracts for the maintenance of repair of:

(1) Automated data processing equipment, including office information systems, procured pursuant to P.L. 89–306 (40 U.S.C. 759);

(2) Scientific and medical apparatus or equipment which has automated data processing or other high technology as an essential element; and

(3) Office and business machines not otherwise exempt pursuant to paragraph (1) above.

Comments

The proposed exemptions were supported generally by several trade associations representing firms in the affected industries, numerous individual firms, and three Federal agencies. Commentators in this group include CBEMA, SAMA, AEA, the Health Industries Manufacturers Association, the National Micrographics Association, the C of C, IBM, Hewlett-Packard, Digital Equipment Corporation, Texas Instruments, Honeywell, Kodak, DOD, GSA and SBA. Several individual firms endorsed the CBEMA comments.

Numerous industry commentators asserted that Congress did not intend the Act to apply to the product support services performed by the "high technology" industry. They stated that the intent of Congress in enacting the SCA was to prevent price competition for labor-intensive service contracts from depressing prevailing wage standards, i.e., to eliminate "wage busting," and that the nature of the "high technology" product support service business is not conducive to wage busting. They also stated that the Act's legislative history does not mention these services in discussions of the types of contracts intended to be covered. In addition, CBEMA, SAMA, and others in this group submitted detailed comments and factual support for the proposed exemptions.

CBEMA presented a survey of firms in the ADP and business equipment field regarding the merit pay systems used to compensate employees engaged in equipment maintenance and repair services. This survey showed that under merit pay systems, employees are assigned on the basis of experience and skill to one of several job classification levels, and generally are relatively highly paid. In addition, firms typically have different pay structures in different areas of the country. Several commentators noted that the relatively high pay is due to the rapid growth in these industries, the relative shortage of skilled employees, and the investment made in job training.

Many industry commentators also remarked that their merit pay systems were incompatible with the requirements of the SCA because it is inherent in the system that some employees are paid below the mean or median rate of pay in the industry. Thus, they asserted, in order to comply with the Act, firms would have to change their methods of doing business in one of several ways, all of which they found disruptive and costly. Accordingly, several corporations stated that, rather than restructure their pay systems, they would cease performing contracts covered by the Service Contract Act.

Further information indicates that the preponderance of total industry contracts with the Federal Government is for commercial products and servicing of those products at standard commercial prices. The CBEMA submission suggested that for the typical industry contractor the Government service business is a small part of the total product service business. The CBEMA survey found that the median percentage of service business performed for the Federal Government was 7 percent. The maintenance and repair of equipment furnished to the Government, as to other customers, is of an "on-call nature" and, therefore, is sporadic and intermittent. In addition, the employees in question are not principally assigned to Government contract work but perform such work as an integral part of their day-to-day duties of servicing equipment in commercial establishments. Service is provided to the customer as operational problems result and, in some cases, as preventive maintenance is scheduled.

Several industry commentators, as well as GSA and DOD, also recommended specific changes in the scope of the proposed exemptions. CBEMA and SAMA recommened that the provisions in sections 4.123(e)(1), (2), and (3), applying the exemptions to "contract requirements" be changed to refer to "contracts" on the grounds that the Act should apply on a "contract" basis, not a "contract requirement" (i.e., specification) basis.

GSA, DOD, and CBEMA recommended deleting the provision in proposed section 4.123(e)(1) limiting that exemption to equipment procured "pursuant to P.L. 89–306 (40 U.S.C. 759)," known as the Brooks Act, which generally concerns procurement of ADP equipment. GSA remarked that the nature and characteristics of ADP maintenance services are independent of coverage under the Brooks Act. DOD

noted that several classes of its ADP equipment that are not subject to the Brooks Act are repaired under the conditions cited by the Department in its rationale for proposing the exemptions.

CBEMA and SAMA recommended that the scope of section 4.123(e)(2) be clarified by deleting the phrase "ADP or other high technology" and applying the exemption to scientific and medical equipment "where the application of microelectronic circuitry or other technology of at least similar sophistication is an essential element."

CBEMA and SAMA also suggested that proposed section 4.123(e)(2) be made more precise by citing certain Federal Supply Classification (FSC) classes as being largely composed of the types of equipment within the exemption. Hewlett-Packard, AEA, Health Industries Manufacturers Association, and others recommended that, in place of the proposed three-part exemption, the Department adopt a single, comprehensive exemption applicable to "commercial product support services", under which the contractor would make certifications regarding the commerciality of the services and the use of the same compensation plan for both Government contract employees and other employees. Hewlett-Packard asserted that such an exemption would minimize the definitional problems inherent in the Department's proposal, and would protect against "wage busting." SAMA also endorsed an exemption of this type as an alternative approach.

The proposed exemptions in §§ 4.123(e)(1), (2), and (3) were opposed in their entirety by the AFL–CIO, IAM, Teamsters, IATSE, SEIU, LIUNA, and the United Brotherhood of Carpenters.

The AFL–CIO and IAM asserted that the terms and legislative history of the original Act and the 1976 amendments evidence a Congressional intent to cover all classes of service workers and service contracts not specifically exempt under section 7 of the Act. They also argued that the 1972 amendments restricted the Department's authority to adopt industrywide exemptions such as those proposed. In addition, the union commentators advanced arguments in rebuttal of the Department's rationale for proposing the exemptions.

The AFL–CIO, IAM and the Teamsters asserted that the Act was intended to protect prevailing wage standards whether those standards are high or low, and pointed out that any doubts in this respect were settled by the 1976 amendments clarifying SCA coverage of white collar employees. The AFL–CIO and IAM commented that, to the extent that merit pay systems may be incompatible with SCA compliance, this is not unique to the "high technology" industry.

The union comentators also argued that it was improper to grant legal concessions because firms threaten to cease doing business with the Government. The Teamsters asserted that the Department's claim that necessary services could not be obtained absent the exemptions cannot be reconciled with the accompanying claim that the contracts in question are largely for servicing of standard commercial products. IAM pointed out that for many years the Government awarded numerous contracts for maintenance of the equipment in question which contained SCA prevailing wage requirements, and that no evidence has been presented that firms were unable to perform those contracts in the past because of SCA.

The AFL–CIO and IAM pointed out that the preamble to the proposal only states that "the preponderance" of the contracts in question are for service of commercial products at commercial prices. They asserted that since this is not an industry-wide characteristic, it cannot justify industry-wide exemption. These commentators also asserted that the fact that commercial prices are offered is no assurance that prevailing wage standards will be protected.

Finally, AFL–CIO and IAM stated that the Department's description of the Government contracts as a minor proportion of total business, which is performed on a sporadic basis by employees who perform such work as a part of their day-to-day duties servicing commercial businesses describes a condition common to many types of service contractors. They stated that the legislative history does not differentiate between "sporadic and intermittent" contractors and those who work full-time for the Government.

Discussion of Final Rule

It is the Department's view that the possibility of granting industry-wide administrative exemptions was not foreclosed when Congress statutorily exempted certain broad categories of contracts under section 7 of the Act, nor by the 1972 amendments tightening the criteria in section 4(b) of the Act. By its terms section 4(b) specifically authorizes the granting of administrative exemptions where its criteria are satisfied.

Turning to the exemption itself, we have concluded that, as discussed below, an exemption for maintenance, calibration, and/or repair of ADP equipment and office information systems, high technology scientific and medical equipment, and office/business machines where the services are performed by the manufacturer or supplier is appropriate where the items are commercial items, the services are based on commercial prices, and the contractor utilizes the same compensation plan for its Government contract employees as it uses for its commercial customers. (A large percentage of the contracts with requirements for servicing of such equipment would not be covered by the Act in any event since they are lease/purchase contracts and are not principally for services. See sections 4.110, 4.132.)

The principal intent of Congress in enacting the SCA was to preserve prevailing wage standards, and to prevent the "wage busting" due to intense competition which had occurred as a result of the practice of awarding Government service contracts to the lowest bidder. See H.R. Rep. No. 948, 89th Cong., 1st Sess. (1965); 1965 House Hearings at 5–6. Accordingly, although not determinative of coverage, the presence or absence of wage busting in a particular industry is considered to be a significant factor in determining whether an exemption is in accordance with the remedial purpose of the Act to protect prevailing labor standards. In this regard, it is pertinent to note that we have received no evidence that the special wage determinations discussed above, which have been issued since 1979 for most of the contracts in question and permitted contractors to pursue their normal wage policies, have had any adverse effect on the employees in the industry.

It is clear that "merit pay" systems are pervasive in the ADP industry. The comments submitted, as well as the CBEMA survey and the Comptroller General reports, demonstrate the sophistication of these pay systems, the fact that the workers, whose skills are in great demand, are relatively well paid, and that there is a potential disruption of merit pay systems from the application of SCA. Although the Department recognizes that commercial pricing factors are unique to those types of Government contracts which would be exempt under the proposal, commercial pricing does diminish the possibility of cutting workers' wages to obtain Government contracts. Furthermore, the information submitted by CBEMA and the Comptroller General reports demonstrates that Government business is a small proportion of the individual firms' total business and that the employees in question perform Government work only as a part of their

day-to-day duties servicing commercial establishments, also tending to preserve wage standards for the workers on Government contracts. The foregoing factors, together with the fact that most ADP services are performed by the vendor in an effort to assure statisfactory servicing of the equipment, have led the Department to conclude that wage competition in the industry is not a significant factor in obtaining Government contracts.

Accordingly, this exemption is found to be in accordance with the remedial purposes of the Act because the affected employees are relatively highly paid pursuant to complex merit pay systems and because the nature of the industry, as described by the commentators and detailed in the Comptroller General reports, is such that price competition based on labor costs and concomitant wage abuses are highly unlikely to occur. Because the protections of SCA are therefore not necessary to these workers and because, by virtue of the nature of the industry and its merit pay plan, compliance with SCA would disrupt the merit pay system and staff assignments, thereby disrupting the workers as well as the industry, it is also found to be necessary and proper in the public interest to grant these exemptions.

Finally, the exemptions are necessary to aviod the serious impairment of Government business. It is well documented in the Comptroller General reports that in the absence of these exemptions, there is likely to be serious adverse impact on the operations of the Government, such as the potential curtailment of crucial programs and services, many of which are critical to national defense and security, as a result of segments of the industry ceasing to do business with the Government. The comments received suggest that this continues to be true.

It is true that the Department had over several years issued wage determinations for contracts for the maintenance and repair of the types of equipment in question, without any indication that industry firms were unable to perform those contracts. However, the Department has ascertained that contracting agencies had failed to include SCA provisions in the majority of such contracts, particularly contracts for service in conjunction with the lease or purchase of equipment. It is the industry's concern that full implementation of the SCA by contracting agencies will result in substantial adverse impact on it.

When viewed in the context of the overall industry position, the possible refusal to accept SCA contracts is an understandable response of individual firms attempting to preserve their economic self-interest by declining to accept business opportunities seen as disruptive and unprofitable. Since in many cases it is not feasible to obtain necessary services from other sources, it is clear that Government operations would be adversely impacted in those cases. In fact, in some cases in the past the Department has exempted individual contracts where national security agencies were confronted with the refusal of sole-source suppliers to accept SCA covered contracts.

The Teamsters' comments imply that, in view of the claim that a preponderance of the affected contracts pertain to commercial products, competitive pressures would assure that necessary services could be obtained notwithstanding a refusal by some firms to accept contracts. However, the fact that a given item of equipment is a standard commercial item merely means that it is sold to commercial and Government purchasers alike, and does not mean that a firm other than the original manufacturer of that item has the necessary expertise or access to parts to maintain it. While some of the equipment which would be exempted under the proposal can be repaired by other manufacturers, or by "service-only" firms, much of the equipment must, as a practical matter, by repaired by the original manufacturer.

In conclusion, the Department is aware that every characteristic of the industry cited by the Department in the preamble of the proposal and documented in the detailed industry comments and Comptroller General reports may not apply to every firm in the industry or to every Government contract for the services in question; however, it is clear that these characteristics apply to the industry as a general matter. Furthermore, it is the Department's conclusion that the rationale, as a whole, provides a sufficient basis under section 4(b) of the Act, provided that certain additional restrictions, discussed below, are met.

The Department has concluded, as suggested by several industry commentators, that it is necessary to limit the exemptions to the servicing of only that equipment furnished to the Government which is also furnished commercially and where the service price is based on established catalog or market prices, thus excluding from the exemption any custom-designed equipment, and limiting its application to that sector of the industry and the work force to which the rationale applies. The commercial pricing language used in the final regulation is adopted from longstanding criteria for cost and pricing data contained in DAR 3-807.7(b), 32 CFR 3-807.7(b), which are routinely used and understood by contracting officers and the industry.

The contractor is also required to certify that it will maintain the same compensation plan for employees on Government and commercial equipment. This limitation will help ensure that these contractors, who the record demonstrates pay relatively high wages to their work force, will not reduce wages to gain an unfair advantage in the competition for Government contracts. This limitation therefore further ensures that the exemptions are in accord with the remedial purposes of the Act.

In addition, the contracting officer is required to make an affirmative determination that the conditions of the exemption have been met. If the Department determines afterward that the conditions have not in fact been met, the exemption will no longer be applicable to the contract.

The Department also determined that it is necessary to continue the limitation on the exemption for office and business equipment to services performed by the original manufacturer or supplier. The record contains no support for finding that the rationale of the exemption applies to firms which only service such equipment. Indeed, the Department's experience is that the rationale does not apply to such firms.

Regarding the various other recommendations for changes in the specific provisions of the proposed exemptions, the comments by CBEMA and SAMA that any exemptions should apply on a "contract" basis, rather than to contract requirements, and the comments by DOD, GSA and CBEMA that the exemptions should not be tied to Brooks Act coverage, are well taken and have been adopted. In addition, CBEMA and SAMA's suggestion that FSC classes be cited as examples of high technology scientific and medical apparatus in §4.123(e)(2) provides useful clarification.

With the modifications discussed, the Secretary finds that these exemptions are necessary and proper in the public interest and to avoid the serious impairment of Government business, and are in accord with the remedial purpose of the Act to protect prevailing labor standards.

Finally, we wish to note that the exercise of the exemption authority in section 4(b) of the Act is discretionary. If experience shows that the depressing of prevailing wage standards or "wage busting" occurs, the Department would

not hesitate to modify or withdraw these exemptions.

Accordingly, §§ 4.123(e) (1), (2), and (3) are modified as discussed above and are renumbered and adopted as 4.123(e)(1).

Section 4.123(e)(4)—Exemption for Research and Development (R&D) Contracts

History of Provision

(a) Contemporaneous construction—R&D contracts have always been considered subject to SCA when they are principally for the furnishing of a service (such as collection and analysis of information or testing), provided that there is more than a minor use of service employees in performing the contract services. On the other hand, R&D contracts for construction, such as a contract to build a pilot coal gasification plant, or for manufacture or supply, such as a contract for a prototype, are subject to the Davis-Bacon Act or the Walsh-Healey Public Contracts Act, respectively, rather than SCA.

(b) Existing regulations—No specific provision regarding R&D, but see section 4.113(a)(2), providing that service contracts involving more than a minor use of service employees are covered, and section 4.131(a), providing that a contract principally for services is covered even if the contract requires tangible items to be supplied as a part of the services furnished.

(c) Current practice—Same as (a).

(d) January 1981 regulations—R&D contracts were listed as a specific example of a type of contract which is covered by the Act if a significant number of service employees are used, even if they work under the direction of professional personnel and professionals perform the final analysis and reporting. At section 4.131, contracts for data collection and statistical surveys are given as examples of covered contracts, even though the contractor may be required to furnish tangible items such as written reports.

(e) Proposed regulations—An exemption for R&D contracts was proposed at section 4.123(e)(4). In addition, section 4.113, discussed above, was revised to provide that only contracts performed principally through the use of service employees are covered by the Act; and R&D contract performed principally by professional personnel was listed as an example of a contract not subject to the Act. No change was proposed in section 4.131(e).

Comments

The SBA, Counsel on Governmental Relations, American Council on Education, Association of American Medical Colleges, National Association of State University and Land-Grant Colleges, Southern Research Institute, and a number of individual colleges and universities supported the exemption for R&D contracts. Several of these commentators contended that covering such contracts went beyond the intent of SCA and that to apply the Act to such contracts would cause severe disruptions in their existing pay systems. However, they provided no evidence to substantiate this prediction.

DOD stated that, in its view, Congress did not intend the Act to cover contracts for R&D and that an exemption was thus unnecessary. DOD suggested that the regulations should simply provide that the Act does not apply to R&D contracts.

The AFL–CIO, Teamsters, LIUNA, IAM, IATSE, and the Florida Association of Professional Employees opposed the exemption on several grounds. They claimed that the legislative history of SCA did not support the view stated in the proposal that Congress did not intend the Act to apply to R&D contracts. They stated that, since the House Report cited by the Department pertained to a 1964 bill which was never enacted, it should not determine coverage of the SCA, which was passed in 1965 by a different Congress. In addition, to support their claim that the Department has not substantiated its assertion that the lack of an R&D exemption would impair Government business, the unions pointed out that numerous R&D contracts have been covered in the past. These commentators also remarked that the scope of the exemption could not be determined from the language used in the proposal.

Discussion of Final Rule

In deciding whether R&D contracts are subject to SCA, the question must be whether they are contracts, "the principal purpose of which is to furnish services * * * through the use of service employees." If R&D contracts meet this test, they are covered by the Act. DOD has suggested that although an R&D contractor engages in collection and analysis of technical and scientific information and the conduct of sophisticated tests, the principal purpose of R&D contracts is to buy a product, i.e., the information obtained. To the contrary, it is our view that the principal purpose of such contracts is the service of collection and analysis of information, testing, etc., although the information obtained is generally manifested in a report. See *Descomp, Inc.* v. *Sampson*, 577 F. Supp. 254, 261 (D. Del. 1974).

In fact, DOD's own regulations list R&D as a type of service contract, and provide: "A service contract is one which calls directly for a contractor's time and effort rather than for a concrete end product. For purposes of this definition, a report shall not be considered a concrete end product if the primary purpose of the contract is to obtain the contractor's time and effort and the report is merely incidental to this purpose." DAR § 22–101, 32 CFR § 22–101. With regard to DOD's view that R&D contracts are not performed principally through the use of service employees, see the discussion of the Act's principal purpose provision, above, §§ 4.110–4.113, which have been revised to revert to the existing principal purpose test and to eliminate the reference to R&D contracts.

Because many R&D contracts are subject to SCA, and DOL had been of the view that application of SCA was inappropriate, an exemption was proposed for R&D contracts. Unlike the proposed ADP exemption, although many commentators (especially colleges and universities) urged such an exemption, they did not provide evidence to support an exemption. After a careful analysis of the comments received, therefore, the Department has concluded that the record does not demonstrate a sufficient evidentiary basis to find that such an exemption would be "necessary and proper in the public interest or to avoid the serious impairment of government business, and [would be] in accord with the remedial purpose of the Act to protect prevailing labor standards," as required by section 4(b) of the Act. The record also indicates that the parameters of such an exemption cannot easily be determined.

Accordingly, the proposed R&D exemption is not being adopted at this time. The Department will reconsider this issue at a later date if sufficient documentation is submitted that the criteria for exemption in section 4(b) would be met.

Sections 4.130(a), 4.131(f)—Coverage of Timber Sales Contracts

A major dispute has existed for years concerning application of SCA to contracts with the U.S. Forest Service for sale of timber.

History of Provision

(a) Contemporaneous construction—It has been the Department's view since the issue first arose in 1972, that the provision of services inherent in timber sales contracts—such as land clearing, road building, fire fighting—rather than the sale of timber, was the principal

purpose of the contract. Thus, the DOL has been of the view that the contracts are principally for services and subject to SCA.

(b) Existing regulations—Section 4.116(b) provides that contracts for clearing timber are subject to SCA if not followed by construction (and therefore subject to the Davis-Bacon Act). However, the provision does not mention timber sales contracts.

(c) Current practice—The actual practice in the industry never conformed to the Department of Labor's consistent position that timber sales contracts were subject to SCA coverage. The Department of Agriculture-Forest Service (USDA/FS) has contested the Department of Labor's position since 1972 when, after discovering that the Forest Service was not including SCA provisions in its timber sale contracts, the Department of Labor began asserting SCA coverage. The USDA contended that the sale of timber is the principal purpose of timber sales contracts and has never incorporated SCA in such contracts.

(d) January 1981 regulations—In response to the Department of Labor's December 1979 proposal to incorporate its longstanding position on SCA coverage of timber sales contracts into its written regulations, 44 FR 77057 (December 28, 1979), the Secretary of Agriculture wrote to the Secretary of Labor opposing the proposed regulation, stating that it "improperly expands the application of the Service Contract Act," contrary to the statutory purposes of both the National Forest management statutes and the "principal purpose" requirement of the Service Contract Act (Letter dated March 27, 1980). The Department then reexamined the issue and concluded in section 4.131(f) of the 1981 regulations that some contracts called "timber sales contracts" have as their principal purpose the furnishing of services and thus, such contracts are subject to SCA. Some examples include contracts for the removal of trees to open up the forest for public use, or for the removal of trees that are infested with insects or are damaged by disasters. The 1981 regulations also concluded that "certain contracts for timber sales" would "not be principally for services" and therefore not subject to SCA. 46 FR 4331. However, such contracts "generally" contain specifications principally for services, such as "building of temporary roads, fire-fighting and control, erosion control, slash removal and trimming, and the removal of diseased or injured trees"; such individual specifications, under the 1981 regulations, would be covered.

(e) Proposed regulations—Section 4.131(f), which concerns "furnishing services involving more than use of labor," noted that where the contractor "receives tangible items" from the government "in return for furnishing services," the contract is covered by SCA where "the facts show that the furnishing of services is the principal purpose" of the contract. The regulation then stated specifically that "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," i.e., the sale of timber. Furthermore, because of the change in coverage of separate contract specifications (see sections 4.110 and 4.132), when the principal purpose of a timber sales contract is not services, the contract would not be subject to SCA coverage simply because it contains specifications which have the provision of services as their principal purpose.

Comments

Industry associations, including the National Forest Products Association, the American Pulpwood Association, the American Plywood Association, a number of timber firms and the Small Business Administration, supported the proposed regulations. Additionally, some industry comments suggested that the proposed regulations should be even stronger, and should be changed to reflect that timber sales contracts are never subject to SCA coverage.

The AFL–CIO, LIUNA, IAM, and UBC opposed the proposed regulations, contending that the sales provisions contained in such contracts are only incidental to a broad forest management program requiring a variety of services to be performed. They noted that, although a contractor may only be interested in obtaining timber, the harvesting of forests improves timber stands and thus is an essential service to the nation.

Discussion of Final Rule

Consistent with the Department's view that SCA applies only to contracts which are principally for services, the question of whether timber sales contracts are covered by SCA turns on whether the principal purpose of the contracts is considered to be sales or service. In reexamining this issue, the Department considered the statutes and regulations concerning National Forests, timber sales contracts, and Forest Service manuals. The Department of Labor now concurs with the longstanding position of the Department of Agriculture—the Department charged with administering the timber sale programs—that generally the principal purpose of timber sales contracts is sales, not service. This determination based in large part on the stated purpose of the National Forests, as contained in the Organic Act of June 4, 1897, 16 U.S.C. 475, which is "to furnish a continuous supply of timber for the use and necessities of the citizens of the United States," as well as the great concern expressed in the legislative history of the National Forest Management Act of 1976, for the importance of the National Forests to the supply of timber.

Furthermore, the Department's determination that generally the sale of timber is the principal purpose of timber sales contracts, is consistent with the USDA/FS regulations. For example, the regulations include a requirement for timber management plans which must be designed to aid in providing a continuous supply of timber for the use of United States citizens. 36 CFR 221.3. Such plans also must provide "so far as feasible" for an "even flow" of "national forest timber" to "facilitate the stabilization of communities" and "opportunities for employment." *Ibid.* Additionally, the Forest Service monitors the situation to ensure, among other things, that land classified as not suitable for timber production will be examined at least every 10 years to determine if such lands can be returned to timber production. 36 CFR 219.13(i). These examples indicate the importance of timber production for ultimate sale.

Although the legislation also requires multiple use management of the forests, and timber contracting compatible with those uses, these requirements do not detract from the determination that generally the sale of timber is the principal purpose of timber sales contracts. However, certain contracts may, in fact, be principally for some other purpose, such as clearing land or removal of diseased or dead timber. Pursuant to section 4.111, such a contract may be subject to SCA coverage, for in any given instance, the facts concerning a particular contract will determine the principal purpose of the contract.

Accordingly, the proposed regulation, which provides that generally the sale of timber, not the provision of services, is the principal purpose of the timber sales contracts and thus such contracts are generally not covered by the SCA, is adopted.

Section 4.133—Beneficiary of Contract Services

SCA by its terms applies to all contracts the principal purpose of which

is to furnish services in the United States through the use of service employees. The question which arises is whether SCA should apply to contracts where the benefit of the services to the Government is very remote, especially concession contracts such as those in the National Parks.

History of Provision

(a) Contemporaneous construct on—As a result of informal correspondence after passage of the SCA and a statement by Congressman O'Hara during debate on amendments to the FLSA the following year, DOL did not apply SCA to concession contracts which principally serve the public and where the benefit to the Government is very remote. In practice, this exclusion from SCA applied to National Park Service concessions and certain FAA concessions at Dulles and National Airports.

(b) Existing regulations—Same as (a).

(c) Current practice—Same as (a); however, it is recognized that the exception from coverage is in effect an administrative exemption and that the Act contains no such restriction to contracts benefiting the Government. See *District Lodge No. 166, IAM* v. *TWA Services, Inc.*, 25 WH Cases 208 (M.D. Fla. 1981), appeal pending on other issues, 11th Cir., No. 82-3159.

(d) January 1981 regulations—Provided that the Act contains no restriction regarding the beneficiary of the contract services, but provided an exemption for National Park and similar concession contracts for the furnishing of food, lodging, souvenirs, etc., to the general public, as distinguished from the United States. Specifications within such contracts for other services such as maintenance and dissemination of information about the Government and its programs were not exempt.

(e) Proposed regulations—Substantively the same as (d) except that visitor information services would also be exempt.

Comments

NASA and DOE commented that all concession contracts which benefit the public in general and not the Government or its employees (like those of the National Park Service) should be considered not covered. They recommended that this interpretation of the Act be used in lieu of the proposal to cover concession contracts like all other contracts for services, but to exempt certain types of concession contracts pursuant to the Secretary's authority under section 4(b) of the Act.

NASA and DOE further commented on the provision in section 4.133(b) which stated that where exempt contracts include "substantial" requirements for services other than those specified as exempt, those services are not exempt. These agencies proposed that section 4.133(b) be revised to apply the proposed principal purpose concept for determining whether the entire contract is exempt or not (i.e., if a majority of the contract services are exempt, then the entire contract is exempt even though the contract also provides for substantial services which would otherwise not be exempt).

The IAM, AFL-CIO, LIUNA, and UPGWA contended that there is no statutory provision or clear legislative history to support the proposal to exempt visitor information services from SCA coverage. LIUNA and UPGWA asserted that this proposed exemption exceeds the discretion of the Secretary of Labor and that the requirements for granting exemptions contained in section 4(b) of the Act have not been satisfied. IAM noted that concession contracts for visitor information services were distinguishable from national park concessionaires in that the former bestow a direct benefit on the Government by fulfilling one of its principal functions, which is informing the public.

The AFL-CIO and the IAM also objected to the statement in the current regulations that the Act does not apply to certain concessionaires servicing the public in Federal parks. The AFL-CIO maintained that neither the original regulation nor its subsequent revisions state that such contracts are exempt under section 4(b) of the Act, and that there is no finding that what is now alleged to have been an exemption is "necessary or proper in the public interest or to avoid serious impairment of Government business." IAM stated that remarks by Congressman O'Hara, co-author of the Act, in the context of amending the Fair Labor Standards Act one year after enactment of the SCA, could not be considered legislative history, and thus do not provide a legitimate basis for the exemption.

Discussion of Final Rule

NASA and DOE's views that the Act does not cover concession contracts which primarily benefit the public must be rejected. The language of the Act makes no distinction based on the beneficiary of the contract services, and further, the Act's legislative history provides no evidence of a Congressional intent to so limit coverage. See the recent decision in *District Lodge No. 166, IAM* v. *TWA Services, Inc., supra.*

However, the Department continues to be of the view that an exemption from the Act is necessary for National Park and similar concession contracts providing food, lodging, souvenir, and similar services to the general public. Such an exception from the Act's requirements has been in the regulations since 1968. However, because of difficulties in applying the current regulation, which speaks in more general terms of contracts where the benefit to the Government is "indirect or remote," the regulation was recast in the January 1981 regulations and the proposed regulations, making it clear that the provision was an exemption and carefully delimiting its scope to the listed concession contract services.

Furthermore, it is the Department's view that the underlying purpose for the exemption does not apply to substantial requirements for services other than those listed. Therefore, NASA's recommendation that the exemption should apply if the contract is principally for exempt services is not being adopted.

The Department agrees, however, that visitor information services are of a different character than the concessionaire services listed in the exemption. Furthermore, the decision in *District Lodge No. 166* concluded that the current regulations have not exempted visitor information center services. Accordingly, the Department has determined that exempting visitor information services is not now appropriate.

The Secretary of Labor has determined, based on the information available, that because the proposed exemption is supported by statements of members of Congress made shortly after enactment, it is necessary and proper in the public interest; and further that because the proposed regulation will clarify the limits and make clear the basis of the previous regulation, it is therefore in accord with its remedial purpose to protect prevailing labor standards.

Section 4.134(b)—Service Requirements in Building Leases

The question has arisen whether the coverage provisions of the Act apply to janitorial and other building services which are furnished on an incidental basis in a contract for lease of building space for Government occupancy.

History of Provision

(a) Contemporaneous construction—The Act historically has not been applied to building lease contracts containing maintenance requirements.

(b) Existing regulations—Section 4.134(b) of the current regulations contains this noncoverage position.

(c) Current practice—Current practice is consistent with the existing regulations.

(d) January 1981 regulations—Reversed the prior policy and provided for SCA coverage where the contract contained separate specifications requiring certain specified levels and frequencies of janitorial or other maintenance services in contracts for building space.

(e) Proposed regulations—Stated that the Act does not apply to the furnishing of building services where the principal purpose of the contract is the leasing of space.

Comments

The SEIU opposed the exclusion from SCA coverage of janitorial and maintenance service specifications in building leases, stating they saw no justification for denying labor standards protections to personnel working at Government-leased facilities.

Discussion of Final Rule

As discussed above under sections 4.110, 4.132, the Department has adopted the proposal that the SCA would not apply to contracts which, as a whole, do not have as their principal purpose the furnishing of services. It follows that contracts for the lease of building space for Government occupancy, where the building owner furnishes general janitorial and other building services on an incidental basis, would be outside the Act's coverage because the leasing of the space rather than the furnishing of the building services is the principal purpose of the contract.

This position is fully consistent with the legislative history of the statute which is discussed above in §§ 4.110, 4.132, and particularly with the Solicitor of Labor's testimony during the House and Senate hearings on the bill. Accordingly, § 4.134(b) is adopted as proposed.

Section 4.145(a)—Extended Term Contracts

Section 2(a) of the Act requires that every covered contract contain a wage determination. In addition, subject to annual appropriation limitations, the Act permits contracts to be entered into for up to five years, provided that the contract provides for adjustment of wages and fringe benefits at least every two years.

History of Provision

(a) Contemporaneous construction—When a contract is entered into for a term of years, but is subject to annual appropriation by Congress, it has been considered that each year is a new contract, since the appropriation is necessary to render the contract effective. Accordingly, a new wage determination has been required each year. Similarly, exercise of an option has been considered a new contract under the act.

(b) Existing regulations—Same as (a), set forth at section 4.145(a).

(c) Current practice—Same as (a).

(d) January 1981 regulations—Substantively the same as (b) with clarifying language.

(e) Proposed regulations—Same as (d).

Comments

GSA noted that this subsection was unclear as to its application to contracts of one year duration which are not awarded on a fiscal year cycle and could be interpreted to require incorporating a new (revised) wage determination at the beginning of the new fiscal year, even though the contract had been in effect for only a few months. In their view, the same problem would occur under multi-year contracts which are not awarded on a fiscal year basis.

Discussion of Final Rule

This section is intended to cover only those contracts for terms in excess of one year and the language has been clarified accordingly. In addition, the language is amended to clarify that a new contract is deemed to begin upon the contract anniversary date in the new fiscal year, rather than at the beginning of each fiscal year, if those two dates, in fact, are different.

Section 4.152(c)—Trainee Classifications

It has been the Department's experience in administering the Act that contractors have often attempted to establish additional classifications for trainees and other subclassifications of classifications listed on the wage determinations. Accordingly, in addition to revisions to the conformable classification procedures set forth of § 4.6(b)(2), it was considered necessary to explain more fully the situations in which conformance is not permitted.

History of Provision

(a) Contemporaneous construction—Since trainees perform duties performed by other classifications on wage determinations, conformance of trainee rates has not been permitted. In addition, trainee classifications have not been issued on wage determinations unless found in a survey to prevail, or unless provided for in a collective bargaining agreement which governs the wages and benefits required to be paid pursuant to section 4(c) fo the Act.

(b) Existing regulations.—No specific provision.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Specifically provided that additional classifications below the lowest rate in a job family on a wage determination cannot be established through the conformance process and therefore trainee and helper classifications cannot be conformed to the wage determination.

(e) Proposed regulations—Provided that trainee and helper classifications cannot be conformed, but also provided that trainee classifications may be used if listed in the wage determinations.

Comments

NASA and DOE objected to the prohibition against conforming trainee wage rates within a job classification if such classifications are not listed on a wage determination, stating that the provision is contrary to the prevailing wage concept, is inconsistent with DOL conformance procedures and industry pay practices, and increases contract costs.

The AFL-CIO, IAM, LIUNA, and the Teamsters objected to what they perceived as substantive differences between the language of this section and the language of the corresponding section in the stayed regulations of January 1981, which did not mention that trainee rates can be used if listed on the wage determination. The AFL-CIO stated that slotting procedures in section. 4.51(c) would lead to the increased issuance of trainee classifications on wage determinations where few currently exist. They further objected that the proposal does not contain a definition of trainees and does not provide a ratio for their use. IAM contended that the proposal represents a turnaround of DOL's position on this issue and will permit the widespread use of trainees which will lead to "wage busting."

Discussion of Final Rule

It is basic to the concept of a prevailing wage rate that such rate be the minimum permitted to be paid to all employees performing given duties in a particular classification. Therefore, the Department believes it would not be in accord with statutory intent to permit the establishment of lower level subclassifications through conformance procedures. Furthermore, conformance of subclassifications would be

inconsistent with the legislative intent that wages not be a factor in the competitive procurement process. (Appropriate variations have been provided in section 4.6(o) for apprentices, student learners and handicapped workers.) Moreover, as discussed in section 4.152(c), a wage determination will often list a series of classes within a job classification family (e.g., Technician Classes A, B, and C) where the practice prevails in the industry and where bona fide differences in the work performed exist. In such situations, the lowest level listed in considered to be the entry level and the establishment of a lower level (or intermediate levels) through conformance or otherwise is not warranted.

The union commentators appear to misunderstand the proposed regulation. The Department does not intend to alter its previous practice of issuing entry level or trainee classifications under the SCA only when they are prevailing or are mandated under section 4(c) of the Act. Therefore, the use of slotting techniques in the issuance of wage determinations will not be used to establish trainee classifications. However, the statement that trainees may be used if listed on the wage determination is being deleted to eliminate any suggestion that there will be a change in the Department's practice.

Because the specific duties performed by trainees and the extent of their use vary greatly by service occupation, it would not be appropriate to establish fixed definitions or ratios regarding trainees.

Thus, § 4.152(c) is adopted with revisions to eliminate the confusion raised by the language of the proposed regulations and simply state that trainee classifications may not be conformed.

Section 4.163(g)—Contract Reconfigurations

Section 4(c) of the Act generally requires that, where the employees of a predecessor contractor were covered by a collective bargaining agreement, the successor of a contract "under which substantially the same services are furnished" must pay its employees no less than the wages and fringe benefits provided by that agreement. Where predecessor contracts or portions thereof are reconfigured, consolidated or combined into one or more new contracts, a question arises concerning the application of section 4(c) to the new contract(s).

History of Provision

(a) Contemporaneous construction—It has been the practice of the Department since the first time this issue arose after the 1972 amendments, to apply each predecessor contractor's collectively bargained rates to the same identifiable work in the new or consolidated contract.

(b) Existing regulations—There is no corresponding provision.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Provided that the protections of section 4(c) follow identifiable contract requirements which have been placed into new or consolidated contracts.

(e) Proposed regulations—Provided that in order for section 4(c) to apply when two or more previous contracts are combined into a single "reconfigured" contract, the new contract must be primarily for services which were furnished in the same locality under predecessor contracts. Further, where there is more than one such predecessor contract, the one covering the predominant part of the services called for under the new contract would control for purposes of section 4(c), and the collectively bargained wages and fringe benefits under that contract, if any, would apply to the new contract.

Comments

CODSIA favored the proposal because it would eliminate situations where employees in the same classification who previously worked on different contracts, work side by side on the new reconfigured contract and receive different rates.

The IBEW, SEIU, IAM, LIUNA, and IATSE opposed any limitations on the requirement for successor contractors to pay no less than a predecessor's negotiated rates, contending that their collective bargaining agreements would be negated, contrary to the intent of the 1972 amendments. These organizations also argued that agencies could reconfigure contracts to avoid a predecessor's negotiated wage and fringe benefit rates. In addition, the IBEW stated that, where two or more predecessor contracts for *different* services are combined, negotiated wages and fringe benefits for classifications not covered by the collective bargaining agreement under the predominant predecessor contract would be ignored under the new contract.

Discussion of Final Rule

A literal application of the policy expressed in the January 1981 regulations to reconfigured contracts results in the application of more than one predecessor collective bargaining agreement to the same services, and different negotiated rates applied to the same employee classifications on the new contract. Likewise, a similar problem arises where one predecessor has a collective bargaining agreement while another does not and the new contract combines identical work functions. In these situations, contractors have been required to pay employees working side by side, performing the same services, different wages and fringe benefits, entailing detailed records to ensure the proper rate is applied to the services performed, and potentially causing labor unrest.

While the labor organizations cited legislative history that section 4(c) was enacted to prevent wage undercutting on contract recompetitions, which they argue would include reconfigurations, they do not address the problems that arise under the current policy that section 4(c) follows identifiable work, without any limitation.

A careful analysis of the comments makes it clear that the regulatory language requires clarification. On reconsideration, we have concluded that a limitation on the application of section 4(c) is not necessary where clearly different and distinguishable services are combined in a reconfigured contract, since the problems the proposal was designed to alleviate do not arise in that situation. Such a limitation is deemed necessary, however, where two contracts involving the same or similar work functions are combined and, as a result, employees working side by side on the reconfigured contract would otherwise perform identical work but receive different rates.

Accordingly, § 4.163(g) is amended to provide that where an agency combines more than one predecessor contract involving the same or similar work functions performed by substantially the same job classifications, the predecessor contract which covers the greater portion of such work under the new contract would control for purposes of section 4(c). However, where *different* services are combined, all predecessor collectively bargained rates continue to follow identifiable work requirements into the new contract. In addition, the regulation has been revised to make it clear that the proviso is a limitation on section 4(c). The Secretary finds that in order to eliminate the anomalous situation of workers working for the same employer, side by side, and performing the same work but receiving different rates of pay, with attendant

recordkeeping difficulties and labor unrest, such a limitation is necessary and proper in the public interest and is in accord with the remedial purpose of the Act to protect prevailing labor standards.

Section 4.163(i)—Application of "Successorship" Provisions of Section 4(c) of the Act When the Successor Contract Is Performed in a Different Locality From That of the Predecessor Contract

Section 4(c) of the Act applies to every contractor "under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished". In those instances in which the contract is not performed in the same location as the predecessor contract, the question arises whether the requirements of section 4(c) apply or whether its application is limited to those follow-on contracts performed in the same locality as the predecessor contract.

History of Provision

(a) Contemporaneous construction—It has been the Department's customary practice since passage of the 1972 amendments, which added section 4(c) to the Act, to apply its provisions irrespective of the place of performance of the successor contract.

(b) Existing regulations—Sections 4.1a(a), 4.1c, and 4.4(c) provide that the 4(c) successorship provisions apply to a contract which succeeds a contract "under which substantially the same services * * * are furnished for the same location," i.e., for the same procuring facility.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Specifically provided that the successorship requirements of section 4(c) apply to all successor contracts for substantially the same services, whether performed at the same government installation or at the location of the successful bidder.

(e) Proposed regulations—Provided that the successorship requirements of section 4(c) apply to successorship contracts performed in the same locality as the predecessor contract.

Comments

The C of C and NCTSI favored the proposal on the ground that it is in accord with the Act's provisions that employees be paid the wages prevailing in the locality where the work is actually performed.

Labor organizations, including the AFL–CIO, the Teamsters, LIUNA, SEIU, and IAM, opposed the proposal, contending that there is no express limitation on locality in section 4(c) of the Act, and the only statutory test of 4(c) applicability is whether "substantially the same services are furnished" by the successor contractor as were furnished under the predecessor contract. They contended that the intent of section 4(c) was to protect collectively bargained wage rates and prevent labor instability, and that Congressional hearings held subsequent to the enactment of section 4(c) indicated that it was to apply regardless of the place of performance.

Discussion of Final Rule

In reconsidering this issue, the Department has fully reviewed the Act's legislative history. The Senate Report on the 1972 amendments states that the provisions of section 4(c) apply to successor contracts "for *services* at the *same* location." S. Rep. No. 92–1131, 92nd Cong., 2nd Sess. 4 (1972) (emphasis in original). Furthermore, limiting the application of section 4(c) to successor contracts performed in the same locality satisfies the statutory intent of protecting *local* wage rates. This is implicit in the provisio to section 4(c), providing an exception from section 4(c) if the Secretary finds after a hearing that the collectively bargained rates "are substantially at variance with those which prevail for services of a character similar in the locality." Indeed, the proviso for variance hearings to ensure that the collectively bargained rates are in line with local rates refutes the argument that section 4(c) contains no express locality provision. Concomitantly, adoption of this position should prevent disruption of locally prevailing rates when higher (or lower) rates contained in a collective bargaining agreement are imported from a different locality.

Applying section 4(c) only to those contracts where the successor contract is performed at the same location as that of the predecessor is also consistent with the legislative history which gave rise to the 1972 amendment adding section 4(c). The primary motivation for the amendment was the "wage busting" which had occurred at Cape Kennedy when the contractor which took over the operations contract did not observe the higher pay scale paid by the predecessor contractor. Cong. Rec. (Daily), S15342–15343 (Sept. 19, 1972); *The Plight of Service Workers under Government Contracts*, pp. 14–16 (Comm. Print 1971). Such "wage busting" is not a problem where the successor performs services at a different locality and thus utilizes a different work force.

However, to avoid problems which could arise if a contractor changes the place of performance after contract award, section 4.163(i) is amended to make it clear that once a contract which is subject to the provisions of section 4(c) has been awarded, section 4(c) will continue to apply if a successor prime contractor subsequently changes the place of contract performance or subcontracts work to a firm which performs the work in a different locality.

Section 4.163(j)—Interpretation of 4(c) Wage Determinations

History of Provision

(a) Contemporaneous construction—It has been the Department's position that where a contract is subject to section 4(c), and where a wage determination fails to accurately set forth the terms of the underlying collective bargaining agreement, the contractor is bound to observe the terms of the collective bargaining agreement. Furthermore, where the agreement is ambiguous, it is necessary to look to the intent of the parties.

(b) Existing regulations—No specific provision.

(c) Current practice—Same as (a).

(d) January 1981 regulations—Explained the Department's position, set forth at (a).

(e) Proposed regulations—Same as (d).

Comments

CODSIA objected to the requirement that interpretations of the wage and fringe benefit provisions of a section 4(c) wage determination be based on the intent of the parties to the predecessor's collective bargaining agreement. They contended that this section may restrict the right of a successor contractor to meet SCA obligations by furnishing an equivalent combination of fringe benefits and/or cash, and thus would be contrary to the language of the Act.

Discussion of Final Rule

It is the Department's view that the requirement of section 4(c) that contractors pay not less than the wages and fringe benefits "to which such service employees would have been entitled if they were employed under the predecessor contract," requires a contractor to follow the language of the agreement and, where necessary to resolve a question concerning the meaning of the language, the intent of the contracting parties. However, this section places no limit on the successor contractor's right to furnish equivalent combinations of fringe benefits or cash in meeting its obligations, but merely provides that the successor look to the provisions of the predecessor's

collective bargaining agreement and, where necessary, the intent of the parties to determine its monetary obligations under section 4(c).

In the majority of cases, the language of the agreement is clear, and the wage and fringe benefit provisions of the agreement are accurately reflected in the applicable wage determination. However, in those rare instances where the meaning of a wage or fringe benefit provision in a predecessor contractor's agreement cannot be determined by a successor contractor, the Department of Labor will assist in obtaining interpretative guidance from the parties to that agreement.

Section 4.163(j) is adopted with minor clarification.

Section 4.168(b)—Wash-and-Wear Uniform Maintenance Costs

Where the wearing of uniforms is required by the employer, the Government contract, or the nature of the work, the cost of furnishing and maintaining such uniforms is a business expense of the employer which may not be borne by the employees to the extent that it would reduce the employees' compensation below that required by the law. This is a principle that has been repeatedly applied by the Department in enforcement of the Fair Labor Standards Act, and upheld by the courts. However, the issue of whether employees incur measurable costs when maintaining so-called "wash-and-wear" uniforms has been under review for some time. The question which arises is whether, for those uniforms of wash-and-wear material which can ordinarily be included with the family wash and do not require special treatment, a uniform maintenance liability is appropriate.

History of Provision

(a) Contemporaneous Construction—It has been the Department's practice since the first time this issue arose under the SCA to conform to its enforcement practice under the Fair Labor Standards Act, i.e., to require reimbursement of the cost to employees of maintaining required uniforms.

(b) Existing regulations—Section 4.170(b) states that the cost of uniforms and their laundering is properly a business expense of the employer where the nature of the work it has contracted to perform requires the employee to wear a uniform.

(c) Current practice—The Department's practice has recently been modified in recognition of the common use of wash-and-wear uniforms, to assert no employer liability where such garments may be routinely washed and dried with other personal garments and require no special treatment.

(d) January 1981 regulations—Specifically provided for reimbursement of uniform maintenance expenses, with no special proviso for wash-and-wear uniforms.

(e) Proposed regulations—Same as (d), with the addition of a special exception for wash-and-wear uniforms, to reflect current practice.

Comments

Kentron International, Inc., commented in favor of the proposed revision. The proposal was opposed by the Textile Rental Services Association, LIUNA, and the UPGWA on the ground that it places an unfair burden on low paid employees, who must absorb the maintenance costs and for whom the cost of maintaining uniforms is not *de minimis*.

Discussion of Final Rule

The Department has concluded that as a general matter, for wash-and-wear uniforms requiring no special treatment, a uniform maintenance liability for employers would not be apppropriate because the cost of, and time spent in, maintaining such uniforms by employees is considered *de minimis*. The Department's experience has been that in such cases there is generally no practicable means of measuring either the cost or time required for washing the uniform, as a separate item.

This section has been adopted with a revision to clarify that a requirement of daily washing constitutes special treatment requiring compensation. This conforms the regulation to the policy applied under the Fair Labor Standards Act, and responds in large part to the concerns expressed by those commentators who opposed the proposal.

The provisions has also been revised to clarify that, notwithstanding the general provision regarding wash-and-wear uniforms, where wage determinations are issued under section 4(c) of the Act for successor contracts, the amount established in the predecessor collective bargaining agreement is deemed to be the cost of laundering wash-and-wear uniforms.

Section 4.171—"Bona Fide" Fringe Benefits

SCA requires at section 2(a)(2) that the Department's wage determinations set forth prevailing or, where section 4(c) applies, collectively bargained fringe benefits. The Act enumerates types of benefits and further provides that a contractor may satisfy its fringe benefit obligation by furnishing any equivalent combination of fringe benefits and/or cash payments, in accordance with rules established by the Secretary.

History of Provision

(a) Contemporaneous construction—The Department has always considered that it had the authority to establish rules for bona fide fringe benefit plans. Furthermore, the Department has generally considered that unfunded plans are not bona fide.

(b) Existing regulations—No specific discussion of bona fide fringe benefits. However, § 4.170(b) requires that a fund, plan or program be bona fide.

(c) Current practice—Same as (a); however, in the jurisdiction of the Ninth Circuit, unfunded plans are permitted. See *White Glove Bldg. Maintenance, Inc.* v. *Hodgson*, 459 F.2d 175 (1972).

(d) January 1981 regulations—Set forth rules for bona fide fringe benefits. Provided that normally unfunded fringe benefit plans are not bona fide, but provided a procedure for contractors to request approval of such a plan from the Administrator.

(e) Proposed regulations—Same as (d).

Comments

NASA and DOE asserted that the intent of this section, which explains the requirements for bona fide fringe benefits for purposes of the Act, was not clear because the term "bona fide" in subparagraph (b), concerning unfunded plans, was not defined. NASA and DOE further questioned the authority of the Department to set policy on fringe benefit plans. NCTSI maintained that the Department's authority is limited to determining only whether fringe benefits other than those enumerated in the Act are bona fide.

Discussion of Final Rule

As set forth in section 2(a)(2) of the Act, the types of benefits listed therein and benefits of a similar nature are generally considered bona fide for purposes of the Act. Subparagraph (a) of § 4.171 specifies criteria which must be met for a fringe benefit to be considered bona fide. The purpose of § 4.171 is to give force and effect to the fringe benefit provisions of the Act by ensuring that a contractor actually incurs the required monetary obligation and provides for the furnishing of the specified fringe benefits or their equivalent to its employees. The statutory authority for the Secretary to make such rules and regulations is set forth in section 4 of the Act.

Accordingly, this section is adopted as proposed with minor editorial changes.

Other Changes

In addition to the changes described in preceding sections of the preamble, minor editorial and language changes have been made in some sections of the SCA rules.

Classification—Executive Order 12291

This rule would not appear to require a regulatory impact analysis under Executive Order 12291 since the changes will result in substantial cost savings annually for both contractors and the Government while still assuring protection of local labor standards in accordance with the purposes of the Act. However, because of the importance to the Government and the public of the issues involved, the Department has concluded that the regulation should be deemed a "major rule" for purposes of the Executive Order. It has been determined, in accordance with Executive Order 12291, that of those alternatives which are consistent with the purpose of the statute, these changes provide the greatest net benefit to society at the least cost.

Summary of Final Regulatory Impact and Flexibility Analysis

The Department has prepared its final regulatory impact analysis (FRIA) to identify and quantify the cost impact of the final revisions in the Service Contract Act regulations and various alternatives that were explored and to inform the public of the economic considerations behind these revisions in accordance with Executive Order 12291.

The new rule must also consider the Regulatory Flexibility Act of 1980. This Act requires agencies to prepare regulatory flexibility analyses and to develop flexible alternatives whenever possible in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The analysis, which is summarized below, also meets the requirements set forth for assessing the economic impact of the final changes in the Service Contract Act regulations on small entities as required under the Regulatory Flexibility Act.

A. SCA Coverage Revisions and Exemption Issues

1. *Preliminary Regulatory Impact Estimates*

The final regulatory impact analysis builds on the estimates developed for the proposal published on August 14, 1981 (46 FR 41380). The preliminary regulatory impact analysis estimated the cost implications of several important proposed changes affecting coverage and exemptions under the Act, including (1) the proposed exemption of research and development contracts; (2) the proposal to cover contracts under SCA only when the work is performed principally through service workers; (3) the proposed exemption of maintenance and repair services on ADP and high technology scientific and medical apparatus or equipment, and on office/business machines when performed by the manufacturer or supplier; (4) the proposal not to generally apply the Act to timber sales contracts; and (5) the proposed coverage of specifications for services only in instances where the contract as a whole is principally for services.

The PRIA estimated that the proposed changes would result in substantial cost savings over the January 1981 regulations, amounting to at least $240 million annually to both contractors and procuring agencies, while still assuring necessary protection to service employees' wages on service contracts. The Department requested comments and additional information on all economic assumptions used in the analysis, as well as any alternative suggestions designed to achieve the objectives of the Executive Order.

2. *Comments on the Preliminary Regulatory Impact Analysis*

The Department received numerous comments on the PRIA estimates and economic assumptions. These comments can be categorized into two groups. Union groups called into question the validity of the whole economic analysis. They challenged, in particular, the Department's methodology as built from highly questionable assumptions and data that failed to differentiate between industries and occupations. The end-result, in their view, was highly unreliable estimates of cost savings to contractors and procuring agencies from the proposed revisions. Moreover, they viewed the analytical deficiencies as working to inflate the cost savings. Finally, they faulted the analysis as inadequate because it failed to consider the indirect costs of the proposed regulations in terms of the loss of wage protection and jobs for workers, increased risk of substandard performance of contract work, productivity losses due to impaired labor relations and their impact on certain regions (i.e., a shift in contract awards from high wage to low wage regions). Union commentators suggested that the Department issue the final revisions contained in the January 1981 regulations.

In contrast, industry associations, agencies, and individual contractors strongly endorsed the proposed changes as vastly improving government contract administration, increasing efficiency in both agency and contract operations, and resulting in substantial budgetary savings. Those commenting on the PRIA generally viewed the estimates of cost savings as on the low side, since they ignored the "spillover effects" of wage increases for workers below the SCA rates on the wage rates of other workers (i.e., increasing wage rates for the lowest paid employees on Government contracts may require raising wages of the highest paid employees on Government and private contracts by the same percentage amount).

The Department has carefully reviewed all of these comments in finalizing the regulations and has incorporated these considerations, as appropriate, into the final regulatory impact analysis (FRIA). Since the final rule differs from the proposal in several important respects, the cost estimates were revised to reflect the changes. In addition, the final analysis uses more recent wage data available for the ADP and business equipment industries and for "blue collar" service occupations and refines the PRIA estimates of the contracting universe impacted by the final rule to the extent permitted by available data. Based on the evidence, the Department has concluded that today's final regulations will assure necessary protection of service employees' wages on contracts principally for the furnishing of services, as contemplated in the legislation. At the same time, they will produce substantial cost savings for Government contractors and procuring agencies—in the neighborhood of $124 million annually when compared to the January 1981 regulations. The following sections highlight the major methodological issues and the Department's conclusions.

3. *Methodology for Cost Savings Estimates Associated with Alternative Coverage and Exemption Provisions*

The major economic concern of industries and procuring agencies faced with potential SCA coverage is that the wage determinations required by the Service Contract Act add to the costs of federal contracts. Therefore, we attempted to assess the impact of SCA coverage (and hence the potential cost savings from the absence of SCA coverage) using a wage analysis that

compared SCA wage determinations to a range of wages found for similar service occupations in each area. Under this methodology, the portion of the wage distribution that lies below each SCA wage rate provides a measure of the possible wage cost savings in the absence of SCA coverage. This approach thus recognizes that if wages are set at the mean or median wage, Government contracting costs could still be increased to the extent that contractors could not pay wages below the prevailing rate.

Labor cost increases associated with SCA coverage can be estimated as the simple product of (1) the net dollar volume of contracts expected to contain SCA provisions under alternative regulations (after subtracting out the dollar amounts of contracts currently containing SCA provisions); (2) the percent of contract costs paid service employees; and (3) the average percentage wage increase resulting from SCA coverage expected for relevant categories of service employees. Cost savings resulting from the final regulatory changes over the regulations published in January 1981 are calculated from these wage cost estimates.

Baseline data on the current SCA contract volume for most coverage areas as well as the appropriate SCA universe is available from the Federal Procurement Data System (FPDS). The universe for timber sales contracts can be determined from Department of Agriculture data on appraisal costs, while the universe for service specifications under equipment supply contracts comes from the General Services Administration.

Estimates of the percent of contract funds used to pay service employees come from individual agencies—the Department of Defense (DOD) for R&D and related contracts, General Service Administration (GSA) for installation, maintenance, and repair of equipment and buildings, and the Department of Agriculture (DOA) for timber sales contracts.

To estimate the magnitude of wage increases associated with SCA coverage, SCA rates in effect in 1979 for selected occupational categories were compared to wage distributions for these groups obtained from BLS area wage surveys. To illustrate how this procedure works, estimates are developed below for R&D and related professional service contracts (although the final regulations do not include an exemption for R&D and related contracts). This same technique is generally transferable to other coverage areas using different data, but some modifications may be necessary (e.g., in cases where existing contracts do not contain SCA wage determinations).

For our sample of 23 technical and clerical occupations in 30 areas from area wage surveys conducted by the Bureau of Labor Statistics (BLS), every observed wage in the BLS Survey which fell below the level of the relevant SCA wage determination was identified. All wages below the SCA rate were then subtracted from the SCA determination for each occupational class in each city. Summing these differences and dividing by the number of workers in the relevant sample and the average wage produced individual estimates of the percentage increase in wages resulting from SCA for each occupation in each city. These individual estimates were next averaged across areas and occupations to provide a single representative estimate of 4.17 percent as the wage impact of SCA coverage for these clerical and technical occupations. The results using this methodology suggest that there may be some modest upward pressure on wages from SCA requirements, but its magnitude is not as large as is sometimes asserted.

In the final analysis, this percentage increase ws used to proxy possible wage effects from SCA coverage in two areas: (1) the proposed exemption of R&D contracts and alternatives under review, and (2) the proposed change in the Department's coverage interpretation which would apply the Act only to contracts performed principally through the use of service employees, and which would largely impact R&D and related contracts. This more limited role for the R&D estimated impact in the final analysis would appear in large measure to remedy the unions' criticism of widespread application of the R&D estimate to dissimilar categories of workers in the preliminary analysis.

Wage increases from coverage of timber sales contracts are estimated using this methodology but with different data applicable to the special occupations used in such contracts and in rural areas. These calculations indicate that SCA coverage would exert upward pressure on labor costs of about 1.56 percent for logging activities (assuming that prospective SCA rates would be set at or near the median).

For other non-logging land and forest management services, the resulting estimates show a similar increase of 1.8 percent in wages associated with SCA coverage. In addition, we have specific data on the ADP and high technology industries for maintenance/repair services. Applying the ADP wage distributions results in an estimated average wage increase of 6.7 percent. (The estimated impact using the new data set is substantially below the 10.7 percent estimate used in the preliminary analysis which was based on a more limited range of wages taken from a General Accounting Office report.) We also applied this 6.7 percent estimate to the maintenance and repair of other equipment no longer subject to the Act because of the final rule's determination that specifications for services which are part of nonservice contracts are not covered by the Service Contract Act because of the similarities in occupations. (This also replaces the 10.7 percent estimate used in the preliminary analysis.) Finally, the PRIA estimates that dealt with lower wage service workers, such as janitors and guards, who would no longer be covered as part of building lease contracts which contain separate specifications for the furnishing of janitorial or other maintenance services, have been revised to reflect a 1981 nationwide BLS wage distribution for janitors, which was used to proxy SCA wage effects for other lower wage workers. Assuming that SCA rates are set at the mean wage paid janitors ($5.23 per hour), these data suggest an average wage effect of 16.5 percent. This percentage is well above the 4.17 percent R&D estimate used in the preliminary analysis.

With these wage impact estimates, the cost impacts of alternative options were derived by multiplying the estimated wage increases for each contract type by the share of total contract costs paid to service employees. The estimated labor cost savings from the final revisions over the regulations published in January 1981 for each coverage and exemption issue were then calculated directly from these cost estimates. Specific applications of this methodology to the coverage and exemption areas under review and individual cost estimates are presented in the final regulatory impact analysis.

4. *Summary of Estimated Cost Savings from SCA Changes Affecting Coverage and Exemptions*

The final rule contains several important changes concerning coverage and exemptions under the Act including: (1) the exemption of maintenance, calibration, and repair services on ADP, scientific and medical apparatus or equipment where microelectronic circuitry or other technology of at least similar sophistication is an essential element, and on office/business machines when performed by the manufacturer or supplier; (2) the decision that the Act does not generally apply to timber sales contracts; and (3)

the coverage of specifications for services only in instances where the contract as a whole is principally for services. Together, these coverage revisions and exemptions should result in substantially lower labor and administrative costs on federal contracts amounting to nearly $124 million annually. The changes are in accord with our best interpretation of Congressional intent and the criteria for exemption in section 4(b) of the Act.

It should be emphasized that these figures do not reflect the *net* savings to society. This is because they do not subtract out any indirect costs incurred by workers and the public as a result of the SCA coverage revisions and exemptions. The Service Contract Act was enacted to provide labor standards protection for the service employees of contractors and subcontractors furnishing services to federal agencies. The legislative history recognizes that statutory protection was considered necessary to prevent contractors from using wages lower than those locally prevailing to obtain a competitive advantage in securing Government contracts. Lowering wages as a means of getting contracts would otherwise be likely for many types of service contracts which are highly labor intensive and which depend on "lowest-bidder" procurement practices. SCA prevailing wage protections effectuate the "longstanding policy of Congress that the Federal Government shall not be a party to the depressing of labor standards in any area of the Nation" (111 Cong. Rec. 2437 (1965), Statement of Congressman O'Hara, co-author of the Act).

Examples of indirect costs that potentially could arise through coverage revisions and exemptions include job and wage losses (at least for employees of affected contractors), lower quality services and reduced productivity, among others. The Department recognizes the potential for these indirect costs, but unfortunately the necessary data with which to estimate their magnitude are not available. Moreover, the Department believes these costs will not be substantial for several reasons.

First, the estimates measure the savings in wage costs over the baseline of full compliance with the January 1981 rule. Yet, many of the contracts affected by the coverage revisions and exemptions do not currently contain SCA provisions. These include, for example, all of the timber sales contracts and maintenance as part of GSA building leases, and most maintenance and repair specifications under contracts for lease or supply of equipment. For workers under these contracts there are no existing SCA provisions and hence no actual wage losses. Secondly, the exemptions impact largely on high wage workers. For example, the average hourly earnings of most occupations impacted by the exemptions are well in excess of average earnings levels in the economy. CBEMA data on the earnings levels of technicians in data processing occupations average between 24–50 percent above those for all private nonfarm establishments. Finally, because the workers in the ADP and high technology industries are in great demand and because it is characteristic of the industries that Government business is only a small percentage of the total business of individual firms and that workers perform Government work as part of day-to-day duties servicing commercial establishments it is highly unlikely that job or wage losses would occur. All of these considerations and others are discussed in further detail in the final regulatory impact analysis.

B. Locality of Wage Determinations

For a small percentage of wage determinations, the place of performance of the contract is unknown at the time of bid solicitation because the contract will be performed at the location of the successful bidder's facility. Accordingly, the proper locality to use for these wage determinations is problematic.

The Department of Labor in recent years has generally issued wide-area, composite wage determinations encompassing all of the localities in which potential bidders would be located. The composite area could be a cluster of counties, a state, a region, or even the entire country. "Averaging" across localities would tend to raise contracting costs.

After further consideration of a recent court decision in *Southern Packaging and Storage Company* v. *United States, supra*, generally prohibiting nationwide rates except in extraordinary cases, and the problems of issuing wage determinations which do not reflect locally prevailing rates, the Department proposed to implement a two-step procedure that would generally result in wage determinations for the various localities of the potential bidders.

In addition, the proposal limited the application of the successorship provisions of section 4(c) of the Act to successor contracts which are performed in the same locality as the predecessor contract. The current interpretation as expressed in the January 1981 regulations imposes no such limitation, thereby requiring a successor contractor performing services at its own facility in a different locality from its predecessor contractor to pay collectively bargained rates from a different locality. This had the potential of disrupting locally prevailing wages.

Agencies and industry groups generally supported the proposed locality revisions, although they recommended modifications in the procedures to accommodate their particular view. In contrast, labor commentators opposed the two-step procurement procedure as contrary to the Act's remedial purpose, in part because it would tend to channel contract awards to "low wage" areas (i.e., it grants an unfair competitive advantage to "low wage" bidders). They likewise challenged the proposal to limit the application of the successorship provisions under section 4(c) of the Act to successor contracts performed in the same locality as the predecessor contract, on the grounds that section 4(c) contains no express limitation on locality and that the only statutory test of 4(c) applicability is whether "substantially the same services are furnished" by the successor contract as were furnished under the predecessor contract.

After careful review of the evidence, together with the legislative history of the Act, the Department has adopted these locality provisions. The Department has concluded that the two-step procurement process would prevent the "importation" of both higher and lower wage rates and consequent disruption of local labor markets that would occur under other methods. Furthermore, the Department notes that this is no support in the legislative history for any of the alternatives to the two-step procedure, including the locality of the procurement agency or of the predecessor contracts, as suggested by some commentators. However, a minor revision has been made to the procedure to permit the Department to follow the modified procedure on its own initiative, after consultation with the contracting agency. The Department has also determined that limiting the application of section 4(c) to successor contracts performed in the same locality would satisfy the statutory intent of protecting *local* wage rates and is fully consistent with the legislative history.

While the cost impact of these locality provisions cannot be quantified, the final revisions will not only decrease Government contract costs but will best assure that SCA determinations reflect

wages found in the locality where the contract is performed, as contemplated by the statute, thereby eliminating the destabilizing effects of the previous DOL procedures.

C. Changes in Conformance Procedures

In addition, the proposal introduced several changes designed to improve the operation of the conformance process. Under the proposed procedures, rates would be issued for classifications requested by agencies to the extent possible through use of slotting procedures, a widely-used technique in pay administration, to establish rates for unlisted occupations. These provisions would substantially reduce the frequency of cases requiring conformance actions because a classification is not listed on a wage determination. Also, the burdens on the Department and contracting agencies associated with DOL review of the conformance actions would be substantially lessened by allowing agencies and contractors to conform wage rates and fringe benefits which were the subject of a previous conformance action through indexing procedures.

Commentators generally supported these provisions (with some modifications), as necessary to substantially reduce the burdens on the Department and contracting agencies associated with conformance actions Accordingly, the final regulations adopt these changes in the conformance procedures.

Again, it is not possible with available data to quantify the cost reductions associated with these conformance revisions, but the administrative cost savings are expected to be substantial.

D. Application of the Act to Overhaul and Modification Contracts

The proposal contained guidelines to determine when overhaul or modification of equipment is so extensive as to constitute manufacturing subject to the Walsh-Healey Act, rather than the Service Contract Act. Work of a routine maintenance, tune-up, repair, inspection, etc., nature would continue to be subject to the Service Contract Act.

Industry viewed the proposed guidelines delineating major overhaul of equipment as overly detailed. Union commentators acknowledged that the current "dual" coverage position was unworkable. However, they opposed the proposed guidelines as arbitrary and unjustified by the language and history of both Acts as well as contrary to case law. Furthermore, it would be impossible, in their view, to determine before contract award whether proposed work would be extensive enough to be covered by Walsh-Healey as "remanufacturing", as this is determinable only after tear-down and inspection of the equipment.

After careful review of the evidence, the Department has adopted the proposed guidelines. The detailed guidelines appear necessary to distinguish between coverage under the two Acts and to eliminate possible overlapping of the differing labor standards. Moreover, agencies should be able to initially determine whether the proposed contract would involve principally "remanufacturing" based on the guidelines and their contract experience, and to incorporate the appropriate labor standards clauses prior to soliciting bids. The Department believes these guidelines will effectively deal with the complex administrative problems encountered in deciding where SCA coverage ended and Walsh-Healey coverage began under the "dual" coverage positions. In the process, the Department expects that government contracting costs for these services will be reduced, but the precise amount cannot be determined at the time.

E. Cost Impact on Small Entities

Much of these costs savings would be passed on to small contractors who take up a large part of the Federal contracting universe. For example, Employer Information Reports filed in 1980 by all Federal contractors with at least 50 employees and a $50,000 or more contract show that even at these thresholds, about 54 percent of those federal contractors were firms with fewer than 250 employees. This included 3,308 small employers with 50–90 employees and 5,540 slightly larger firms with 100–249 employees. In the logging industry, the proportion of small contractors is even larger. About 80 percent of the logging operations in 1969 were in establishments having fewer than 100 employees. Thus, even if costs are proportionate for small and large contractors, there would be a large reduction expected in contracting costs for smaller contractors.

F. Summary

The final revisions discussed above will result in substantial cost savings of at least $124 million annually for both contractors and the Government while still assuring protection of local wage rates and practices. The changes will have a substantial beneficial impact on small contractors.

Paperwork Reduction Act

Information collection requirements contained in this regulation (sections 4.6(b)(2), 4.6(e), 4.6(g)(1) (v) and (vi), and 4.6(l) (1) and (2)) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB control number 1215–0150.

Other information collection requirements contained in this regulation (sections 4.6(g)(1) (i)–(iv) and 4.6(q)(3)) have been approved by the Office of Management and Budget and have been assigned OMB Control Number 1215–0017.

Conclusion

The Solicitor of Labor has determined in accordance with Executive Order 12291, that this regulation is clearly within the authority delegated to the Secretary of Labor by the Service Contract Act (41 U.S.C. 351, *et seq.*, 79 Stat. 1034, as amended in 86 Stat. 789, 90 Stat. 2358), which incorporates sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38 and 39), as well as 5 U.S.C. 301. The Solicitor, as set forth above in the discussion of the major issues, has determined that this regulation is consistent with the congressional intent of the Service Contract Act that contractors on Federal contracts subject to this Act pay their workers in accordance with local wage standards. The regulation also provides protection for the workers and mechanisms for enforcement, as intended by the Service Contract Act.

This document was prepared under the direction and control of William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Dates of Applicability

Many of the provisions contained in these regulations reflect existing policies and interpretations of the Act or are procedural in nature. However, significant changes have been made with respect to contract clauses, contract coverage, exemptions from coverage, and provisions relating to wage determinations, including those issued pursuant to section 4(c) of the Act. Because existing contracts contain SCA provisions and wage determinations issued under the regulations and policies in existence when the contracts were awarded, the substantive revisions herein relating to contract clauses, coverage and exemptions from the Act, and wage determinations issued thereunder,

including those issued in accordance with section 4(c) of the Act, are prospective only. Accordingly, the revisions to §§ 4.1b, 4.4, 4.5, and 4.6 of Subpart A; §§ 4.116, 4.117, 4.123(e), 4.132, and 4.133 of Subpart C; and §§ 4.163(g), 4.163(i) and 4.168(b) of Subpart D of this Part shall be applicable only to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after December 27, 1983. None of the revisions noted hereinabove shall be applicable to any contract entered into prior to that date. The remaining provisions of Subparts A, B, C, D, and E are effective on December 27, 1983.

List of Subjects in 29 CFR Part 4

Administrative practice and procedures, Employee benefit plans, Government contracts, Investigations, Labor, Law enforcement, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

Accordingly, 29 CFR Part 4 is revised as set forth below.

Concurrent with the publication today of this final rule, the final rules previously published in the Federal Register on January 16 and 19, 1981 (46 FR 4320 and 46 FR 4386, respectively) and subsequently stayed are hereby withdrawn.

Signed at Washington, D.C. on this 19th day of October, 1983.

William M. Otter,

Administrator, Wage and Hour Division.

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

Subpart A—Service Contract Labor Standards Provisions and Procedures

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Authority: 41 U.S.C. 351, et seq., 79 Stat. 1034, as amended in 86 Stat. 789, 90 Stat. 2358; 41 U.S.C. 38 and 39; and 5 U.S.C. 301.

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, Pub. L. 93-57, 87 Stat. 140, effective July 6, 1973, and Pub. L. 94-489, 90 Stat. 2358, effective October 13, 1976 and any subsequent amendments thereto.

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

(c) "Wage and Hour Division" means the organizational unit in the Employment Standards Administration 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 §§ 4.107-4.134.)

(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.

§ 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 Board of Service Contract Appeals, the date of the decision of the Board of Service Contract Appeals. (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 of his 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 ($2.90 per hour beginning January 1, 1979, $3.10 per hour beginning January 1, 1980, and $3.35 per hour after December 31, 1980).

§ 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) 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.

(c) 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)(2)(i)).

(d) 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, D.C. and copies will be made available on request at Regional Offices of the Wage and Hour Division.

§ 4.4 Notice of intention to make a service contract.

(a)(1) For any contract exceeding $2,500 which may be subject to the Act, the contracting agency shall file with the Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. With respect to recurring or known requirements, such notices shall be filed not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) prior to (1) any invitation for bids, (2) request for proposals, (3) commencement of negotiations, (4) exercise of option or contract extension, (5) annual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress, or (6) each biennial anniversary date of a multi-year contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division. (See § 4.4(d).) Notices with regard to solicitations where such planning is not feasible shall be submitted as soon as possible, but not later than 30 days prior to the above contracting actions. Such notice shall be submitted on Standard Form 98, Notice of Intention to Make a Service Contract, and Standard Form 98–A or a statement containing the information in paragraph (b) of this section and shall be completed in accordance with the instruction provided and shall be supplemented by the information required under paragraphs (c) and (d) of this section. Supplies of Standard Forms 98 and 98–A are available in all GSA supply depots under stock numbers 7540–926–8972 and 7540–118–1008, respectively. If there exists any question or doubt as to the possible application of the Act to a particular procurement, the contracting agency shall submit such question in a timely manner to the Administrator for determination.

(2)(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 shall, upon identification of firms participating in the procurement in response to an initial solicitation, file with the Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. In addition to the requirements contained in paragraph (a)(1) of this section, such submission shall identify each location where the work may be performed as indicated by participating firms. Subsequent amendments to the solicitation setting forth the wage determinations and any necessary change in the date and time for submission of final bids shall be made upon receipt of wage determinations. 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 (i) above is not practicable in a particular situation, in which event the Department may authorize a modified procedure which may result in the subsequent issuance of wage determinations for one or more composite localities.

(b) The contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) either a Standard Form 98–A or a statement in writing, containing the following information concerning the service employees expected by the agency to be employed by the contractor and any subcontractors in performing the contract:

(1) The number of such employees of all classes, or a statement indicating whether such number will or will not exceed 5, the number for which the inclusion of a wage determination in the contract is mandatory under the provisions of section 10 of the Act as set forth in § 4.3(a); and

(2) A listing of those classes of service employees expected to be employed under the contract which, if employed by the agency, would be subject to the wage provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332, together with a specification of the rates of wages and fringe benefits that would be paid by the Government to employees of each such class if such statute were applicable to them. (Under section 2(a)(5) of the Act and § 4.6 the inclusion of such a statement in the service contract is also required.)

(c) 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 file with its Notice of Intention to Make a Service Contract (SF-98) 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. 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 (section 4.4(a)(2)). 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 that 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 Notice of Intention to Make a Service Contract (Form SF-98).

(d) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall file with its Standard Form 98 a statement in writing concerning the type of funding and the contemplated term of the proposed contract. Unless otherwise advised by the Wage and Hour Division that a Standard Form 98 must be filed on the annual anniversary date, a new Standard Form 98 shall be submitted 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.

(e) Any Standard Form 98 submitted by a contracting agency without the information required under paragraphs (b), (c), or (d) of this section will be returned to the agency for further action.

(f) If exceptional circumstances prevent the filing of the notice of intention and supplemental information required by this section on a date at least 60 days (or 30 days in the case of unplanned procurements) prior to any invitation for bids, request for proposals, or commencement of negotiations, the notice shall be submitted to the Wage and Hour Division as soon as practicable with a detailed explanation of the special circumstances which prevented timely submission. In the event the proposed contract involves performance by more than 5 service employees and an emergency situation requires an immediate award, the contracting agency shall contact the Wage and Hour Division by telephone for guidance prior to any such award. In no event may a contract subject to the act on which more than 5 service employees are contemplated to be employed be awarded without an appropriate wage determination. (Section 10 of the Act.)

(g) If any invitation for bids, request for proposals, bid opening, or commencement of negotiations for a proposed contract for which a wage determination was provided in response to a Standard Form 98 has been delayed, for whatever reason, more than 60 days from the date of such procurement action as indicated on the submitted Standard Form 98, the contracting agency shall contact the Wage and Hour Division for the purpose of determining whether the wage determination issued pursuant to the initial submission is still current. Any revision of a wage determination received by the contracting agency as a result of such communication or upon discovery by the Department of Labor of a delay, shall supersede and replace the earlier response as the wage determination applicable to such procurement, subject to the time frames set forth in § 4.5(a)(2).

§ 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 communication from the Wage and Hour Division, Employment Standards Administration, Department of Labor, responsive to the notice required by § 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.

(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)(1) If the notice of intention required by § 4.4 is not filed with the required supporting documents within the time provided in such section, the contracting agency shall, through the exercise of any and all of its power and authority that may be needed (including, where necessary, its authority to negotiate, its authority to pay any necessary additional costs, and its authority under any provision of the contract authorizing changes), include in the contract any wage determinations communicated to it by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, within 30 days of the receipt of such wage determination(s). With respect to any contract for which section 10 of the Act requires an applicable wage determination, the Administrator may require retroactive application of such wage determination.

(2) 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 N] 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 its SF–98 within the time limits discussed in § 4.4(a) and has not received a response from the Department of Labor, the contracting agency shall, with respect to any contract for which section 10 of the Act and § 4.3 of this Part mandate the inclusion of an applicable wage determination, contact the Wage and Hour Division by telephone for guidance.

§ 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. (The information collection requirements contained in the following paragraphs of this section have been approved by the Office of Management and Budget under OMB control number 1215–0150.)

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

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

(iv)(A) The process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be 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, Employment Standards Administration 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 Board of Service Contract Appeals, 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. (Approved by the Office of Management and Budget under OMB control number 1215–0150.)

(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, Employment Standards Administration of the U.S. Department of Labor. (Sections 4.6(g)(1) (i) through (vi) approved by the Office of Management and Budget under OMB control number 1215–0017 and sections 4.6(g)(1) (v) and (vi) approved under OMB control number 1215–0150.):

(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. (Approved by the Office of Management and Budget under OMB control number 1215–0150.)

(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. (Approved by the Office of Management and Budget under OMB control number 1215–0150.)

(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) An employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips may have the amount of tips credited by the employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act in accordance with section 3(m) of the Fair Labor Standards Act and Regulations, 29 CFR Part 531: *Provided, however,* That the amount of such credit may not exceed $1.24 per hour beginning January 1, 1980, and $1.34 per hour after December 31, 1980. 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; (approved by the Office of Management and Budget under OMB control number 1215–0017);

(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.

§ 4.7 Labor standards clause for Federal service contracts not exceeding $2,500.

Every contract with the Federal Government which is not in excess of $2,500 but has as its principal purpose the furnishing of services through the use of service employees shall contain the following clause:

Service Contract Act. Except to the extent that an exemption, variation or tolerance would apply if this were a contract in excess of $2,500, the contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. Regulations and interpretations of the Service Contract Act of 1965, as amended, are contained in 29 CFR Part 4.

§ 4.8 Notice of awards.

Whenever an agency of the United States or the District of Columbia awards a contract subject to the Act which may be in excess of $10,000 and such agency does not submit Standard Form 279, FPDS Individual Contract Action Report, or its equivalent, to the Federal Procurement Data System, it shall furnish the Wage and Hour Division, ESA, an original and one copy of Standard Form 99, Notice of Award of Contract, unless it makes other arrangements with the Wage and Hour Division for notifying it of such contract awards. The form shall be completed as follows:

(a) Items 1 through 7 and 12 and 13: Self-explanatory;

(b) Item 8: Enter the notation "Service Contract Act;"

(c) Item 9: Leave blank;

(d) Item 10: (1) Enter the notation "Major Category," and indicate beside this entry the general service area into which the contract falls (e.g., food services, grounds maintenance, computer services, installation or facility support services, custodial-janitorial service, garbage collection, insect and rodent control, laundry and drycleaning services, etc.);

(e) Item 11: Enter the dollar amount of the contract, or the estimated dollar value with the notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "indefinite," or "not to exceed $——." Supplies of Standard Form 99 are available in all GSA supply depots under stock number 7540–634–4049.

§ 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, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 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 §§ 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.

§ 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, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 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 above, 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 Board of Service Contract Appeals.* 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 Board of Service Contract Appeals 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.

§ 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, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 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 Board of Service Contract Appeals 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 Board of Service Contract Appeals.* 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 Board of Service Contract Appeals 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.

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.* 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); and

(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 (sections 4(c) and 2(a) (1) and (2) of the Act).

§ 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 § 5341 or § 5332 of Title 5, United States Code, were applicable to them. Section 5341 refers to the Wage Board or Coordinated Federal Wage System for "blue collar" workers and § 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 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.

§ 4.53 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)(2)(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).

§ 4.54 Issuance and revision of wage determinations.

(a) Section 4.4 of Subpart A requires that the awarding agency file a notice of intention to make a service contract which is subject to the Act with the Wage and Hour Division, Employment Standards Administration, prior to any invitation for bids or the commencement of negotiations for any contract exceeding $2,500. Upon receipt of the notice, the Wage and Hour Division may issue a new determination of minimum monetary wages and fringe benefits for the classes of service employees who will perform work on the contract or may revise a determination which is currently in effect.

(b) 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)(2) of Subpart A.

(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.

§ 4.55 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 Board of Service Contract Appeals.* Any decision of the Administrator under paragraph (a) of this section may be appealed to the Board of Service Contract Appeals 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.

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, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, or to 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, D.C. 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.

§ 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 N] 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 Pub. L. 92–473, 86 Stat. 798; by Pub. L. 93–57, 87 Stat. 140; and by Pub. L. 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 Pub. L. 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 Pub. L. 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. Pub. L. 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.

§ 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 covers 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, Wake Island, Eniwetok Atoll, Kwajalein Atoll 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.

(b)(1) A service contract to be performed in its entirety outside the geographic limits of the United States as defined is not subject to the labor standards of the Act.

(2) In addition, a contract which is performed essentially outside the United States, with only an incidental portion performed within the United States as defined is not covered by the Act. For example, a contract for services to be performed on a vessel operating exclusively or nearly so in international or foreign waters outside the geographic areas named in section 8(d) would not be for services furnished "in the United States" within the meaning of the Act and would not be covered. However, if a significant or substantial portion of a service contract is performed within the statutory geographic limits, the Act applies, and 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. In such a case, the labor standards must be observed with respect to that part of the contract services which is performed within these geographic limits, but the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

(3) In close cases involving a decision as to whether a significant portion of a contract will be performed within the United States as defined, 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 in the United States and how necessary such work is to contract performance, and the amount of contract work performed or time spent in the United States vis-a-vis other contract work.

§ 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 or 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.

§ 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) *Services 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.

§ 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 (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 components, 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 exists:

(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) above; 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 § 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 to be 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) Contracts 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 hereunder);

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

(ii) The exemptions set forth in this paragraph (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 in substantial quantities to the general public in the course of normal business operations;

(B) The contract 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 commerical 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 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; 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 equivalent employees servicing the same equipment of commercial customers;

(D) The contractor certifies in the contract to the provisions in this subparagraph (ii).

(iii) Determinations of the applicability of this exemption shall be made in the first instance by the contracting officer prior to 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 above conditions have been met.

(iv) If the Department of Labor determines after contract award that any of the above requirements 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 Department of Labor determination. In such case, the corrective procedures in section 4.5(c)(2) of this part shall be followed.

§§ 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 thining, 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 §§ 4.111–4.113, 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 which 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 will immediately request a wage determination from the Department of Labor 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.

§ 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 section 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, §§ 4.6–4.7 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. The minimum wage rate under section 6(a)(1) of the Fair Labor Standards Act is $3.10 per hour beginning January 1, 1980, and $3.35 per hour after December 31, 1980.

§ 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 §§ 4.170–4.177 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 §§ 4.143–4.145). 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 Board of Service Contract Appeals, 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 Board of Service Contract Appeals, 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 §§ 4.170–4.177 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 is that the amount paid a tipped employee by his employer is deemed to be increased on account of tips by an amount determined by the employer, not in excess of 40 percent of the minimum wage applicable under section 6 of that Act, effective January 1, 1980. Thus, the tip credit taken by an employer subject to the Service Contract Act may not exceed $1.34 per hour after December 31, 1980. (See § 4.163(k) for exceptions in section 4(c) situations.) In no event shall the sum credited be in excess of the value of tips actually received by the employee

§ 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 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 non-covered 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 $2,500, 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 or mechanic for performance of work on such contracts must include compensation at a rate not less than 1½ times the employee's basic rate of pay for all hours worked in any workweek in excess of 40 or in excess of eight on any calendar days therein, whichever is the greater number of overtime hours. 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, subject of course to the differences in computations required by reason of the daily overtime provision of the Contract Work Hours and Safety Standards Act, which has no counterpart in the Fair Labor Standards Act.

(3) Although the application of the Contract Work Hours and Safety Standards Act does not depend on

inclusion of its requirements in provisions physically made part of the contract, the Act and the regulations of the Secretary require such provisions to be set forth in contract clauses. (See § 5.5(b) of this subtitle.)

(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 or 8 hours in any day therein. 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 or daily overtime hours, whichever are greater in number. The overtime pay provisions of the Walsh-Healey Act are discussed in greater detail in 41 CFR Part 50–201.

§ 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 Board of Service Contract Appeals, 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–145606, 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, D.C. 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, D.C. 20210.

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

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Part III

Environmental Protection Agency

Pharmaceutical Manufacturing Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards; Final Rule

Pharmaceutical Manufacturing Point Source Category New Source Performance Standards; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 439

[WH-FRL 2443-2]

Pharmaceutical Manufacturing Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final regulation.

SUMMARY: This regulation establishes effluent limitations guidelines and standards limiting the discharge of pollutants into navigable waters by existing and new sources that conduct pharmaceutical manufacturing operations. These regulations are issued under the Clean Water Act and the Settlement Agreement in *Natural Resources Defense Council, Inc.* v. *Train*, 8 ERC 2120 (D.D.C. 1976), *modified*, 12 ERC 1833 (D.C.C. 1979), modified by Orders dated October 26, 1982, and August 2, 1983.

The purpose of this regulation is to specify for certain pollutants "best practicable control technology currently available" (BPT) effluent limitations guidelines, "best available technology economically achievable" (BAT) effluent limitations guidelines, "new source performance standards" (NSPS), and pretreatment standards for existing and new sources (PSES and PSNS, respectively) for the pharmaceutical manufacturing industry.

DATES: In accordance with 40 CFR 100.01 (45 FR 26048), this regulation shall be considered issued for purposes of judicial review at 1:00 p.m. Eastern time on November 10, 1983. This regulation shall become effective December 12, 1983, except for provisions in the following sections which allow facilities not using or generating cyanide to certify to that effect instead of monitoring for cyanide. These certification provisions are contained in the following sections: §§ 439.14–439.17, 439.24–439.27, 439.34–439.37, and 439.44–439.47. These certification provisions have been submitted to the Office Management and Budget (OMB) and are not effective until OMB has approved them under the Paperwork Reduction Act.

The compliance date for the BAT regulations is as soon as possible, but in any event, no later then July 1, 1984. The compliance date for new source performance standards (NSPS) and pretreatment standards for new sources (PSNS) is the date the new source begins operations. The compliance date for pretreatment standards for existing sources (PSES) is October 27, 1986.

Under Section 509(b)(1) of the Clean Water Act, judicial review of this regulation can be made only by filing a petition for review in the United States Court of Appeals within 90 days after the regulation is considered issued for purposes of judicial review. Under Section 509(b)(2) of the Clean Water Act, the requirements in this regulation may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: The basis for this regulation is detailed in four major documents. See **SUPPLEMENTARY INFORMATION** (under "XIV. Availability of Technical Information") for a description of each document. Copies of the technical and economic documents may be obtained from the National Technical Information Service, Springfield, Virginia 22161 (Phone: (703) 487–4600). For additional technical information, contact Dr. Frank H. Hund, Effluent Guidelines Division (WH–552), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 (Phone (202) 382–7182). For additional economic information, contact Mr. Joseph Yance, Office of Analysis and Evaluation (WH–586), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 (Phone (202) 382–5379).

On January 3, 1984, the complete public record for this rulemaking including the Agency's responses to comments on the proposed regulation, will be available for review in EPA's Public Reference Unit, Room 2404 (Rear) (EPA Library), 401 M Street, SW., Washington, D.C. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Dr. Frank Hund at the address listed above or by calling (202) 382–7182.

SUPPLEMENTARY INFORMATION:

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Appendices

A. Abbreviations, Acronyms and Other Terms Used in this Notice
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C. Toxic Pollutants Detected in Treated Effluents of Direct Dischargers: (1) From a Small Number of Sources, (2) Detected in Only Trace Amounts or (3) Sufficiently Controlled by Existing Technologies
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E. Toxic Pollutants Detected in the Effluent of Indirect Dischargers Whose Toxicity and Amount (Taken Together) Is So Insignificant as Not To Justify Developing Pretreatment Regulations

I. Legal Authority

This regulation is being promulgated under the authority of Sections 301, 304, 306, 307, 308, and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, as amended by the Clean Water Act of 1977, Pub. L. 95–217), also called "the Act." It is also being promulgated in response to the Settlement Agreement in *Natural Resources Defense Council, Inc.* v. *Train*, 8 ERC 2120 (D.D.C. 1976), *modified*, 12 ERC 1833 (D.D.C. 1979), modified by Orders dated October 26, 1982, and August 2, 1983.

II. Scope of This Rulemaking and Prior Regulations

A. Prior Regulations

EPA promulgated interim final BPT regulations for the pharmaceutical manufacturing point source category on November 17, 1976 (41 FR 50676; 40 CFR Part 439, Subparts A–E). The five subcategories of the pharmaceutical industry (40 CFR Part 439) are:

- Subpart A—Fermentation Products Subcategory
- Subpart B—Extraction Products Subcategory
- Subpart C—Chemical Synthesis Products Subcategory
- Subpart D—Mixing/Compounding and Formulation Subcategory
- Subpart E—Research Subcategory

The 1976 BPT regulations set monthly limitations for five-day biochemical oxygen demand (BOD5) and chemical oxygen demand (COD) based on percent removals for all subcategories. No daily maximum effluent limitations were

established for these two parameters. The pH was set within the range of 6.0 to 9.0 standard units. The regulation also set maximum 30 day average total suspended solids (TSS) limitations for subcategories B, D, and E only. No TSS values were established for subcategories A and C. Subpart A (applicable to the fermentation operations subcategory) was amended (42 FR 6814) on February 4, 1977, to improve the language referring to separable mycelia and solvent recovery. In addition, the amendment allowed the inclusion of spent beers (broths) in the calculation of raw waste loads for Subpart A in those instances where the spent beer is actually treated in the wastewater treatment system. These regulations were never challenged and are presently in effect.

On November, 26, 1982, EPA proposed regulations applicable to the pharmaceutical manufacturing point source category (47 FR 53584). At that time, EPA: (a) Proposed to modify the existing BPT TSS effluent limitations for Subparts B, D, and E; (b) proposed BPT TSS effluent limitations for Subparts A and C; (c) proposed to modify the existing BPT COD effluent limitations for Subparts A, B, C, D, and E; (d) proposed BPT cyanide effluent limitations for Subparts A, B, C, and D; and (e) proposed BAT and BCT effluent limitations, NSPS, PSES, and PSNS to apply uniformly to subcategories A, B, C, and D. EPA did not propose to establish regulations controlling other toxic pollutant discharges from pharmaceutical research for the reasons discussed in Section VII of this preamble (Pollutants and Subcategories Not Regulated).

With the few exceptions discussed below, the Agency is not modifying the previously promulgated BPT limitations for Subparts A through E. However, in order to publish a complete set of all applicable requirements, the BPT limitations already in effect are reprinted in today's rule. Existing BPT limitations not modified in today's rulemaking are not subject to legal challenge.

B. Scope of this Rulemaking

This final regulation, which was proposed on November 26, 1982 (47 FR 53584), establishes effluent limitations guidelines and standards for existing and new pharmaceutical manufacturing facilities. Pharmaceutical manufacturers use many different methods and raw materials to create a wide range of products. These products include medicinal and feed grades of all organic chemicals having therapeutic value, whether obtained by chemical synthesis, by fermentation, by extraction from naturally occurring plant or animal substances, or by refining a technical grade product.

The pharmaceutical products, processes, and activities covered by this proposal include:

a. Biological products covered by the U.S. Department of Commerce, Bureau of the Census Standard Industrial Classifications (SIC) Code No. 2831.

b. Medicinal chemicals and botanical products covered by SIC Code No. 2833.

c. Pharmaceutical products covered by SIC Code No. 2834.

d. All fermentation, biological, and natural extraction, chemical synthesis, and formulation products which are considered as pharmaceutically active ingredients by the Food and Drug Administration, but are not covered by SIC Code Nos. 2831, 2833, or 2834. (Also, products of these types such as citric acid which are not regarded as pharmaceutical active ingredients will be included if they are manufactured by a pharmaceutically manufacturer by processes, and result in wastewaters, which closely correspond to those of a pharmaceutical product.)

e. Cosmetic preparation covered by SIC Code No. 2844 which function as a skin treatment. (This group of preparations does not include products such as lipsticks or perfumes which serve to enhance appearance or to provide a pleasing odor, but do not provide skin care. In general, this also excludes deodorants, manicure preparations, and shaving preparations which do not primarily function as a skin treatment.)

f. Products with multiple end uses which are attributable to pharmaceutical manufacturing as a final pharmaceutical product, component of a pharmaceutical formulation, or pharmaceutical intermediate. Products which have non-pharmaceutical uses may also be covered entirely by this point source category provided that the product(s) was (were) primarily intended for use as a pharmaceutical.

g. Pharmaceutical research which includes biological, microbiological, and chemical research, product development, clinical and pilot plant activities. (This does not include farms which breed, raise, and/or hold animals for research at another site. This also does not include ordinary feedlot or farm operations utilizing feed which contains pharmaceutically active ingredients.)

A number of products and/or activities such as surgical and medical instruments and medical laboratory activity are not part of the pharmaceutical manufacturing category. A descriptive listing of the products and/or activities which are specifically excluded from the pharmaceutical manufacturing category may be found in Section II of the *Development Document for Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Pharmaceutical Manufacturing Point Source Category.*

EPA is promulgating BPT and BAT effluent limitations, NSPS, and pretreatment standards for existing and new sources (PSES and PSNS, respectively) for the pharmaceutical manufacturing point source category. Concurrent with this regulation, EPA is proposing NSPS to control the discharge of two conventional pollutants (BOD5 and TSS) from the pharmaceutical plants. As explained below, EPA will not establish BCT limitations for the pharmaceutical industry until promulgation of the general methodology for determining appropriate levels of conventional pollutant control under BCT. We are also postponing a final decision on BAT limitations and NSPS for the nonconventional pollutant COD.

III. Summary of Legal Background

The Federal Water Pollution Control Act Amendments of 1972 established a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Section 101(a). To implement the Act, EPA was to issue effluent limitations guidelines, pretreatment standards, and new source performance standards for industrial dischargers.

The Act included a timetable for issuing these standards. However, EPA was unable to meet many of the deadlines and, as a result, in 1976, it was sued by several environmental groups. In settling this lawsuit, EPA and the plaintiffs executed a "Settlement Agreement" which was approved by the court. This agreement required EPA to develop a program and adhere to a schedule for controlling 65 "priority" pollutants and classes of pollutants. In carrying out this program, EPA must promulgate BAT effluent limitations guidelines, pretreatment standards, and new source performance standards for 21 major industries. See *Natural Resources Defense Council, Inc.* v *Train*, 8 ERC 2120 (D.D.C. 1976), *modified*, 12 ERC 1833 (D.D.C. 1979), modified by Orders dated October 26, 1982, and August 2, 1983. The 65 toxic pollutants and classes of pollutants potentially include thousands of specific pollutants. EPA selected 129 specific

toxic pollutants for study in this rulemaking and other industry rulemakings. Since initiation of this rulemaking effort, three toxic pollutants have been removed from the list of 129 toxic pollutants: Dichlorodifluoromethane, trichlorofuloromethane, and bis-chloromethyl ether (46 FR 2266 and 46 FR 10723).

Many of the basic elements of the Settlement Agreement were incorporated into the Clean Water Act of 1977. Like the Agreement, the Act stressed control of toxic pollutants, including the 65 "priority" pollutants. In addition, to strengthen the toxic control program, Section 304(e) of the Act authorizes the Administrator to prescribe "best management practices" (BMPs) to prevent the release of toxic and hazardous pollutants from plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage associated with, or ancillary to, the manufacturing or treatment process.

Under the Act, the EPA is to set a number of different kinds of effluent limitations. These are discussed in detail in the preamble to the proposed regulation and in the Development Document. They are summarized briefly below:

1. *Best Practicable Control Technology (BPT).* BPT limitations are generally based on the average of the best existing performance by plants of various sizes, ages, and unit processes within the industry or subcategory for control of familiar (i.e., classical) pollutants.

In establishing BPT limitations, we consider the total cost of applying the technology in relation to the effluent reduction derived, the age of equipment and facilities involved, the processes employed, process changes required, engineering aspects of the control technologies, and nonwater quality environmental impacts (including energy requirements). We balance the total cost of applying the technology against the effluent reduction.

2. *Best Available Technology (BAT).* BAT limitations, in general, represent the best existing performance in the industrial subcategory or category. The Act establishes BAT as the principal national means of controlling the direct discharge of toxic and nonconventional pollutants to waters of the United States.

In arriving at BAT, the Agency considers the age of the equipment and facilities involved, the process employed, the engineering aspects of the control technologies, process changes, the cost of achieving such effluent reduction, and nonwater quality environmental impacts. The Agency retains considerable discretion in assigning the weight to be accorded these factors.

3. *Best Conventional Pollutant Control Technology (BCT).* The 1977 Amendments to the Clean Water Act added Section 301(b)(2)(E), establishing "best conventional pollutant control technology" (BCT) for discharge of conventional pollutants from existing industrial point sources. Section 304(a)(4) designated the following as conventional pollutants: BOD, TSS, fecal coliform, pH, and any additional pollutants defined by the Administrator as conventional. The Administrator designated oil and grease as "conventional" on July 30, 1979 (44 FR 4450).

BCT is not an additional limitation but replaces BAT for the control of conventional pollutants. In addition to other factors specified in Section 304(b)(4)(B), the Act requires that BCT limitations be assessed in light of a two part "cost-reasonableness" test. *American Paper Institute* v. *EPA*, 660 F. 2d 954 (4th Cir. 1981). The first test compares the cost for private industry to reduce its conventional pollutants with the costs to publicly owned treatment works for similar levels of reduction in their discharge of these pollutants. The second test examines the cost effectiveness of additional industrial treatment beyond BPT. EPA must find that limitations are "reasonable" under both tests before establishing them as BCT. In no case may BCT be less stringent than BPT.

EPA published its methodology for carrying out the BCT analysis on August 29, 1979 (44 FR 50732). In the case mentioned above, the Court of Appeals ordered EPA to correct data errors underlying EPA's calculation of the first test, and to apply the second cost test. (EPA had argued that a second cost test was not required.)

A revised methodology for the general development of BCT limitations was proposed on October 29, 1982 (47 FR 49176). BCT limits for this industry are accordingly deferred until promulgation of the final methodology for BCT development.

4. *New Source Performance Standards (NSPS).* NSPS are based on the best available demonstrated technology (BDT). New plants have the opportunity to install the best and most efficient production processes and wastewater treatment technologies.

5. *Pretreatment Standards for Existing Sources (PSES).* PSES are designed to prevent the discharge of pollutants that pass through, interfere with, or are otherwise incompatible with the operation of publicly owned treatment works (POTW). They must be achieved within three years of promulgation. The legislative history of the 1977 Act indicates that pretreatment standards are to be technology-based, analogous to the best available technology for removal of toxic pollutants. EPA has generally determined that there is pass through of pollutants if the nationwide average percentage of pollutants removed by a well operated POTW achieving secondary treatment is less than the percent removed by the BAT model treatment system. The General Pretreatment Regulation, which serves as the framework for categorical pretreatment regulations, is found at 40 CFR Part 403.

6. *Pretreatment Standards for New Sources (PSNS).* Like PSES, PSNS are designed to prevent the discharge of pollutants which pass through, interfere with, or are otherwise incompatible with the operation of a POTW. PSNS are to be issued at the same time as NSPS. New indirect dischargers, like new direct dischargers, have the opportunity to incorporate in their plant the best available demonstrated technologies. The Agency considers the same factors in promulgating PSNS as it considers in promulgating PSES.

IV. Methodology and Data Gathering Efforts

The methodology and data gathering efforts used in developing the proposed regulations were summarized in the preamble to the proposed pharmaceutical manufacturing industry regulations (47 FR 53584, November 26, 1982). In summary, before publishing the proposed regulation, the Agency conducted a data collection, analytical screening, and analytical verification program for the pharmaceutical industry. This program stressed the acquisition of data on the presence and treatability of the 129 toxic pollutants and classes of toxic pollutants discussed previously.

Based on the results of that program, comments on the proposed regulations, and additional data gathered or submitted since proposal, EPA identified several distinct control and treatment technologies that are in use or are capable of being used to treat pharmaceutical wastewaters. For each of these technologies, the Agency: (i) Compiled and analyzed historical and newly-generated data on effluent quality; (ii) identified the reliability and constraints; (iii) considered the non-water quality environmental impacts (including impacts on air quality, solid

waste generation, and energy requirements); and (iv) estimated the costs and economic impacts of applying the technology as a treatment and control system. Costs and economic impacts of the technology options considered are discussed in detail in *Economic Analysis of Effluent Standards and Limitations for the Pharmaceutical Industry* (U.S. EPA, September 1983). A more complete description of the Agency's study methodology, data gathering efforts, and analytical procedures supporting the regulation can be found in the *Development Document for Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Pharmaceutical Manufacturing Point Source Category* (U.S. EPA, September 1983).

To allow the Agency to respond fully to comments on the proposed rules, the Agency engaged in additional data gathering activities after November of 1982. A major effort involved gathering information on the presence and variability of toxic volatile organics (TVOs) in pharmaceutical raw wastes and treated effluents. In this regard, EPA obtained additonal data on the percentages of process wastewater discharges that are contaminated with TVOs and on the levels of TVOs contained in the contaminated waste streams. To broaden our data base on pass through of TVOs, we also sampled a publicly owned treatment works (POTW) receiving pharmaceutical discharges. The Agency also identified pharmaceutical plants where steam stripping or related technologies are employed and sampled a steam stripper and flash tank used to remove TVOs. EPA incorporated this additonal information into our existing data base and used the expanded data base to reach decisions on regulation of TVO discharges from the pharmaceutical industry.

In some cases, industry comments on our proposed regulations included effluent data on the discharge of toxic, nonconventional, and conventional pollutants. However, these data were often provided in a format that did not allow for proper analysis by the Agency. In those instances, we requested additional information in a format that would allow us to include the data when developing the final regulations.

Detailed discussions of the results of these additional data gathering efforts can be found below and in the final Development Document.

V. Summary of Promulgated Regulations and Changes From Proposal

The final regulations issued today differ from the proposed regulations. The changes are the result of the Agency's review of comments on the proposal and our analysis of additional information obtained to respond to comments. The following includes a review of the proposed regulation, a summary of the changes from proposal to promulgation, and an explanation of the changes.

In brief, EPA is promulgating BPT effluent limitations controlling the discharge of TSS from plants covered under regulations for subcategories A and C and is modifying existing BPT BOD5, COD, and TSS effluent limitations for subcategories B, D, and E. We are also establishing BPT and BAT effluent limitations guidelines, NSPS, PSES, and PSNS controlling cyanide discharges from pharmaceutical plants.

Concurrent with this regulation, EPA is proposing NSPS to control the discharge of two conventional pollutants (BOD5, and TSS) from new pharmaceutical plants.

A. Subcategorization

On November 26, 1982, we proposed to exclude the research-only subcategory (E) from all but BPT regulations. We also collapsed the remaining four subcategories (fermentation—subcategory A, extraction—subcategory B, chemical synthesis—subcategory C, and formulation—subcategory D) into one subcategory for which one set of BAT limitations, NSPS, PSNS, and PSES were proposed.

We received no comments on the exclusion of the research only subcategory from further regulation under BAT, NSPS, PSES, and PSNS. Therefore, for the reasons discussed later in this preamble (see Section VII Pollutants and Subcategories Not Regulated), we have excluded the research only subcategory from development of further regulations beyond BPT.

A number of commenters objected to the proposed establishment of one pharmaceutical subcategory consisting of fermentation, chemical synthesis, extraction, and formulation plants. They explained that there was no need to change the 1976 BPT subcategorization scheme. They maintained that high raw waste generating facilities (fermentation and chemical synthesis plants) should be regulated on a different basis than low raw waste generating facilities (extraction and formulation plants). We received no comments supporting the proposed change in the subcategorization scheme.

In comments on the proposal, the Agency received new plant data which was added to the existing data base. We analyzed data on influent and effluent characteristics of all direct dischargers to determine if the proposed change in subcategorization was appropriate. Our analysis of the most recent data indicate that the subcategorization scheme for this industry should separate fermentation and chemical synthesis plants (subcategory A and C plants) from extraction and formulation plants (subcategory B and D plants). Specifically, our analyses show that usually the influent and effluent conventional pollutant and COD concentrations and discharge flows of subcategory A and C plants are similar; we also found that these characteristics for subcategory B and D plants are similar. However, we found that the characteristics of the subcategory A and C plant group are not similar to the corresponding characteristics of the subcategory B and D plant group. Our analyses indicate that toxic pollutant loads are similar for all four subcategories.

We are also aware that permitting authorities and the regulated industry are familiar with the original subcategorization scheme and the format of the Code of Federal Regulations. Therefore, the Agency has decided to maintain the existing BPT subcategorization scheme. However, because conventional pollutant raw waste characteristics are similar for subcategory A and C plants, conventional pollutant limitations and standards for those plants should be identical. For the same reason, conventional pollutant limitations and standard for subcategory B plants should be identical to those for subcategory D plants. A more detailed discussion of the industry subcategorization scheme can be found in Section IV of the Development Document.

B. BPT for BOD5, TSS, and COD

The Agency proposed a BPT TSS limitation for all subcategories of plants based on a long-term average concentration of 75 mg/l. This limitation was intended to replace the overly stringent BPT TSS limitations for subcategory B, D, and E plants and to establish BPT TSS limitations for A and C subcategory plants. The original overly stringent BPT TSS limitations were based on data from two plants whose operations were not characteristic of the entire range of

operations employed at plants in the B, D, and E subcategories.

One commenter stated that a single number concentration limit for TSS is not appropriate for high raw waste load plants but may be appropriate for low raw waste load plants.

The existing BPT regulations, which are based on the application of biological treatment, require that each pharmaceutical plant, regardless of subcategory, achieve a 90 percent reduction in BOD5. A single number concentration limit for TSS is not consistent with our BPT percent reduction BOD5 limitations, which when converted to long-term average BOD5 effluent concentrations, vary from plant to plant over a wide range (e.g., from about 15 mg/l to almost 400 mg/l). A single number TSS limitation would require some plants to install more advanced treatment than that technology identified as BPT. It would also mean that low raw waste load plants would be able to operate their treatment systems inefficiently and still comply with the proposed single number limitation. After analyzing all available data, the Agency found that effluent TSS concentrations from biological treatment systems usually are greater than corresponding effluent BOD5 concentrations. We found that the median ratio of effluent TSS concentrations to effluent BOD5 concentrations after biological treatment is 1.7 for both the subcategory A and C and the subcategory B and D plant groups. Consequently, the Agency is finalizing BPT TSS limitations for all five subcategories which are equal to a multiple of 1.7 times the existing BPT BOD5 limitations.

The Agency also proposed alternative concentration-based BOD5 and COD BPT limitations for all subcategories. These proposed revisions to BPT were necessitated by the Agency's decision not to change the existing percent reduction-based BPT limitations even though the proposed BCT and BAT limitations were concentration based. Without the proposed modification in BPT BOD5 and COD limitations, some plants would have had concentration-based BCT and BAT limitations that were less stringent than the percent reduction-based BPT limitations. This condition would have been inconsistent with the requirements of the Clean Water Act. No comments were received on these alternative limitations.

The Agency has reviewed the available influent and effluent BOD5 and COD data in the light of our decision to use the original BPT subcategorization scheme. As a result, the Agency is finalizing alternative BOD5 and COD concentration-based limitations for subcategories B, D, and E. Although we are not yet promulgating final BCT limitations for BOD5 or BAT limitations for COD, available data indicate that the alternative BOD5 and COD limitations are appropriate for these subcategories for another reason. These alternative limitations establish minimum concentration levels consistent with EPA's assessment of a realistic estimate of the lowest attainable long-term average BOD5 and COD concentrations representative of the capability of the best practicable control technology currently available in treating pharmaceutical industry wastewaters. Such alternative limitations are not necessary for subcategory A or C because available data indicate that raw waste loads are sufficiently high at chemical synthesis and fermentation plants that limitations as low as the alternative limitations established for subcategories B, D, and E would not be required under BPT.

C. BPT and BAT Effluent Limitations, NSPS, PSES and PSNS for Cyanide

The Agency proposed BPT and BAT effluent limitations guidelines, NSPS, PSES, and PSNS based on in-plant cyanide destruction and biological treatment. These proposed limitations and standards assumed that monitoring would occur at the end-of-pipe. Proposed PSES would have required compliance by July 1, 1984. At proposal, the Agency requested additional data on the performance of cyanide destruction technology in the pharmaceutical industry.

One commenter stated that the proposed cyanide limitations and standards were not sufficiently representative of the production cycle of the industry because the data which were used to derive the limits were obtained during a period of less than normal production. The commenter, at a later date, submitted three additional sets of data to cover periods of normal production. Another commenter complained that a PSES compliance date of July 1, 1984, would be prohibitively difficult to achieve and suggested that the Agency establish a compliance date of three years after promulgation as authorized by the Clean Water Act.

The new data measured both the performance of in-plant cyanide destruction systems directly and the combination of in-plant and biological treatment. EPA is finalizing BPT and BAT effluent limitations guidelines, NSPS, PSES, and PSNS for cyanide based on these new submissions. The regulations include provisions for monitoring either in-plant after cyanide destruction or end-of-pipe.

Section 307(b)(1) provides that PSES shall specify a time for compliance, not to exceed three years from the date of promulgation. This does not create a presumption that three years will necessarily be allowed. However, the Agency has reviewed information on the installation of cyanide destruction technology at pharmaceutical plants. The readjustment of internal processing conditions to segregate contaminated waste streams may require more time than for only the installation of end-of-pipe treatment equipment. Additionally, plants in this and other industries will be installing the treatment equipment suggested as the model technology for this regulation; this may result in delays in engineering, ordering, installing, and operating this equipment. For the above reasons, EPA decided to specify the date for compliance with pharmaceutical industry PSES as three years from the promulgation date of final PSES for cyanide.

D. BAT Effluent Limitations, NSPS, PSES, and PSNS for Toxic Volatile Organics (TVOs)

Toxic volatile organics (TVOs) are those priority pollutants that are readily purged from water because of their high volatility. Many of these compounds are used as industrial solvents. Methylene chloride, benzene, toluene, and chloroform are four toxic volatile organics that are used as solvents in the manufacture of pharmaceutical products.

1. *Direct Dischargers: BAT/NSPS.* At proposal, methylene chloride and all other toxic volatile organics were recommended for exclusion from direct discharger regulations (BAT and NSPS) under the provisions of paragraph 8 of the Settlement Agreement. With the exception of methylene chloride, three has been no change in our rationale for not establishing effluent limitations guidelines and standards for the TVOs. In the case of methylene chloride, we stated that dischargers were controlled by effluent limitations reflecting the best practicable control technology currently available. We received no comments on our proposed exclusion of this toxic pollutant. However, a reexamination of the existing information on the use and discharge of methylene chloride by direct discharging pharmaceutical plants indicates that, in fact, treatable levels of methylene chloride may remain even after the implementation of BPT (i.e., biological treatment).

Available data show that in cases where the concentrations of methylene

chloride discharged to biological treatment systems are greater than 5 mg/l, treatable concentrations of methylene chloride remain in the effluent. Methylene chloride is used in about 15 percent of all fermentation, chemical synthesis, and extraction processes and to a lesser extent in formulation operations. Our data show that 15 of the 51 direct discharging pharmaceutical plants use methylene chloride in their manufacturing processes. For these reasons, we reconsidered our original paragraph 8 determination.

We considered establishing more stringent BAT effluent limitations guidelines for methylene chloride based on in-plant steam stripping technology in addition to biological treatment. This treatment technology would insure that only low effluent concentrations of methylene chloride would be discharged. However, we found that the costs of installing and operating steam strippers to control methylene chloride are not insignificant. We estimate that nine direct discharging plants would incur average capital and average total annual costs of $0.736 million and $0.712 million (1982 dollars), respectively, per plant. We estimate that the installation of steam stripping technology would reduce current discharge levels of methylene chloride by 60,700 pounds per year at these plants. This compares to the 651,000 pounds per year of methylene chloride that are now removed by biological treatment, the best practicable control technology currently available for this industry. We also determined that steam stripping technology is extremely energy intensive and would increase energy use at these nine direct dischargers by the equivalent of 94,300 barrels of oil per year. We project that the average methylene chloride removal cost resulting from the application of steam stripping technology would be $103 per pound, when assuming full value of the recovered solvent.

After considering the relative toxicity of this pollutant in light of these costs, and all the other factors, we have decided not to issue categorical regulations limiting methylene chloride discharges from the pharmaceutical industry based on the addition of treatment technology beyond biological treatment. We have also decided not to establish limitations based on biological treatment because they would not effect a further removal of methylene chloride. Another factor, while not directly a basis for these decisions, confirmed the reasonableness of the weight we accorded to cost and energy factors. We determined that much of the methylene chloride which would be removed by steam stripping will otherwise volatilize during biological treatment. Our data indicate that the volatilized methylene chloride will not be at levels which create a health risk.

Data on the capabilities of steam stripping and biological treatment technologies to reduce the discharge of methylene chloride and on the cost of installing and operating steam strippers to control toxic volatile organics is presented in Section VII of the Development Document. This information may be used by permit writers in developing permit limitations for methylene chloride on a case-by-case basis where necessary.

2. *Indirect Dischargers: PSES, PSNS.* At proposal, we stated that we were considering establishing pretreatment standards to control TVO discharges because available data indicated that pass through of TVOs occurs at POTWs. A standard of 1.2 mg/l for total toxic volatile organics was suggested in the preamble to the proposed rules, pending the availability of adequate supporting data on the performance of steam stripping technology.

One POTW and one State Agency commented that pretreatment standards contolling TVOs should be promulgated. Industry commenters questioned the need for TVO pretreatment standards in view of the low concentrations of toxic volatile organics in POTW effluents. They also questioned the achievability of a 1.2 mg/l discharge level with steam stripping technology.

In the proposed regulation, 17 TVOs were listed as possible candidates for regulation by pretreatment standards. After reexamining all of the available data, we have concluded that, with the exception of methylene chloride and chloroform, these pollutants should be excluded from regulation by the provisions of paragraph 8 of the Settlement Agreement. Thirteen of these pollutants have been excluded because their amount and toxicity, taken together, are so insignificant as not to justify developing uniformly applicable pretreatment regulations (see Appendix E). Of the remaining, there are two (benzene and toluene) which, while not as insignificant, nonetheless are unlikely to pass through POTWs.

To address the issue of pass through, EPA studied 50 well-operated POTWs that use biological treatment to determine the extent to which priority pollutants are reduced by such POTWs. In the case of benzene and toluene, the data indicate that direct discharger median percent reductions exceed POTW median percent reductions by less than 5 percent (100 percent for direct dischargers versus 99 percent for benzene and 97 percent for toluene at POTWs). In light of the fact that EPA had less data in the POTW studies on benzene and toluene than it had for some other pollutants and in light of the variability in analyzing samples for organic priority pollutants at the concentrations typically found in end-of-pipe biological systems at POTWs and pharmaceutical plants, EPA believes that differences of 5 percent or less between the direct discharger and POTW data for benzene and toluene are unlikely to reflect real differences in treatment efficiency. Therefore, EPA has determined that benzene and toluene do not pass through POTWs.

However, a potential interference problem could exist for these two toxic volatile organics because of a potential fire/explosion hazard. Benzene and toluene water mixtures have low flash points. Relatively small concentrations of these solvents in water mixtures (about 180 mg/l) can cause spontaneous combustion in the vapor space above the water mixture under certain conditions. Our latest information indicates that fire/explosions, while not impossible, are unlikely. Benzene and toluene levels above the minimum concentrations required to cause combustion have not been reported in discharges from plants in the pharmaceutical industry. Because pass through does not occur and interference is unlikely, there is no basis for establishing nationally applicable categorical pretreatment standards for benzene or toluene. However, under the general pretreatment regulation, 40 CFR 403.5, an individual POTW may establish pretreatment standards if benzene and toluene discharges from pharmaceutical users result in interference. Section VII of the Development Document contains suggested pretreatment standards for benzene and toluene, based on steam stripping, for consideration by POTWs establishing standards under § 403.5.

At direct discharging pharmaceutical manufacturing plants, chloroform is reduced to levels that are below its treatability through volatilization in biological treatment systems. Therefore, we have excluded chloroform from BAT regulations under the provisions of paragraph 8(a)(iii) of the Settlement Agreement. As for indirect dischargers, we have found that POTWs to which high concentrations of chloroform are discharged achieve high chloroform removal (greater than 95 percent). Therefore, POTWs receiving high

concentrations of chloroform as a result of pharmaceutical discharges are unlikely to experience pass through. For the above reasons, we have decided not to establish pretreatment standards controlling choloroform from indirect discharging pharmaceutical plants.

Through this process, the Agency determined that only methylene chloride was a candidate for national PSES and PSNS regulations. We found that the installation and operation of steam strippers to reduce methylene chloride discharges to POTWs by pharmaceutical plants would result in costs that are not insignificant. We estimate that 25 indirect discharging plants would incur capital and total annual costs of $0.748 million and $0.768 million (1982 dollars), respectively, per plant. We project that one indirect discharging pharmaceutical plant would close if required to install steam stripping technology. Steam strippers are also equally energy intensive at indirect discharging plants as at direct dischargers. We estimate that the operation of steam strippers at the 25 plants would increase energy usage by the equivalent of 315,000 barrels of oil per year. For these reasons and because we concluded that regulation of methylene chloride at direct dischargers is inappropriate, we decided not to establish categorical PSES and PSNS for methylene chloride.

Data on the capabilities of steam stripping technology to reduce the discharge of methylene chloride and on the cost of installing and operating steam strippers to control toxic volatile organics is presented in Section VII of the Development Document. This information may be used by municipalities in developing pretreatment standards for methylene chloride on a case-by-case basis where necessary.

E. New Source Performance Standards for Conventional Pollutants

On November 26, 1982, EPA proposed conventional pollutant new source performance standards that applied uniformly to subcategories A, B, C, and D. Proposed NSPS were based on advanced biological treatment (i.e., biological treatment systems with longer detention times than those considered as the basis of BPT). As discussed previously, we have determined that separate conventional pollutant limitations are appropriate for the subcategory A and C and the subcategory B and D plant groups. We have also identified four pharmaceutical plants where effluent filtration in addition to advance biological treatment is employed. Conventional pollutant discharges from these plants are significantly lower than from plants where only advanced biological treatment is employed. Consequently, the Agency is proposing NSPS based on effluent filtration in combination with advanced biological treatment. For a more detailed explanation of the basis of this decision, see the preamble to the proposed regulation that appears elsewhere in today's **Federal Register**.

F. BAT Limitations and NSPS for COD

The Agency proposed BAT COD concentration limitations that applied uniformly to subcategories A, B, C, and D based on the same technology identified as the best conventional pollutant control technology (BCT) (i.e., add-on biological treatment). NSPS to control COD were proposed based on advanced biological treatment.

One commenter suggested that limitations and standards should be written for specific compounds, if justifiable, rather than regulating additional pollutants through control of COD. Two industry commenters maintained that there are some chemical synthesis plants which have better than the proposed BCT treatment in-place that cannot meet the proposed limitations. Another commenter stated that it was inappropriate to propose COD limitations based on advanced biological treatment for substances which biodegrade slowly or not at all.

The concentrations of many materials that are measured as or contribute to COD are reduced in biological systems by biodegradation or by air stripping and sorption mechanisms; therefore, increased biological treatment system capacity can afford greater removal of these materials. There are some materials, however, that contribute to COD, such as dissolved inorganic salts and some organics, which pass through biological treatment systems without being biodegraded, air stripped, or absorbed. Available data indicate that even after biological treatment system expansion, many subcategory A and C plants would not meet the proposed COD limitations. Additional information on the identity of the pollutants that contribute to COD and on applicable COD removal technologies is required before we can evaluate COD control options. Therefore, the Agency is postponing a final decision on appropriate BAT limitations and NSPS for the nonconventional pollutant COD until a later date. We are continuing our investigation of appropriate COD removal technologies and their costs.

VI. Costs, Economic Impacts, Executive Order 12291, Regulatory Flexibility Analysis, and Small Business Administration (SBA) Loans

A. Cost and Economic Impact

The Agency's economic impact assessment of this regulation is presented in *Economic Analysis of Effluent Standards and Limitations for the Pharmaceutical Industry*. This report details the investment and annual costs for the industry as a whole and for plants covered by the final regulation. Plant costs are engineering estimates for the effluent control systems described in this preamble. The report assesses the impact of effluent control costs in terms of price changes, plant closures, employment effects, and balance of trade effects.

EPA has identified 466 pharmaceutical facilities that are covered by this regulation. An estimated 134 of these plants are zero dischargers and are not expected to incur costs. Of the remaining 332 discharging plants, EPA estimates that nine will incur total investment costs for BPT, BAT, and PSES of $1.47 million, with annual costs of $0.65 million, including depreciation and interest. These costs are expressed in 1982 dollars and are based on the determinations that plants will upgrade their existing treatment systems to comply with BPT, BAT, or PSES, as appropriate. No plant closures are projected as a result of compliance costs for this regulation and, hence, we expect no adverse employment effects on pharmaceutical manufacturing employees. The maximum price increase if all costs were passed on to consumers is less than 0.1 percent for the plants affected by the regulation. Balance of trade effects are nil.

In order to measure the potential economic impacts, a two-step analytical procedure was employed. First, the analysis determined whether a plant's compliance costs exceeded one percent of sales. If the costs did exceed one percent, then the analysis considered information on the firm's financial position, its size, the relative importance of its pharmaceutical line of business, patent protection, and other economic information relevant to assessing the likely impact of the regulation on a firm. If the firm is in a position to pass the costs on to the consumer, due to patent protection, for example, then it is assumed that prices would increase and the plant would remain in operation. If costs cannot be passed on, then based on the above information, a determination was made as to whether a plant might close, a production line

might shut down, or production might be shifted from one plant to another. For the reasons discussed below and after applying this economic impact methodology, the Administrator has determined that the costs of this regulation are justified.

1. *BPT.* BPT regulations for cyanide and TSS are expected to require expenditures at eight plants (cyanide destruction at four plants, TSS control at five plants, with one of these plants requiring both). Total investment and annual costs are estimated to be $1.05 million and $0.39 million, respectively (1982 dollars). The estimated change in price for the affected plants is less than 0.1 percent. No significant economic impacts are projected as a result of BPT.

2. *BAT.* Only cyanide is limited under BAT. Cyanide limits are the same as under BPT. Therefore, no incremental impacts are expected from implementation of BAT.

3. *PSES.* The standard is for the control of cyanide. Only one out of the 277 indirect discharging plants is expected to incur costs; the estimated capital and annual costs are $0.42 million and $0.26 million, respectively (1982 dollars). The expected price change is nil. No significant economic impacts are expected from the PSES cyanide regulation.

4. *NSPS and PSNS.* Only pH and cyanide are limited under NSPS. Since the pH and cyanide limits are the same as under BPT, no incremental impacts will result from implementation of final NSPS. NSPS controlling BOD5 and TSS are being proposed today in a companion notice.

Regulations for indirect discharging new sources (PSNS) are the same as those for existing sources. Therefore, no incremental impacts are expected from implementation of PSNS.

B. Cost Effectiveness

EPA has conducted an analysis of the incremental removal cost per pound equivalent for each toxic pollutant control option. A pound equivalent is calculated by multiplying the number of pounds of pollutant discharged by a weighting factor for that pollutant. The weighting factor is equal to the aquatic life water-quality criterion for a standard pollutant (copper), divided by the aquatic life water-quality criterion for the pollutant being evaluated. The use of "pound equivalent" gives relatively more weight to removal of more highly toxic pollutants. Thus for a given expenditure, the cost per pound equivalent removal would be lower when a highly toxic pollutant is removed than if a less toxic pollutant is removed. This analysis is included in the record of this rulemaking in a document titled "Cost Effectiveness Analysis of Effluent Standards and Limitations for the Pharmaceutical Industry."

C. Executive Order 12291

Executive Order 12291 requires EPA and other agencies to perform regulatory impact analyses of major regulations. Major rules are those which impose an annual cost on the economy of $100 million or more or have certain other economic impacts. This regulation is not a major rule because its annualized cost is less than $100 million and it meets none of the other criteria specified in Section I, paragraph (b) of the Executive Order. The economic impact analysis prepared for this rulemaking satisfies the requirement of the Executive Order for a non-major rule.

D. Regulatory Flexibility Analysis

Pub. L. 96–354 requires EPA to prepare an *Initial Regulatory Flexibility Analysis* for all regulations that have a significant impact on a substantial number of small entities. This analysis may be conducted in conjunction with or as part of other Agency analyses.

Since no firms in the data base are projected to experience significant economic impacts, there is no disproportionate burden on small businesses; therefore, a formal Regulatory Flexibility Analysis is not required.

E. SBA Loans

The Agency is continuing to encourage small pharmaceutical manufacturers to use Small Business Administration (SBA) financing as needed for pollution control equipment. The three basic programs are: (1) The Section 503 Program; (2) the Regular Guarantee Program; and (3) the Guaranteed Pollution Control Bond Program. All the SBA loan programs are open only to businesses that have: (a) Net assets less than $6 million; (b) an average annual after-tax income of less than $2 million; and (c) fewer than 250 employees. The estimated economic impacts for this point source category do not include consideration of financing available through these programs.

The Section 503 Program, as amended in July 1980, allows long-term loans to small and medium sized businesses. These loans are made by SBA approved local development companies. For the first time these companies are authorized to issue Government-backed debentures that are bought by the Federal Financing Bank, an arm of the U.S. Treasury.

Through SBA's Regular Guarantee Program, loans are made available by commercial banks and are guaranteed by the SBA. This program has interest rates equivalent to market rates.

For additional information on the Regular Guarantee and Section 503 Programs, contact your district or local SBA Office. The coordinator at EPA headquarters is Ms. Frances Desselle who may by reached at (202) 382–5373.

For further information and specifics on the Guaranteed Pollution Control Bond Program contact: U.S. Small Business Administration, Office of Pollution Control Financing, 4040 North Fairfax Drive, Rosslyn, Virginia 22203; (703) 235–2902.

VII. Pollutants and Subcategories Not Regulated

Paragraph 8 of the modified Settlement Agreement, approved by the District Court for the District of Columbia on March 9, 1979 (12 ERC 1833), contains provisions authorizing the exclusion from regulation, in certain instances, of toxic pollutants and industry subcategories.

A. Pollutants Excluded

Paragraph 8(a)(iii) of the modified Settlement Agreement allows the Administrator to exclude from regulation toxic pollutants not detected by Section 304(h) analytical methods or other state-of-the-art methods. The toxic pollutants not detected in the effluents of direct discharging pharmaceutical plants and, therefore, excluded from regulation in this industry, are listed in Appendix B of this notice.

Paragraph 8(a)(iii) also allows exclusion of pollutants that are: (1) Detected in the effluent from a small number of sources and uniquely related to those sources; (2) detected in only trace amounts not likely to cause toxic effects; (3) sufficiently controlled by existing technologies; or (4) detected in amounts too small to be effectively controlled by technologies known to the Administrator. Thirty-four different toxic pollutants were found in the effluent of direct discharging pharmaceutical plants during the screening and verification program. Twenty-four of these pollutants (toxic metals and volatile organics) were found at treatable levels only in a small number of instances. In those instances, these levels were attributable to manufacturing activities that are uniquely related to the plants sampled. Another eight toxic pollutants (some phenols and phthalates) were found at or below the treatability limit concentrations determined for existing physical-chemical treatment methods by studies conducted on wastewater from

several industry categories. The 32 pollutants are listed in Appendix C to this notice along with the particular reason for excluding them from regulation. The two remaining toxic pollutants detected in the effluent of direct discharging pharmaceutical plants are cyanide and methylene chloride. EPA is establishing BPT and BAT limitations and NSPS controlling the discharge of cyanide. For the reasons discussed above, EPA is not regulating the discharge of methylene chloride from direct discharging pharmaceutical plants.

Paragraph 8(b)(ii) of the Settlement Agreement authorizes the Administrator to exclude from nationally applicable pretreatment standards a subcategory or category if the toxicity and amount of incompatible pollutants (taken together) introduced by such point sources into POTWs is so insignificant as not to justify developing a national pretreatment regulation. EPA has reviewed available data from indirect dischargers and is excluding the 123 toxic pollutants listed in Appendices D and E from nationally applicable pretreatment standards. Appendix D lists those toxic pollutants not detected in the effluents of indirect dischargers. Appendix E lists those toxic pollutants which, although detected, were not significant enough, in terms of toxicity and amount of incompatible pollutants (taken together), to justify nationally applicable pretreatment standards. EPA is establishing PSES and PSNS controlling the discharge of cyanide. For the reasons discussed previously, EPA is not establishing nationally applicable pretreatment standards for methylene chloride or chloroform.

B. Subcategories Excluded

The Settlement Agreement did not require EPA to regulate the entire pharmaceutical industry. Subcategory E, Pharmaceutical Research, is not mentioned in the Settlement Agreement. Since pharmaceutical research does not involve production and wastewater generation in appreciable quantities on a regular basis, EPA now considers this subcategory outside the province of ordinary industrial guidelines development. Therefore, facilities which conduct pharmaceutical research only are specifically excluded from all limitations and standards in this regulation other than the BPT limitations. Research activities conducted at mixed and single subcategory plants (A, B, C, and D only) will be covered by this regulation because the wastewaters from these activities were studied as part of the technical development of this regulation. However, these activities contribute a very small portion of wastewater to the final effluent of the average production facility.

VIII. Non-Water Quality Aspects of Pollution Control

Eliminating or reducing one form of pollution may cause other environmental problems. Sections 304(b) and 306 of the Act require EPA to consider the non-water quality environmental impacts (including energy requirements) of certain regulations. In compliance with these provisions, EPA has considered the effect of these regulations on air pollution, solid waste generation, and energy consumption. This regulation was reviewed by EPA personnel responsible for non-water quality programs. While it is difficult to balance pollution problems against each other and against energy use, EPA believes that this regulation will best serve often competing national goals.

The following non-water quality environmental impacts (including energy requirements) are associated with the final regulations. The Administrator has determined that the impacts identified below are justified by the benefits associated with compliance with the limitations and standards.

A. Solid Waste

EPA estimates that the total solid waste generated to attain the new BPT TSS limitations will be approximately 138,000 additional pounds per year of wastewater treatment sludge. This is equal to an incremental increase of about 0.3 percent over that currently generated by the pharmaceutical industry to meet existing BPT BOD5 limitations. The solid wastes generated through wastewater treatment at pharmaceutical plants have not been listed as hazardous in regulations promulgated by the Agency under Subtitle C of the Resource Conservation and Recovery Act (RCRA) (see 45 FR 33066; May 19, 1980). Accordingly, it does not appear likely that the wastewater sludges generated by pharmaceutical plants under the new BPT TSS limitations will be subject to the comprehensive RCRA program establishing requirements for persons handling, transporting, treating, storing, and disposing of hazardous wastes. The Agency's estimates of the costs of this regulation include the cost of handling these sludges as a non-hazardous waste.

No sludge will be generated as a result of complying with the final pretreatment standards, NSPS, or the BPT and BAT effluent limitations for cyanide.

B. Air Pollution

EPA does not believe that cyanide removal mechanisms will cause the generation of air pollutants; additionally, we do not anticipate that compliance with the modified and new BPT TSS limitations will result in the generation of additional air pollution from pharmaceutical plants.

C. Energy Requirements

EPA estimates that the achievement of the cyanide and the new modified TSS BPT effluent limitations will increase energy consumption by approximately 0.01 percent of present facility use for all plants. We estimate that compliance with PSES to control cyanide discharges to POTWs will increase over-all energy use by 0.07 percent at the affected indirect discharging pharmaceutical plant. Because BAT limitations and NSPS for cyanide are identical to BPT cyanide limitations and because PSNS are identical to PSES, there will be no incremental increase in energy usage resulting from compliance with BAT effluent limitations, NSPS, or PSNS.

IX. Best Management Practices

Section 304(e) of the Clean Water Act authorizes the Administrator to prescribe what have been termed "best management practices" (BMPs). The Agency is not promulgating BMPs for the pharmaceutical industry at this time. However, the existing BPT regulation requires that separable mycelia and solvents not be included in the raw waste load calculations that form the basis of determinations of BPT effluent limitations for BOD5 and COD. (*See* 40 CFR Part 439; 41 FR 50676, November 17, 1976). This rulemaking does not change this requirement.

X. Upset and Bypass Provisions

A recurring issue of concern has been whether industry guidelines should include provisions authorizing noncompliance with effluent limitations during periods of "upset" or "bypass." An upset, sometimes called an "excursion," is an unintentional noncompliance occurring for reasons beyond the reasonable control of the permittee. It has been argued that an upset provision is necessary in EPA's effluent limitations because such upsets will inevitably occur even in properly operated control equipment. Because technology-based limitations are to require only what technology can achieve, it is claimed that liability for such situations is improper. When confronted with this issue, courts have disagreed on whether an explicit upset

or excursion exemption is necessary or whether upset or excursion incidents may be handled through EPA's exercise of enforcement discretion. Compare *Marathon Oil Company* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977) with *Weyerhaeuser* v. *Costle, supra*, and *Corn Refiners Association, et al.* v. *Costle*, No. 78–1069 (8th Cir., April 2, 1979). See also *American Petroleum Institute* v. *EPA*, 540 F.2d 1023 (10th Cir. 1976); *CPC International Inc.* v. *Train*, 540 F.2d 1320 (8th Cir. 1976); *FMC Corp.* v. *Train*, 539 F.2d 973 (4th Cir. 1976).

An upset is an unintentional episode during which effluent limits are exceeded; however, a bypass is an act of intentional noncompliance during which wastewater treatment facilities are circumvented in emergency situations. We have, in the past, included bypass provisions in NPDES permits.

EPA has determined that both upset and bypass provisions should be included in NPDES permits and has promulgated NPDES regulations which include upset and bypass permit provisions. (*See* 40 CFR 122.41, 45 FR 14166 (April 1, 1983).) The upset provision establishes an upset as an affirmative defense to prosecution for violation of technology-based effluent limitations. The bypass provision authorizes bypassing to prevent loss of life, personal injury, or severe property damage. Consequently, although permittees in the pharmaceutical manufacturing industry will be entitled to the upset and bypass provisions incorporated into NPDES permits, this regulation does not address these issues.

XI. Variances and Modifications

The BPT and BAT effluent limitations and NSPS contained in this regulation must be applied in all Federal and State NPDES permits issued to direct dischargers in the pharmaceutical industry. In addition, the pretreatment standards are directly applicable to any indirect dischargers.

For the BPT effluent limitations, the only exception to the binding limitations is EPA's "fundamentally different factors" variance. (*See E. I. duPont de Nemours and Co.* v. *Train*, 430 U.S. 112 (1977); *Weyerhaeuser Co.* v. *Costle, supra.*) This variance recognizes factors concerning a particular discharger which are fundamentally different from the factors considered in this rulemaking. Although this variance clause was set forth in EPA's 1973 to 1976 regulations for specific industries, it is now included in the general NPDES regulations and will not be included in the specific pharmaceutical industry regulations. (*See* the NPDES regulations at 40 CFR Part 125, Subpart D.) The BAT limitations in this regulation are also subject to EPA's "fundamentally different factors" variance.

Indirect discharges subject to PSES and PSNS are eligible for credits for toxic pollutants removed by POTWs. See 40 CFR 403.7; 48 FR 9404 (January 28, 1981). New sources are not eligible for any other statutory or regulatory modification. See *E. I. duPont de Nemours & Co.* v. *Train, supra.*

Indirect dischargers subject to PSES have, in the past, been eligible for the "fundamentally different factors" (FDF) variance. See 40 CFR 403.13. However, on September 20, 1983, the U.S. Court of Appeals for the Third Circuit held that "FDF variances for toxic pollutants are forbidden by the Act," and remanded § 403.13 to EPA. *National Association of Metal Finishers, et al.* v. *EPA*, Nos. 79–2256 *et al.* (3d Circuit, September 20, 1983). EPA is considering the effect of that decision.

In a few cases, information which would affect these PSES may not have been available to EPA or affected parties in the course of this rulemaking. As a result, it may be appropriate to issue specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate. This will only be done if a different standard is appropriate because of unique aspects of the factors listed in Section 304(b)(2)(B) of the Act: the age of equipment and facilities involved, the process employed, the engineering aspects of applying control techniques, non-water quality environmental impacts (including energy requirements), or the cost of required effluent reductions (but not of ability to pay that cost).

Indirect dischargers and other affected parties may petition the Administrator to examine those factors and determine whether these PSES are properly applicable in specific cases or should be revised. Such petitions *must* contain specific and detailed support data, documentation, and evidence indicating why the relevant factors justify a more, or less, stringent standard, and must also indicate why those factors could not have been brought to the attention of the Agency in the course of this rulemaking. The Administrator will consider such rulemaking petitions and determine whether a rulemaking should be initiated.

XII. Implementation of Limitations and Standards

A. Relationship to NPDES Permits

The BPT and BAT limitations and NSPS in this regulation will be applied to individual pharmaceutical plants through NPDES permits issued by EPA or approved state agencies, under Section 402 of the Act. As discussed in the preceding section of this preamble, these limitations must be applied in all Federal and State NPDES permits except to the extent that variances and modifications are expressly authorized. Other aspects of the interaction between these limitations and NPDES permits are discussed below.

One issue that warrants consideration is the effect of this regulation on the powers of NPDES permit-issuing authorities. The promulgation of this regulation does not restrict the power of any permitting authority to act in any manner consistent with law or these or any other EPA regulations, guidelines, or policy. For example, even if this regulation does not control a particular pollutant, the permit issuer may still limit such pollutant on a case-by-case basis when limitations are necessary to carry out the purposes of the Act. In addition, to the extent that state water quality standards or other provisions of State or Federal law require limitation of pollutants not covered by this regulation (or require more stringent limitations on covered pollutants), such limitations must be applied by the permit issuing authority.

A second topic that warrants discussion is the operation of EPA's NPDES enforcement program, many aspects of which were considered in developing this regulation. We emphasize that although the Clean Water Act is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. We have exercised and intend to exercise that discretion in a manner that recognizes and promotes good-faith compliance efforts.

B. Indirect Dischargers

For indirect dischargers, PSES and PSNS are implemented under National Pretreatment Program procedures outlined in 40 CFR 403. The table below may be of assistance in resolving questions about the operation of that program. A brief explanation of some of the submissions indicated on the table follows.

A "request for category determination" is a written request, submitted by an indirect discharger or its POTW, for a determination of which categorical pretreatment standard

applies to the indirect discharger. This assists the indirect discharger in knowing which PSES or PSNS limits it will be required to meet. See 40 CFR 403.6(a).

A "baseline monitoring report" is the first report an indirect discharger must file following promulgation of an applicable standard. The baseline report includes an identification of the indirect discharger, a description of its operations, a report on the flows of regulated streams and the results of sampling analyses to determine levels of regulated pollutants in those streams, a statement of the discharger's compliance or noncompliance with the standard, and a description of any additional steps required to achieve compliance. See 40 CFR 403.12(b).

A "report on compliance" is required of each indirect discharger within 90 days following the date for compliance with an applicable categorical pretreatment standard. The report must indicate the concentration of all regulated pollutants in the facility's regulated process wastestreams; the average and maximum daily flows of the regulated streams; and a statement of whether compliance is consistently being achieved, and if not, what additional operation and maintenance and/or pretreatment is necessary to achieve compliance. See 40 CFR 403.12(d).

A "periodic compliance report" is a report on continuing compliance with all applicable categorical pretreatment standards. It is submitted twice per year (June and December) by indirect dischargers subject to the standards. The report shall provide the concentrations of the regulated pollutants in its discharge to the POTW, the average and maximum daily flow rates of the facility, the methods used by the indirect discharger to sample and analyze the data, and a certification that these methods conform to the methods outlined in the regulations. See 40 CFR 403.12(e).

INDIRECT DISCHARGES SCHEDULE FOR SUBMITTAL AND COMPLIANCE

Item event	Applicable sources	Date or time period	Measured	Item submitted to
Request for category determination.	Existing	60 days	From effective of standard, or from Development document availability.	Director.[1]
	New	(2)		
Baseline monitoring report	All	180 days	From effective date of standard or Final decision on category determination.	Control authority.[3]
Report on compliance	Existing	90 days	From date for final compliance	Control authority.[3]
	New	90 days	From commencement discharge to POTW.	
Periodic compliance reports	All	June and December.		Control authority.[3]

[1] Director = (a) Chief Administrative Officer of a State water pollution control agency with an approved pretreatment program; or (b) EPA Regional Water Division Director, if State does not have an approved pretreatment program.
[2] Prior to commencement of discharge to POTW.
[3] Control Authority = (a) POTW if its pretreatment program has been approved; or (b) Director of State water pollution control agency with an approved pretreatment program or (c) EPA Regional Administrator, if State does not have an approved pretreatment program.

XIII. Public Participation—Responses to Major Comments

Numerous agencies and groups have participated in this study of the pharmaceutical industry. The Agency solicited comments on the proposed rules and on the Development Document and the economic analysis supporting the proposal.

The comment period ended on January 25, 1983. Comments were submitted by one trade association, 11 individual companies, one state agency, two municipalities, and one engineering consultant representing industrial clients.

The Agency held a public hearing on the proposal on January 17, 1983, in Washington D.C. A Technical Workshop was held on January 18, 1983, in Washington, D.C.

Individual public comments received on the proposed regulation and our responses are presented in a report, "Summary of Comments and Responses on the November 1982 Proposed Regulations for the Pharmaceutical Industry," September 1982, which is part of the public record of this rulemaking. A summary of the major comments that are not discussed elsewhere in this preamble and the Agency's responses follow.

1. *Comment:* Effluent limitations should be in the form of treatment removal efficiencies or mass limits of pollutants with concentration limitations being required only in specific cases at the discretion of the local permit writer where the receiving water quality may be a limiting factor.

Response: Effluent limitations guidelines can be in the form of percent reduction, concentration, or production-based mass limitations. Limitations can be based solely on the performance of applicable treatment technologies. However, when the available production data for an industrial category or subcategory can be correlated with pollutant discharges, EPA can develop mass limitations based on both treatment technology performance and production. This latter approach, however, is not appropriate for the pharmaceutical manufacturing point source category because of the large number of different products involved, the constantly changing nature of the product mix, and the lack of an established correlation between pollutant discharge and production. The development of percent reduction limitations requires that influent as well as effluent data descriptive of treatment technology performance be available whereas concentration limitations require only that effluent data be available. Oftentimes, influent data relating to treatment system performance is either not available or is considerably less extensive and descriptive than the effluent data. Both of these considerations influenced the Agency's decision to propose concentration-based limitations for the pharmaceutical industry.

Effluent limitations guidelines whether in the form of percent reduction, concentration, or production-based mass limits are to be used by NPDES permit writers in developing minimum permit requirements. Generally, effluent limitations are converted into mass limitations by permit writers. Permit writers may incorporate more stringent limits such as those required by water quality considerations, but in no case may the permit limits be less stringent (i.e., allow a greater pollutant discharge) than those that are indicated by an applicable technology-based effluent limitations guideline.

2. *Comment:* On June 8, 1982, EPA issued a final rulemaking which modified effluent limitations guidelines for pH for all industrial dischargers. The final rule required compliance 99 percent of the time and limited individual excursions to 60 minutes. We believe that EPA has inadvertently failed to include this change in the proposed pharmaceutical guidelines and therefore request EPA to incorporate this change into the guidelines.

Response: The applicability of the final rule cited by the commenter (see 47 FR 34534–34537, June 4, 1982) is contingent on whether a permittee is required, or has the option, to monitor

continuously the pH of its wastewater as specified by the conditions of the permittee's National Pollutant Discharge Elimination System (NPDES) permit. If the industrial discharger's NPDES permit does not contain a requirement or an option for the permittee to monitor pH continuously, then the monthly and individual excursion limitations of that rule are not applicable. Thus, the rule applies only to those industrial dischargers with an NPDES permit requirement or option to monitor continuously the pH of their wastewater. The modified pH rule for continuous monitoring is currently applicable to permittees having this requirement or option (see 40 CFR 401.17). It is not necessary that this modified rule be explicitly stated in all categorical regulations.

3. *Comment:* Several commenters requested additional time to comment on the grounds that EPA, in these proposed rules and accompanying documents, has for the first time released substantial portions of the information on which certain of the proposed rules are based, and has materially revised other portions of the information on which other portions of the proposed rules are based.

Response: After consideration of the amount and complexity of the new information released in the proposed rulemaking and the fact that all of the information supporting the proposed regulations was available to the public at the time that the proposed regulations were published in the Federal Register, we concluded that a 60-day comment period was an adequate time period for commenting on the proposed regulations. The Agency has allowed extensions of comment periods on some proposal regulations due to certain special circumstances surrounding those rulemakings. However, no such circumstances were present in the pharmaceutical rulemaking. Therefore, the Agency concluded that an extension of the comment period for this rulemaking was not appropriate.

EPA received several comments after the close of the official comment period. The Agency has evaluated and responded to these comments.

4. *Comment:* One commenter stated that TSS limits are inappropriate for plants discharging to rivers, such as the Mississippi, presumably because they are naturally turbid. The commenter recommended that permit writers be allowed to disregard or modify TSS limitations.

Response: We have not made any changes in response to this comment. Section 304 of the Act requires that effluent limitations guidelines be based on the application of control and treatment technology. EPA may not consider receiving water quality in developing such guidelines. Accordingly, BPT TSS limitations are based on the application of currently available technology, not on water quality considerations. Since receiving water quality is not a factor which is considered in establishing categorical limitations, it follows that it cannot be considered by the permit writer as a basis for a fundamentally different factors (FDF) variance.

5. *Comment:* One commenter objected to the fact that "new sources" were defined in terms of plants whose construction commences after proposal of a new source performance standard, rather than after final promulgation. The commenter noted that there may be changes in the standard between proposal and final promulgation.

Response: The definition of "new source" in Appendix A to the proposal is a shortened version of the definition of new source established in EPA's NPDES permit regulations (40 CFR 122.2, April 1, 1983, 48 FR 14146). To avoid confusion, we have revised the definition in Appendix A.

6. *Comment:* Since regulations controlling the discharge of BOD5 are included in the proposed regulation, we question the need for COD limitations. What additional pollutants is EPA trying to control with COD limitations? We consider these limitations to be duplicative in nature and unwarranted.

Response: Many materials that are measured as or contribute to COD biodegrade slowly or not at all, while those materials which contribute to BOD5 are, by definition, biodegradable. Removal of COD in a biological treatment system is accomplished to some extent by biodegradation but also by incidental removal mechanisms such as air stripping and sorption. Since the extent to which any of these mechanisms operates to remove COD depends in part on the size of the biological treatment system, any increase in the capacity of a biological treatment system should result in greater removal of these materials. The Agency recognizes that there are also some pollutants measured by COD, such as salts and some solvents, which do not biodegrade.

The 1976 BPT regulation requires all subcategories to achieve a 74 percent reduction of COD from raw waste levels and, in addition, specifies that separable solvents be removed by in-plant control methods prior to measurement of raw waste COD levels. The purpose of the existing BPT COD limitations is to limit the discharge of those materials which biodegrade slowly or not at all by first prohibiting the inclusion of certain non-biodegradable materials (e.g., some solvents) in raw waste streams and by accounting for the incidental removal of COD that occurs in biological treatment systems. More stringent BAT limitations and NSPS for COD based on add-on biological treatment were included in the proposed regulation of November 26, 1982. We intend to issue final BAT limitations and NSPS for COD for all subcategories after reviewing additional data on the pollutants which constitute COD in pharmaceutical plants and on the cost of their removal. The Agency continues to believe that limitations controlling the discharge of COD are appropriate and not duplicative in nature.

7. *Comment:* EPA has proposed to apply broad categorical limits for an individual pollutant, cyanide, that may be present in only a few operations. By proposing a limit for cyanide, EPA will require all pharmaceutical plants to expend resources to monitor for cyanide whether or not cyanide is used or generated in the manufacturing process. At a minimum, EPA's action will force certain dischargers to request a fundamentally different factors (FDF) variance at the time of permit re-issuance to avoid unnecessary monitoring requirements.

Response: EPA agrees with the commenter that if cyanide is not used or generated in the manufacturing process, dischargers should not be required to monitor for cyanide. Therefore, the final regulations allow facilities not using or generating cyanide to certify to that effect instead of monitoring for cyanide. Permit issuing authorities may find it necessary to require that specific monitoring programs be instituted at individual plants if cyanide contamination is suspected.

XIV. Availability of Technical Information

The basis for this regulation is detailed in four major documents. Analytical methods are discussed in *Sampling and Analysis Procedures for Screening of Industrial Effluents for Priority Pollutants* (U.S. EPA, April 1977). EPA's technical conclusions are detailed in *Development Document for Effluent Guidelines, New Source Performance Standards, and Pretreatment Standards for the Pharmaceutical Manufacturing Point Source Category* (USEPA, September 1983). The Agency's economic analysis is presented in *Economic Analysis of Effluent Standards and Limitations for the Pharmaceutical Industry* (USEPA,

September 1983). A summary of the public comments received on the proposed regulation is presented in a report "Summary of Responses to Comment on the Proposed Pharmaceutical Manufacturing Industry Regulations," which is a part of the public record for this regulation. On November 28, 1983, copies of the technical development document and the economic analysis will be available for public review in EPA's Public Information Reference Unit, Room 2404 (Rear) in the EPA Library, 401 M Street, SW., Washington, D.C. Copies of the technical and economic documents may also be obtained from the National Technical Information Service (NTIS), Springfield, Virginia 22161, (703) 487–4600. A notice will be published in the **Federal Register** announcing the availability of these documents from NTIS. (This should occur on or before December 27, 1983).

Additional information concerning the economic impact analysis may be obtained from Mr. Joseph Yance, Economic Analysis Staff (WH–586), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 or by calling (202) 382–5397. Technical information may be obtained by writing to Dr. Frank Hund, Effluent Guidelines Division (WH–552), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 or by calling (202) 382–7182.

XV. Office of Management and Budget (OMB) Review

This notice was submitted to the Office of Management and Budget for review as required by Executive Order 12291. Any commments from OMB to EPA and any EPA response to those comments are available for public inspection through contacting Dr. Frank Hund at the address listed at the beginning of this notice.

This regulation contains provisions in §§ 439.14–439.17, 439.24–439.27, 439.34–439.37, and 439.44–439.47 which allow facilities not using or generating cyanide to certify to that effect instead of monitoring for cyanide. The information collection requirements in ths rule have been submitted to OMB under provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* They are not effective until OMB approves them and a technical amendment to that effect is published in the **Federal Register.**

XVI. List of Subjects in 40 CFR Part 439

Drugs, Waste treatment and disposal, Water pollution control.

Dated: September 30, 1983.

William D. Ruckelshaus,

Administrator.

Appendix A—Abbreviations, Acronyms, and Other Terms Used in this Notice

Act—The Clean Water Act.

Agency—The U.S. Environmental Protection Agency.

BAT—The best available technology economically achievable, under Section 304(b)(2)(B) of the Act.

BCT—The best conventional pollutant control technology, under Section 304(b)(4) of the Act.

BMP—Best management practices, under Section 304(e) of the Act.

BPT—The best practicable control technology currently available, under Section 304(b)(1) of the Act.

Clean Water Act—The Federal Water Pollution Control Act Amentments of 1972 (33 U.S.C. 1251 *et seq.*), as amended by the Clean Water Act of 1977 (Pub. L. 95–217).

Direct Discharger—A facility where wastewaters are discharged or may be discharged into waters of the United States.

Indirect Discharger—A facility where wastewaters are discharged or may be discharged into a publicly owned treatment works.

New Sources—Industrial facilities which are "new sources" under the definition in Section 306 of the Act.

NPDES Permit—A National Pollutant Discharge Elimination System permit issued under Section 402 of the Act.

NSPS—New source performance standards, under Section 306 of the Act.

POTW or POTWs—Publicly owned treatment works.

PSES—Pretreatment standards for existing sources of indirect discharges, under Section 307(b) of the Act.

PSNS—Pretreatment standards for new sources of indirect discharges, under Section 307 (b) and (c) of the Act.

RCRA—Resource Conservation and Recovery Act (Pub. L. 94–580) of 1976, as amended, 42 U.S.C. 6901 *et seq.*

Appendix B—Toxic Pollutants Not Detected in the Effluent of Direct Dischargers

acenaphthene
acrylonitrile
benzidine
1,1-dichloroethane
1,2,4-trichlorobenzene
hexachlorobenzene
hexachloroethane
1,1,2-trichloroethane
1,1,2,2-tetrachloroethane
chloroethane
bis(2-chloroethyl) ether
2-chloroethyl vinyl ether
2-chloronapthalene
2,4,6-trichlorophenol
parachlorometa cresol
2-chlorophenol
1,3-dichlorobenzene
1,4-dichlorobenzene
3,3'-dichlorobenzidine
1,1-dichloroethylene
1,2-trans-dichloroethylene
2,4-dichlorophenol
1,2-dichloropropane
1,3-dichloropropylene
2,4-dinitrotoluene
2,4-dimethyl phenol
2,6-dinitrotoluene
1,2-diphenlhydrazine
fluoranthene
4-chlorophenyl phenyl ether
4-bromophenyl phenyl ether
bis(2-chloroethoxy) methane
methyl bromide
dichlorobromomethane
chlorodibromethane
hexachlorobutadiene
hexachlorocyclopentadiene
isophorone
naphthalene
nitrobenzene
2-nitrophenol
4,6-dinitro-o-cresol
N-nitrosodimethylamine
N-nitrosodiphenylamine
N-nitrosodi-n-propylamine
pentachlorophenol
butyl benzyl phthalate
di-n-octyl phthalate
dimethyl phthalate
benzo(a)anthracene
benzo(a)pyrene
3,4-benzofluoranthene
benzo(k)fluoranthane
chrysene
acenaphthylene
anthracene
benzo(ghi)perylene
fluorene
phenanthrene
dibenzo(a,h)anthracene
indeno(1,2,3-c,d)pyrene
pyrene
aldrin
dieldrin
chlordane
4,4'-DDT
4,4'-DDE
4,4'-DDD
alpha-endosulfan
beta-endosulfan
endosulfan sulfate
endrin
endrin aldehyde
heptachlor
heptachlor epoxide
alpha-BHC
beta-BHC
gamma-BHC (lindane)
delta-BHC
PCB–1242
PBC–1254

PCB–1221
PCB–1232
PCB–1248
PCB–1260
PCB–1016
toxaphene
asbestos (fibrous)
beryllium (total)
2,3,7,8-tetrachloro-dibenzo-p-dioxin (TCDD)

Appendix C—Toxic Pollutants Detected in Treated Effluents of Direct Dischargers: (1) From a Small Number of Sources, (2) Detected in Only Trace Amounts, (3) Sufficiently Controlled by Existing Technologies, or (4) Detected in Amounts Too Small to be Effectively Controlled by Technologies Known to the Administrator

Pollutant and basis for exclusion	
Acrolein	1
Benzene	3
Bromoform	1
Carbon tetrachloride	2
1,2-dichloroethane	3
1,1,1-trichloroethane	3
Chloroform	3
Ethylbenzene	3
Bis(2-chloroisopropyl) ether	1
Methyl chloride	3
4-nitrophenol	3
2,4-dinitrophenol	3
Phenol	3
Bis(2-ethylhexyl) phthalate	4
Di-n-butyl phthalate	4
Diethyl phthalate	4
Tetrachloroethylene	2
Toluene	3
Trichloroethylene	3
Vinyl chloride	2
Antimony	4
Arsenic	4
Cadmium	4
Chromium	4
Copper	4
Lead	4
Mercury	4
Nickel	4
Selenium	4
Silver	4
Thallium	4
Zinc	4

Appendix D—Toxic Pollutants Not Detected in the Effluent of Indirect Dischargers

acenaphthene
benzidine
1,2,4-trichlorobenzene
hexachlorobenzene
hexachloroethane
1,1,2-trichloroethane
1,1,2,2-tetrachloroethane
chloroethane
bis(2-chloroethyl) ether
2-chloroethyl ether
2-chloronapthalene
2,4,6-trichlorophenol
parachlorometa cresol
2-chlorophenol
1,3-dichlorobenzene
1,4-dichlorobenzene
3,3'-dichlorobenzidine
2,4-dichlorophenol
1,2-dichloropropane
1,3-dichloropropylene
2,4-dinitrotoluene
2,6-dinitrotoluene
1,2-diphenlhydrazine
fluoranthene
4-Chlorophenyl phenyl ether
4-bromophenyl phenyl ether
bis(2-chloroethoxy) methane
methyl bromide
dichlorobromomethane
chlorodibromethane
hexachlorobutadiene
hexachlorocyclopentadiene
isophorone
naphthalene
nitrobenzene
4-nitrophenol
2,4-dinitro phenol
4,6-dinitro-o-cresol
N-nitrosodi-n-propylamine
pentachlorophenol
butyl benzyl phthalate
di-n-octyl phthalate
dimethyl phthalate
benzo(a)anthracene
benzo(a)pyrene
3,4-benzofluoranthene
benzo(k)fluoranthane
chrysene
acenaphthylene
anthracene
benzo(ghi)perylene
phenanthrene
dibenzo(a,h)anthracene
indeno (1,2,3-c,d)pyrene
pyrene
aldrin
dieldrin
chlordance
4,4'-DDT
4,4'-DDE
4,4'-DDD
alpha-endosulfan
beta-endsulfan
endosulfan sulfate
endrin
endrin aldehyde
heptachlor
heptachlor epoxide
alpha-BHC
beta-BHC
gamma-BHC (lindane)
delta-BHC
PCB–1242
PCB–1254
PCB–1221
PCB–1232
PCB–1248
PCB–1260
PCB–1016
toxaphene
asbestos (fibrous)
beryllium
2,3,7,8-tetrachloro-dibenzo-p-dioxin (TCDD)

Appendix E—Toxic Pollutants Detected in the Effluent of Indirect Dischargers Whose Toxicity and Amount (Taken Together) Are So Insignificant As Not To Justify Developing Pretreatment Regulations

*acrolein
*acrylonitrile
benzene
*carbon tetrachloride
*chlorobenzene
methyl chloride
1,2-dichlorobenzene
*1,2-dichloroethane
*1,1, 1-trichloroethane
*1,1-dichloroethane
*1,1-dichloroethylene
*1,2-trans-dichloroethylene
*ethylbenzene
*bromoform
*tetrachloroethylene
toluene
*trichloroethylene
2,4-dimethylphenol
2-nitrophenol
N-nitrosodiphenylamine
phenol
bis(2-ethyl hexyl) phthalate
diethyl phthalate
fluorene
antimony
arsenic
cadmium
chromium
copper
lead
mercury
nickel
selenium
silver
thallium
zinc

*Volatile organics identified at proposal as potential candidates for categorical pretreatment standards (47 FR 53584).

Part 439 of Title 40 is revised to read as follows:

PART 439—PHARMACEUTICAL MANUFACTURING POINT SOURCE CATEGORY

General Provisions

Sec.
439 Applicability.
439.1 General definitions.
439.2 Monitoring requirements.

Subpart A—Fermentation Products Subcategory

439.10 Applicability; description of the fermentation products subcategory.
439.11 Specialized definitions.
439.12 Effluent limitations representing the degree of effluent reduction attainable by

Sec.
the application of the best practicable control technology currently available (BPT).
439.13 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]
439.14 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
439.15 New source performance standards (NSPS).
439.16 Pretreatment standards for existing sources (PSES).
439.17 Pretreatment standards for new sources (PSNS).

Subpart B—Extraction Products Subcategory

439.20 Applicability; description of the extraction products subcategory.
439.21 Specialized definitions.
439.22 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
439.23 Effluent limitations representing the degree of effluent reducton attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]
439.24 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
439.25 New source performance standards (NSPS).
439.26 Pretreatment standards for existing sources (PSES).
439.27 Pretreatment standards for new sources (PSNS).

Subpart C—Chemical Synthesis Products Subcategory

439.30 Applicability; description of the chemical synthesis products subcategory.
439.31 Specialized definitions.
439.32 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
439.33 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]
439.34 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
439.35 New source performance standards (NSPS).
439.36 Pretreatment standards for existing sources (PSES).
439.37 Pretreatment standards for new sources (PSNS).

Subpart D—Mixing/Compounding and Formulation Subcategory

Sec.
439.40 Applicability; description of the mixing/compounding and formulation subcategory.
439.41 Specialized definitions.
439.42 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
439.43 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]
439.44 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
439.45 New source performance standards (NSPS).
439.46 Pretreatment standards for existing sources (PSES).
439.47 Pretreatment standards for new sources (PSNS).

Subpart E—Research Subcategory

439.50 Applicability; description of the research subcategory.
439.51 Specialized definitions.
439.52 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
439.53 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]
439.54 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT). [Reserved]
439.55 New source performance standards (NSPS). [Reserved]
439.56 Pretreatment standards for existing sources (PSES). [Reserved]
439.57 Pretreatment standards for new sources (PSNS). [Reserved]

Authority: Sec. 301, 304 (b), (c), (e), and (g), 306 (b) and (c), 307 (b) and (c), and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977) (the "Act"); 33 U.S.C. 1311, 1314 (b), (c), (e), and (g), 1316 (b) and (c), 1317 (b) and (c), and 1361; 86 Stat. 816, Pub. L. 92-500; 91 Stat. 1567, Pub. L. 95-217.

General Provisions

§ 439 Applicability.

This part applies to any pharmaceutical manufacturing facility which discharges or may discharge process wastewater pollutants to the waters of the United States, or which introduces or may introduce process wastewater pollutants into a publicly owned treatment works.

§ 439.1 General definitions.

In addition to the definitions set forth in 40 CFR Part 401, the following definitions apply to this part:

(a) The term "maximum 30 day average" shall mean the maximum average of daily values for 30 consecutive days.

(b) The term "cyanide destruction unit" shall mean a treatment system designed specifically to remove cyanide.

§ 439.2 Monitoring requirements.

Unless otherwise noted, self-monitoring will be conducted at the final effluent discharge point.

Subpart A—Fermentation Products Subcategory

§ 439.10 Applicability; description of the fermentation products subcategory.

The provisions of this subpart are applicable to discharges resulting from the manufacture of pharmaceuticals by fermentation.

§ 439.11 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in 40 CFR Part 401 and 439.01 shall apply to this subpart.

(b) The term "product" shall mean pharmaceutical products derived from fermentation processes.

§ 439.12 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this paragraph, which may be discharged by a fermentation products plant from a point source subject to the provisions of this paragraph after application of the best practicable control technology currently available:

(1) The allowable effluent discharge limitation for the daily average mass of BOD5 in any calendar month shall be expressed in mass per unit time and shall specifically reflect not less than 90% reduction in the long term daily average raw waste content of BOD5 multiplied by a variability factor of 3.0.

(2) The allowable effluent discharge limitation for the daily average mass of COD in any calendar month shall be expressed in mass per unit time and shall specifically reflect not less than 74 percent reduction in the long term daily average raw waste content of COD multiplied by a variability factor of 2.2.

(3) The long term daily average raw waste load for the pollutants BOD5 and COD is defined as the average daily mass of each pollutant discharged in the influent to the wastewater treatment system over a 12 consecutive month period within the most recent 36 months, which shall include the greatest production effort.

(4) To assure equity in regulating discharges from the point sources covered by this subpart of the point source category, calculation of raw waste loans of BOD5 and COD for the purpose of determining NPDES permit limitations (i.e., the base numbers to which the percent reductions are applied) shall exclude any waste load associated with separable mycelia and solvents in those raw waste loads, except that residual amounts of mycelia and solvents remaining after the practice of recovery and/or separate disposal or reuse may be included in the calculation of the raw waste loads. These practices of removal, disposal, or reuse include physical separation and removal of separable mycelia, recovery of solvents from waste streams, incineration of concentrated solvent waste streams (including tar still bottoms), and broth concentration for disposal other than to the treatment system. This regulation does not prohibit inclusion of such waste in the raw waste loads in fact, nor does it mandate any specific practice, but rather describes the rationale for determining the permit conditions. These limits may be achieved by any of several or a combination thereof of programs and practices.

(5) The pH shall be within the range of 6.0–9.0 standard units.

(6) The allowable effluent discharge limitation for the daily average mass of TSS in any calendar month shall be 1.7 times the BOD5 limitation determined in paragraph (a)(1) of this section.

(7) For those plants using or generating cyanide in the manufacturing process, the allowable effluent discharge for cyanide is shown below.

(i)

Pollutant or pollutant property	BPT Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(ii) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution to meet the above effluent limitations may not be practiced.

§ 439.13 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

§ 439.14 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart where cyanide is used or generated in the manufacturing process must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(1)

Pollutant or pollutant property	BAT Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
COD	(1)	(1)

[1] Reserved.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above effluent limitations may not be practiced.

§ 439.15 New source performance standards (NSPS).

(a) The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart.

(1)

Pollutant or pollutant property	NSPS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
BOD5	(1)	(1)
TSS	(1)	(1)
COD	(1)	(1)
pH	(2)	(2)

[1] Reserved.
[2] Within the range of 6.0 to 9.0 at all times.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide standard is multiplied by 0.18, the maximum 30 day average cyanide standard is multiplied by 0.35, and both standards are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide standard must be multiplied by 0.18, the maximum 30 day average cyanide standard must be multiplied by 0.35, and both standards must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Only facilities where cyanide is used or generated in the manufacturing process are subject to cyanide standards. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.16 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by October 27, 1986, where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for existing sources (PSES).

(1)

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.17 Pretreatment standards for new sources (PSNS).

(a) Except as provided in 40 CFR 403.7, any new source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for new sources (PSNS).

(1)

Pollutant or pollutant property	PSNS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total Cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

Subpart B—Extraction Products Subcategory

§ 439.20 Applicability; description of the extraction products subcategory.

The provisions of this subpart are applicable to discharges resulting from the manufacture of pharmaceuticals by extraction.

§ 439.21 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in 40 CFR Part 401 and 439.01 shall apply to this subpart.

(b) The term "product" shall mean biological and natural extraction products. This subcategory shall include blood fractions, vaccines, serums, animal bile derivatives, endocrine products, and isolation of medicinal products, such as alkaloids, from botanical drugs and herbs.

§ 439.22 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this paragraph, which may be discharged by an extraction products plant from a point source subject to the provisions of this paragraph after application of the best practicable control technology currently available:

(1) The allowable discharge for the pollutant parameters BOD5 and COD shall be expressed in mass per unit time and shall represent the specified wastewater treatment efficiency in

terms of a residual discharge associated with an influent to the wastewater treatment plant corresponding to the maximum production period for a given pharmaceutical plant as defined in paragraph (a)(4) of this section.

(2) The allowable effluent discharge limitation for the daily average mass of BOD*5* in any calendar month shall specifically reflect not less than 90 percent reduction in the long term daily average raw waste content of BOD*5* multiplied by a variability factor of 3.0. However, a plant shall not be required to attain a maximum 30 day average BOD*5* effluent limitation of less than the equivalent of 45 mg/l.

(3) The allowable effluent discharge limitation for the daily average mass of COD in any calendar month shall specifically reflect not less than 74 percent reduction in the long term daily average raw waste content of COD multiplied by a variability factor of 2.2. However, a plant shall not be required to attain a maximum 30 day average COD effluent limitation of less than the equivalent of 220 mg/l.

(4) The long term daily average raw waste load for the pollutants BOD*5* and COD is defined as the average daily mass of each pollutant discharged in the influent to the wastewater treatment system over a 12 consecutive month period within the most recent 36 months, which shall include the greatest production effort.

(5) To assure equity in regulating discharges from the point sources covered by this subpart of the point source category, calculation of raw waste loads of BOD*5* and COD for the purpose of determining NPDES permit limitations (i.e., the base numbers to which the percent reductions are applied) shall exclude any waste load associated with solvents in those raw waste loads, except that residual amounts of solvents remaining after the practice of recovery and/or separate disposal or reuse may be included in the calculation of the raw waste loads. Those practices of removal, disposal, or reuse include recovery of solvents from waste streams and incineration of concentrated solvent waste streams (including tar still bottoms). This regulation does not prohibit inclusion of such wastes in the raw waste loads in fact, nor does it mandate any specific practice, but rather describes the rationale for determining the permit conditions. These limits may be achieved by any one of several or a combination thereof of programs and practices.

(6) The allowable effluent discharge limitation for the daily mass of TSS in any calendar month shall be 1.7 times the BOD*5* limitation determined in paragraph (a)(2) of this section.

(7) The pH shall be within the range of 6.0–9.0 standard units.

(8) For those plants using or generating cyanide in the manufacturing process, the allowable effluent discharge for cyanide is shown below.

(i)

Pollutant of pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(ii) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution to meet the above effluent limitations may not be practiced.

§ 439.23 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

§ 439.24 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart where cyanide is used or generated in the manufacturing process must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(1)

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total Cyanide	33.5	9.4
COD	(1)	(1)

[1] Reserved.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitations must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream

flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above effluent limitations may not be practiced.

§ 439.25 New source performance standards (NSPS).

(a) The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart.

(1)

Pollutant or pollutant property	NSPS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
BOD5	(1)	(1)
TSS	(1)	(1)
COD	(1)	(1)
pH	(2)	(2)

[1] Reserved.
[2] Within the range of 6.0 to 9.0 at all times.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide standard is multiplied by 0.18, the maximum 30 day average cyanide standard is multiplied by 0.35, and both standards are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide standard must be multiplied by 0.18, the maximum 30 day average cyanide standard must be multiplied by 0.35, and both standards must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Only facilities where cyanide is used or generated in the manufacturing process are subject to cyanide standards. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.26 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by October 27, 1986, where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for existing sources (PSES).

(1)

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total Cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.27 Pretreatment standards for new sources (PSNS).

(a) Except as provided in 40 CFR 403.7, any new source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for new sources (PSNS).

(1)

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total Cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

Subpart C—Chemical Synthesis Products Subcategory

§ 439.30 Applicability; description of the chemical synthesis products subcategory.

The provisions of this subpart are applicable to discharges resulting from the manufacture of pharmaceuticals by chemical synthesis.

§ 439.31 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in 40 CFR 401 and 439.01 of this chapter shall apply to this subpart.

(b) The term "product" shall mean pharmaceutical products derived from chemical synthesis processes.

§ 439.32 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application

of the best practicable control technology currently available (BPT).

(a) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this paragraph, which may be discharged by a chemical synthesis plant from a point source subject to the provisions of this paragraph after application of the best practicable control technology currently available:

(1) The allowable discharge for the pollutant parameters BOD5 and COD shall be expressed in mass per unit time and shall represent the specified wastewater treatment efficiency in terms of a residual discharge associated with an influent to the wastewater treatment plant corresponding to the maximum production period for a given pharmaceutical plant as defined in paragraph (a)(4) of this section.

(2) The allowable effluent discharge limitation for the daily average mass of BOD5 in any calendar month shall specifically reflect not less than 90 percent reduction in the long term daily average raw waste content of BOD5 multiplied by a variability factor of 3.0.

(3) The allowable effluent discharge limitation for the daily average mass of COD in any calendar month shall specifically reflect not less than 74 percent reduction in the long term daily average raw waste content of COD multiplied by a variability factor of 2.2.

(4) The long term daily average raw waste load for the pollutant parameters BOD5 and COD is defined as the average daily mass of each pollutant discharged in the influent to the wastewater treatment system over a 12 consecutive month period within the most recent 36 months, which shall include the greatest production effort.

(5) To assure equity in regulating discharges from the point sources covered by this subpart of the point source category, calculation of raw waste loads of BOD5 and COD for the purpose of determining NPDES permit limitations (i.e., the base numbers to which the percent reductions are applied) shall exclude any waste load associated with solvents in those raw waste loads, except that residual amounts of solvents remaining after the practice of recovery and/or separate disposal or reuse may be included in the calculation of the raw waste loads. These practices of removal, disposal, or reuse include recovery of solvents from waste streams and incineration of concentrated solvent waste streams (including tar still bottoms). This regulation does not prohibit inclusion of such wastes in the raw waste loads in fact, nor does it mandate any specific practice, but rather describes the rationale for determining the permit conditions. These limits may be achieved by any one of several or a combination thereof of programs and practices.

(6) The pH shall be within the range of 6.0 to 9.0 standard units.

(7) The allowable effluent discharge limitation for the daily average mass of TSS in any calendar month shall be 1.7 times the BOD5 limitation determined in paragraph (a)(2) of this section.

(8) For those plants using or generating cyanide in the manufacturing process, the allowable effluent discharge for cyanide is shown below.

(i)

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(ii) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution to meet the above effluent limitations may not be practiced.

§ 439.33 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

§ 439.34 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart where cyanide is used or generated in the manufacturing process must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(1)

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
COD	[1]	[1]

[1] Reserved.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound

(b) Dilution in order to meet the above effluent limitations may not be practiced.

§ 439.35 New source performance standards (NSPS).

(a) The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart.

(1)

Pollutant or pollutant property	NSPS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
BOD[5]	(1)	(1)
TSS	(1)	(1)
COD	(1)	(1)
pH	(2)	(2)

[1] Reserved.
[2] Within the range of 6.0 to 9.0 at all times.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide standard is multiplied by 0.18, the maximum 30 day average cyanide standard is multiplied by 0.35, and both standards are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide standard must be multiplied by 0.18, the maximum 30 day average cyanide standard must be multiplied by 0.35, and both standards must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Only facilities where cyanide is used or generated in the manufacturing process are subject to cyanide standards. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.36 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by October 27, 1986, where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for existing sources (PSES).

(1)

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total Cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.37 Pretreatment standards for new sources (PSNS).

(a) Except as provided in 40 CFR 403.7, any new source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for new sources (PSNS).

(1)

Pollutant or pollutant property	PSNS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total Cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

Subpart D—Mixing/Compounding and Formulation Subcategory

§ 439.40 Applicability; description of the mixing/compounding and formulation subcategory.

The provisions of this subpart are applicable to discharges resulting from mixing/compounding and formulaton operations of pharmaceutical products.

§ 439.41 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in 40 CFR Part 401 and 439.01 of this chapter shall apply to this subpart.

(b) The term "product" shall mean products from plants which blend, mix, compound, and formulate pharmaceutical ingredients. Pharmaceutical preparations for human and veterinary use such as ampules, tablets, capsules, vials, ointments, medicinal powders, solutions, and suspensions are included.

§ 439.42 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this paragraph, which may be discharged by a mixing/compounding and formulation plant from a point source subject to the provisions of this paragraph after application of the best practicable control technology currently available:

(1) The allowable discharge for the pollutant parameters BOD5 and COD shall be expressed in mass per unit time and shall represent the specified wastewater treatment efficiency in terms of a residual discharge associated with an influent to the wastewater treatment plant corresponding to the maximum production period for a given pharmaceutical plant as defined in paragraph (a)(4) of this section.

(2) The allowable effluent discharge limitation for the daily average mass of BOD5 in any calendar month shall specifically reflect not less than 90 percent reduction in the long term daily average raw waste content of BOD5 multiplied by a variability factor 3.0. However, a plant shall not be required to attain a maximum 30 day average BOD5 effluent limitation of less than the equivalent of 45 mg/l.

(3) The allowable effluent discharge limitation for the daily average mass of COD in any calendar month shall specifically reflect not less than 74 percent reduction in the long term daily average raw waste content of COD multiplied by a variability factor of 2.2. However, a plant shall not be required to attain a maximum 30 day average COD effluent limitation of less than the equivalent of 220 mg/l.

(4) The long term daily average raw waste load for the pollutant parameters BOD5 and COD is defined as the average daily mass of each pollutant discharged in the influent to the wastewater treatment system over a 12 consecutive month period within the most recent 36 months, which shall include the greatest production effort.

(5) To assure equity in regulating discharges from the point sources covered by this subpart of the point source category, calculation of raw waste loads of BOD5 and COD for the purpose of determining NPDES per limitations (i.e., the base numbers to which the percent reductions are applied) shall exclude any waste load associated with solvents in those raw waste loads except that residual amounts of solvents remaining after the practice of recovery and/or separate disposal or reuse may be included in the calculation of the raw waste loads. These practices of removal, disposal, or reuse include recovery of solvents from waste streams and incineration of concentrated solvent waste streams (including tar still bottoms). This regulation does not prohibit inclusion of such wastes in the raw waste loads in fact, nor does it mandate any specific practice, but rather describes the rationale for determining the permit conditions. These limits may be achieved by any one of several or a combination thereof of programs and practices.

(6) The allowable effluent discharge limitation for the daily average mass of TSS in any calendar month shall be 1.7 times the BOD5 limitation determined in (2) above.

(7) The pH shall be within the range of 6.0–9.0 standard units.

(8) For those plants using or generating cyanide in the manufacturing process, the allowable effluent discharge for cyanide is shown below.

(i) See table below:

Pollutant or pollutant property	BPT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(ii) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution to meet the above effluent limitations may not be practiced.

§ 439.43 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

§ 439.44 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart where cyanide is used or generated in the manufacturing process must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(1)

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
COD	(1)	(1)

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide limitation is multiplied by 0.18, the maximum 30 day average cyanide limitation is multiplied by 0.35, and both limitations are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a

cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide limitation must be multiplied by 0.18, the maximum 30 day average cyanide limitation must be multiplied by 0.35, and both limitations must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above effluent limitations may not be practiced.

§ 439.45 New source performance standards (NSPS).

(a) The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart.

(1)

Pollutant or pollutant property	NSPS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4
BOD5	(1)	(1)
TSS	(1)	(1)
COD	(1)	(1)
pH	(2)	(2)

[1] Reserved.
[2] Within the range of 6.0 to 9.0 at all times.

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit and the effluent from the cyanide destruction unit is discharged to a biological treatment system, self-monitoring must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the daily maximum cyanide standard is multiplied by 0.18, the maximum 30 day average cyanide standard is multiplied by 0.35, and both standards are adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated in a cyanide destruction unit or if the effluent from the cyanide destruction unit is not discharged to a biological treatment system, self-monitoring must be conducted at the final effluent discharge point and the daily maximum cyanide standard must be multiplied by 0.18, the maximum 30 day average cyanide standard must be multiplied by 0.35, and both standards must be adjusted based on the dilution ratio of the cyanide-contaminated waste stream flow to the total process wastewater discharge flow. Only facilities where cyanide is used or generated in the manufacturing process are subject to cyanide standards. Permittees not using or generating cyanide must certify to the permit-issuing authority that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.46 Pretreatment standards for existing sources (PSES).

(a) Except as provided in 40 CFR 403.7 and 403.13, any existing source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and by October 27, 1986, where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for existing sources (PSES).

(1)

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

§ 439.47 Pretreatment standards for new sources (PSNS).

(a) Except as provided in 40 CFR 403.7 any new source subject to this subpart that introduces pollutants into a publicly owned treatment works must comply with 40 CFR Part 403 and where cyanide is used or generated in the manufacturing process, must achieve the following pretreatment standards for new sources (PSNS).

(1)

Pollutant or pollutant property	PSNS	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter (mg/l)	
Total cyanide	33.5	9.4

(2) If all cyanide-containing waste streams are diverted to a cyanide destruction unit, self-monitoring for cyanide must be conducted after cyanide treatment and before dilution with other streams. Alternatively, self-monitoring may be conducted at the final effluent discharge point, if the cyanide standard is adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. However, if all cyanide-containing waste streams are not treated, self-monitoring must be conducted at the final effluent discharge point and the cyanide standard must be adjusted based on the dilution ratio of contaminated waste stream flow to the total process wastewater discharge flow. Indirect dischargers not using or generating cyanide must certify to the publicly owned treatment works that they are not using or generating this compound.

(b) Dilution in order to meet the above standards may not be practiced.

Subpart E—Research Subcategory

§ 439.50 Applicability; description of the research subcategory.

The provisions of this subpart are applicable to discharges resulting from pharmaceutical research.

§ 439.51 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations, and methods of analysis set forth in in 40 CFR Part 401 and 439.01 shall apply to this subpart.

(b) The term "product" shall mean products or services resulting from pharmaceutical research, which includes

microbiological, biological, and chemical operations.

§ 439.52 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this paragraph, which may be discharged by a pharmaceutical research operation from a point source subject to the provisions of this paragraph after application of the best practicable control technology currently available:

(1) The allowable discharge for the pollutant parameters BOD*5* and COD shall be expressed in mass per unit time and shall represent the specified wastewater treatment efficiency in terms of a residual discharge associated with an influent to the wastewater treatment plant corresponding to the maximum production period for a given pharmaceutical plant as defined in paragraph (a)(4) of this section.

(2) The allowable effluent discharge limitation for the daily average mass of BOD*5* in any calendar month shall specifically reflect not less than 90 percent reduction in the long term daily average raw waste content of BOD*5* multiplied by a variability factor of 3.0. However, a plant shall not be required to attain a maximum 30 day average BOD*5* effluent limitation of less than the equivalent of 45 mg/l.

(3) The allowable effluent discharge limitation for the daily average mass of COD in any calendar month shall specifically reflect not less than 74 percent reduction in the long term daily average raw waste content of COD multiplied by a variability factor of 2.2. However, a plant shall not be required to attain a maximum 30 day average COD effluent limitation of less than the equivalent of 220 mg/l.

(4) The long term daily average raw waste load for the pollutant parameters BOD*5* and COD is defined as the average daily mass of each pollutant influent to the wastewater treatment system over a 12 consecutive month period within the most recent 36 months, which shall include the greatest production effort.

(5) To assure equity in regulation discharges from the point sources covered by this subpart of the point source category, calculation of raw waste loads of BOD*5* and COD for the purpose of determining NPDES permit limitations (i.e., the base numbers to which the percent reductions are applied) shall exclude any waste load associated with solvents in those raw waste loads, except that residual amounts of solvents remaining after the practice of recovery and/or separate disposal or reuse may be included in the calculation of the raw waste loads. These practices of removal, disposal, or reuse include recovery of solvents from waste streams and incineration of concentrated solvent waste streams (including tar still bottoms). This regulation does not prohibit inclusion of such wastes in the raw waste loads in fact, nor does it mandate any specific practice, but rather describes the rationale for determining the permit conditions. These limits may be achieved by any one of several or a combination thereof of programs and practices.

(6) The allowable effluent discharge limitation for the daily average mass of TSS in any calendar month shall be 1.7 times the BOD*5* limitation determined in paragraph (a)(2) of this section.

(7) The pH shall be within the range of 6.0–9.0 standard units.

(b) Dilution to meet the above effluent limitations may not be practiced.

§ 439.53 Effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

§ 439.54 Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT). [Reserved]

§ 439.55 New source performance standards (NSPS). [Reserved]

§ 439.56 Pretreatment standards for existing sources (PSES). [Reserved]

§ 439.57 Pretreatment standards for new sources (PSNS). [Reserved]

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