to the FMP. These actions impose no information collection requirements under the Paperwork Reduction Act.

Section 661.23 of the ocean salmon regulations states that the Secretary will publish a notice establishing management measures each year and will invite public comments prior to its effective date. If the Secretary determines, for good cause, that a notice must be issued without affording a prior opportunity for public comment, comments on the notice will be received by the Secretary for a period of 15 days after the filing of the notice with the **Federal Register.**

Because of the depressed status of some salmon stocks, and the need to reduce harvest in some areas to prevent overfishing and achieve the FMP's spawning escapement goals, the Secretary has determined that time does not permit a comment period prior to the date the management measures must be in effect. Comments will be accepted for 15 days after the effective date of this notice.

The public has had opportunity to comment on these management measures during the process of their development. The public participated in the March and April Council, STT, and Salmon Advisory Subpanel meetings, and in public hearings held in Washington, Oregon, and California in late March, which generated the management actions recommended by the Council and approved by the Secretary. Written public comments were invited by the Council between the March and April Council meetings.

Authority: 16 U.S.C. 1801 *et seq.*

List of Subjects in 50 CFR Part 661

Fisheries, Fishing, Indians.

Dated: May 1, 1989.

Andrew J. Kemmerer,

Acting Executive Director, National Fisheries Service.

[FR Doc. 89–10793 Filed 5–2–89; 11:17 am]

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Federal Register

Monday
May 8, 1989

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 1 et al.

Federal Acquisition Regulation (FAR); Restrictions on Procurement of Products and Services From Toshiba/Kongsberg; Debarment and Suspension; and Service Contract Act; Final Rule and Interim Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 5, 9, 22, 25, 32, 33, 36, 44, and 52

[Federal Acquisition Circular 84-46]

RIN 9000-AB83; 9000-AC83

Federal Acquisition Regulation (FAR); Restrictions on Procurement of Products and Services From Toshiba/Kongsberg; Debarment and Suspension; and Service Contract Act

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule; and interim rule with request for comment.

SUMMARY: Federal Acquisition Circular (FAC) 84-46 amends the Federal Acquisition Regulation (FAR) to add coverage pertaining to sanctions (Toshiba/Kongsberg) for violations of export controls; to implement changes to the debarment and suspension procedures applicable to Government contractors; and to implement the statutes and labor standards provisions applicable to contracts subject to the Service Contract Act of 1965, as amended.

DATES: *Effective Date:* June 7, 1989 except Subpart 25.10 which is effective May 8, 1989.

Comment Date: Comments on the interim rule, Subpart 25.10, should be submitted to the FAR Secretariat at the address shown below on or before July 7, 1989, to be considered in the formulation of a final rule. Please cite FAC 84-46, Item I, in all correspondence on this subject.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755. Please cite FAC 84-46.

SUPPLEMENTARY INFORMATION:

A. Determination To Issue an Interim Regulation

FAC 84-46, Item I. A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration to issue the regulation in FAC 84-46, Item I, as an interim regulation. This action is necessary in order to implement section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100-418), enacted August 23, 1988, and Executive Order 12661, dated December 27, 1988. However, pursuant to Pub. L. 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating a final rule.

B. Background

FAC 84-46, Item I. The Federal Acquisition Regulation (FAR) has been revised by adding new Subpart 25.10, Sanctions for Violations of Export Controls, and related coverage in Part 52, Solicitation Provisions and Contract Clauses. This revision is necessary in order to implement the procurement and contracting provisions of section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100-418), and Executive Order 12661, dated December 27, 1988.

FAC 84-46, Item II. This final rule is issued by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration to make revisions to the debarment and suspension procedures in the FAR. Among other things, the revisions require a certification of eligibility prior to contract award, render contractors ineligible for award Governmentwide upon issuance of a notice of proposed debarment, and establish the policy that contractors must make compelling reason determinations prior to awarding subcontracts to contractors debarred, suspended, or proposed for debarment.

C. Regulatory Flexibility Act

FAC 84-46, Item I. On December 27, 1988, the President signed Executive Order 12661 imposing the sanctions referred to in section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100-418). This interim rule implements these provisions in the Federal Acquisition Regulation. This interim rule may have a significant economic impact on a substantial number of small entities. The actual impact is not known. Current guidance requires that a regulatory flexibility analysis be prepared if the interim rule will have a significant impact on a substantial number of small entities. Accordingly, an Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act of 1980, Pub. L. 96-354 is on file in the FAR Secretariat and will be submitted to the Chief Counsel for Advocacy, Small Business Administration. Publication as an interim rule will afford the public the opportunity to comment on its economic impact on small entities, and such comments will be considered in the formulation of the final regulatory flexibility analysis and the final rule. Comments must be submitted separately and cite 89-610 pertaining to Item I of FAC 84-46.

FAC 84-46, Item II. The proposed rule published in the **Federal Register** on July 31, 1987 (52 FR 28642) contained an Initial Regulatory Flexibility Analysis. A Final Regulatory Flexibility Analysis has been prepared and is on file in the FAR Secretariat. The Final Analysis will be submitted to the Chief Counsel for Advocacy, Small Business Administration.

FAC 84-46, Item III. A full, final regulatory impact and regulatory flexibility analysis was prepared by the Department of Labor (DOL) and a summary was published in the **Federal Register** on October 27, 1983 (48 FR 49758) when DOL published its regulation. The revision to FAR 22.10 is an implementation of the policy and the regulation published by DOL and other agencies. DOD, GSA, and NASA certify that this regulation will not have a significant economic impact on a substantial number of small entities because it merely codifies in the FAR (48 CFR), for the convenience of contractors and Government contracting personnel, regulations issued by DOL and codified in 29 CFR for which comments were requested and considered.

D. Paperwork Reduction Act

FAC 84-46, Item I. The Paperwork Reduction Act (Pub. L. 96-511) does not apply because this interim rule does not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

FAC 84-46, Item II. The information collection requirements contained in this FAR revision were approved by the Office of Management and Budget (OMB) and have been assigned OMB Control Number 9000-0094. Due to the reduction in the paperwork burdens resulting from the change in the requirements with, respect to subcontracting, a revised Paperwork Reduction Act Analysis has been submitted to the Office of Management

and Budget for expedited review pursuant to 5 CFR 1320.18. The Annual Reporting Burden is estimated as follows: Prime Contracts—respondents, 414,767; responses per respondent, 3; total annual responses, 1,244,301; hours per response, 5 mins.; and total response burden hours, 103,692. Subcontracts—respondents, 500; responses per respondent, 1; total annual responses, 500; hours per response, .50; and total response burden hours, 250. Public comments concerning this request should be submitted to OMB, Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503 by May 30, 1989.

FAC 84–46, Item III. The information collection requirements contained in this regulation were approved by the Office of Management and Budget (OMB) and have been assigned OMB Control Numbers 1215–0017 and 1215–0150.

E. Public Comments

FAC 84–46, Item II. On July 31, 1987, a proposed rule was published in the **Federal Register** (52 FR 28642). Thirty-nine responses were received. Thirteen of these respondents either concurred or recommended no change. Four other respondents indicated no comment. The comments of the remaining respondents were considered by the Councils in developing the final rule. In addition, the Councils considered the recent initiatives regarding self-governance in developing the final rule. As a result of the public comments, the rule now limits certification to prime contractors and requires prime contractors to make compelling reason determinations and so notify the contracting officer prior to entering into a subcontract with a contractor that has been debarred, suspended, or proposed for debarment. In addition, administrative changes to Subparts 9.1 and 9.4 have been made to reflect a change in the name of what was formerly designated as the Consolidated List, and to provide the public with information for obtaining a copy of the list.

FAC 84–46, Item III. On February 26, 1988, a proposed rule and notice of availability was published in the **Federal Register** (53 FR 5928). The comments that were received were considered by the Councils in the development of this final rule.

List of Subjects in 48 CFR Parts 1, 5, 9, 22, 25, 32, 33, 36, 44, and 52

Government procurement.

Dated: May 2, 1989.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84–46 is effective June 7, 1989, except Subpart 25.10 (Item I) which is effective May 8, 1989.

Eleanor Spector,

Assistant Secretary of Defense for Procurement, DOD.

Richard H. Hopf, III,

Associate Administrator for Acquisition Policy, GSA.

S.J. Evans,

Associate Administrator for Procurement, NASA.

Federal Acquisition Circular (FAC) 84–46 amends the Federal Acquisition Regulation (FAR) as specified below:

Item I—Restrictions on Procurement of Products and Services From Toshiba/Kongsberg

FAR Subpart 25.10, Sanctions for Violations of Export Controls, and a related provision and clause are added pursuant to section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100–418), enacted August 23, 1988, and Executive Order 12661, dated December 27, 1988.

Item II—Debarment and Suspension Procedures

FAR Parts 1 and 9 are revised and FAR 44.303(c), the provision at 52.209–5, Certification regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, and the clause at 52.209–6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, are added.

Item III—Service Contract Act and Price Adjustment Clause

FAR 1.105 and 5.207 are revised, and Subpart 22.10, and eight clauses at 52.222–40 through 52.222–44 and 52.222–47 through 52.222–49, are added to provide detailed instructions to contracting officers implementing the statutes and Department of Labor (DOL) regulations which prescribe labor standards requirements for contracts to furnish services in the United States through the use of service employees.

Item IV—Editorial Corrections

FAR 1.105 is amended to add OMB Control Number 9000–0100 applicable to Subpart 19.10 and corrects FAC 84–42; section 33.101 is amended to correct FAC 84–40; section title 32.909, and 36.102(b) and (c) is amended to correct FAC 84–45.

Therefore, 48 CFR Parts 1, 5, 9, 22, 25, 32, 33, 36, 44, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 5, 9, 22, 25, 32, 33, 36, 44, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.105 is amended by adding, in numerical order, FAR segments and corresponding OMB Control Numbers to read as follows:

1.105 OMB Approval under the Paperwork Reduction Act.

FAR segment	OMB Control Number
* * * * *	
19.10	9000–0100
* * * * *	
52.209–5	9000–0094
52.209–6	9000–0094
* * * * *	
52.222–41	1215–0017 and 1215–0150
* * * * *	

PART 5—PUBLICIZING CONTRACT ACTIONS

3. Section 5.207 is amended by adding paragraph (f)(4) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(f) * * *

(4) "*Place of performance unknown.* This contract is subject to the Service Contract Act and the place of performance is unknown. Wage determinations have been requested for (insert localities). The contracting officer will request wage determinations for additional localities if asked to do so in writing by (insert time and date)."

PART 9—CONTRACTOR QUALIFICATIONS

4. Subsection 9.105–1 is amended by revising paragraph (c)(1) as follows:

9.105–1 Obtaining information.

(c) * * *

(1) The list entitled Parties Excluded from Procurement Programs (list of contractors debarred, suspended, proposed for debarment, and declared

ineligible) maintained in accordance with Subpart 9.4.

* * * * *

5. Section 9.400 is amended by revising paragraph (a)(2) to read as follows:

9.400 Scope of subpart.

(a) * * *

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 9.403); and

* * * * *

6. Section 9.401 is revised to read as follows:

9.401 Applicability.

This subpart does not apply to the exclusion of participants or principals from Federal financial or nonfinancial assistance programs and benefits pursuant to Executive Order 12549. Such exclusions are contained within the list entitled Parties Excluded from Nonprocurement Programs of the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

7. Section 9.402 is amended by revising paragraph (c) and by adding paragraph (d) to read as follows:

9.402 Policy.

* * * * *

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

8. Section 9.403 is amended by adding alphabetically the definitions "Civil judgment" and "Parties Excluded from Procurement Programs"; by removing the definition "Consolidated List of Debarred, Suspended, and Ineligible Contractors"; and by revising the definitions "Affiliates" and "Contractor" to read as follows:

9.403 Definitions.

* * * * *

"Affiliates." Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contract or that was debarred, suspended, or proposed for debarment.

* * * * *

"Civil judgment" means a judgment or finding of a civil offense by any court of competent jurisdiction.

"Contractor," as used in this subpart, means any individual or other legal entity that (a) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract or (b) conducts business with the government as an agent or representative of another contractor.

* * * * *

"Parties Excluded from Procurement Programs", formerly referred to as the Consolidated List of Debarred, Suspended, and Ineligible Contractors means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred, suspended, or proposed for debarment by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority other than Executive Order 12549. The list of Parties Excluded from Procurement Programs is contained within the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

* * * * *

9. Section 9.404 is amended by revising the section title, paragraphs (a), (b), (c)(4) and (c)(5), and by adding paragraph (d) to read as follows:

9.404 Parties excluded from procurement programs.

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

(2) Periodically revise and distribute the list and issue supplements, if necessary, to all agencies and the General Accounting Office; and

(3) Include in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The list entitled Parties Excluded from Procurement Programs shall indicate—

(1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The name of the agency or other authority taking the action;

(3) The cause for the action (see 9.406–2 and 9.407–2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) The effect of the action;

(5) The termination date for each listing;

(6) The DUNS No.; and

(7) The name and telephone number of the point of contact for the action.

(c) * * *

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(5) Establish procedures to provide for the effective use of the Parties Excluded from Procurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the Parties Excluded from Procurement Programs, except as otherwise provided in this subpart; and

* * * * *

(d) The public may obtain a subscription to the list from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Order and Inquiry Desk at (202) 783–3238.

10. Section 9.405 is amended by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the acquiring agency's head or designee determines that there is a compelling reason for such action (see 9.405–2, 9.406–1(c), and 9.407–1(d)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the

Government as agents or representatives of other contractors.

(b) Contractors included on the Parties Excluded from Procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. * * *

11. Section 9.405–1 is revised to read as follows:

9.405–1 Continuation of current contracts.

(a) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension.

12. Section 9.405–2 is revised to read as follows:

9.405–2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject to Government consent (see Subpart 44.2), contracting officers shall not consent to subcontracts with such contractors unless the acquiring agency's head or a designee states in writing the compelling reasons for this approval action. (See 9.405(b) concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors shall not enter into any subcontract equal to or in excess of $25,000 with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion on the list of Parties Excluded from Procurement Programs (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209–6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor being on the list of Parties Excluded from Procurement Programs;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement Programs; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(c) The contractor's compliance with the requirements of 52.209–6 will be reviewed during Contractor Purchasing System Reviews (see Subpart 44.3).

13. Section 9.406–1 is amended by revising paragraph (c) and by adding paragraph (d) to read as follows:

9.406–1 General.

* * * * *

(c) A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(d)(1) When the debarring official has authority to debar contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to the Federal Property Management Regulations (FPMR) 101–45.6, that official shall consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the debarment notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

14. Section 9.406–2 is amended by revising the introductory text of paragraph (a); by revising paragraph (b); and by redesignating existing paragraph (c) as (b)(2) and paragraph (d) as (c) to read as follows:

9.406–2 Causes for debarment.

(a) The debarring official may debar a contractor for a conviction of or civil judgment for—

* * * * *

(b) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(1) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(i) Willful failure to perform in accordance with the terms of one or more contracts; or

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

* * * * *

15. Section 9.406–3 is amended by revising paragraph (b)(2); by revising the introductory text of paragraph (c); and by revising paragraphs (c)(6) and (c)(7) to read as follows:

9.406–3 Procedures.

* * * * *

(b) * * *

(2) In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

* * * * *

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested—

* * * * *

(6) Of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment.

* * * * *

16. Section 9.406–4 is amended by revising the third sentence in paragraph (a) and by revising paragraph (c)(2) to read as follows:

9.406–4 Period of debarment.

(a) * * * The period of the proposed debarment, or of any prior suspension, shall be considered in determining the debarment period.

* * * * *

(c) * * *

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

* * * * *

17. Section 9.407–1 is amended by adding paragraph (e) to read as follows:

9.407-1 General.

* * * * *

(e)(1) When the suspending official has authority to suspend contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to FPMR 101-45.6, that official shall consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the suspension notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

18. Section 9.408 is added to read as follows:

9.408 Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.

(a) When an offeror, in compliance with the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, indicates an indictment, charge, civil judgment, conviction, suspension, debarment, proposed debarment, ineligibility, or default of a contract, the contracting officer shall—

(1) Request such additional information from the offeror as the contracting officer deems necessary in order to make a determination of the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment.

(b) Offerors who do not furnish the certification or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible.

19. Section 9.409 is added to read as follows:

9.409 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, in solicitations where the contract value is expected to exceed $25,000.

(b) The contracting officer shall insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in solicitations and contracts where the contract value exceeds $25,000.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

20. Subpart 22.10, consisting of sections 22.1000 through 22.1026, is added to read as follows:

Subpart 22.10—Service Contract Act of 1965, as Amended

Sec.

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

Subpart 22.10—Service Contract Act of 1965, as Amended

22.1000 Scope of subpart.

This subpart prescribes policies and procedures implementing the provisions of the Service Contract Act of 1965, as amended (41 U.S.C. 351, et seq.), the applicable provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.), and related Secretary of Labor regulations and instructions (29 CFR Parts 4, 6, 8, and 1925).

22.1001 Definitions.

"Act" or "Service Contract Act," as used in this subpart, means the Service Contract Act of 1965, as amended.

"Agency labor advisor" means an individual responsible for advising contracting agency officials on Federal contract labor matters.

"Contractor," as used in this subpart, includes a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

"Multiple year contracts," as used in this subpart, means contracts having a term of more than 1 year regardless of fiscal year funding. The term includes multi-year contracts with a term of more than 1 year (see 17.101).

"Notice," as used in this subpart, means Standard Form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," and SF 98a "Attachment A." The term "Notice" is always capitalized in this subpart when it means Standard Forms 98 and 98a.

"Service contract," as used in this subpart, means any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under section 7 of the Act (41 U.S.C. 356; see 22.1003–3 and 22.1003–4), or any subcontract at any tier thereunder. See 22.1003–5 and 29 CFR 4.130 for a partial list of services covered by the Act.

"Service employee" means any person engaged in the performance of a service 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. 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.

"United States," as used in this subpart, includes 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 (43 U.S.C. 1331, et seq.), American Samoa, Guam, Northern Mariana Islands, Wake Island, and Johnston Island but does not include any other territory under U.S. jurisdiction or any U.S. base or possession within a foreign country.

"Wage and Hour Division" means the unit in the Employment Standards Administration of the Department of Labor to which is assigned functions of the Secretary of Labor under the Act.

"Wage determination" means a determination of minimum wages or fringe benefits made under sections 2(a) or 4(c) of the Act (41 U.S.C. 351(a) or 353(c)) applicable to the employment in a given locality of one or more classes of service employees.

22.1002 Statutory requirements.

22.1002–1 General.

Service contracts over $2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent Federal employee classifications and wage rates. Under 41 U.S.C. 353(d), service contracts may not exceed 5 years.

22.1002–2 Wage determinations based on prevailing rates.

Contractors performing on service contracts in excess of $2,500 to which no predecessor contractor's collective bargaining agreement applies shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act.

22.1002–3 Wage determinations based on collective bargaining agreements.

(a) Successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract. This requirement will not apply if the Secretary of Labor determines as a result of a hearing that the wages and fringe benefits are substantially at variance with those which prevail for services of a similar character in the locality or that they have not been reached as a result of arm's length negotiations.

(b) Paragraphs in this Subpart 22.10 which deal with this statutory requirement and the Department of Labor's implementing regulations are 22.1008–3, concerning applicability of this requirement and the forwarding of a collective bargaining agreement with a Notice (SF 98, 98a); 22.1010, concerning notification to contractors and bargaining representatives of procurement dates; 22.1012–3, explaining when a collective bargaining agreement will not apply due to late receipt by the contracting officer; and 22.1013 and 22.1021, explaining when the application of a collective bargaining agreement can be challenged due to a variance with prevailing rates or lack of arm's length bargaining.

22.1002–4 Application of the Fair Labor Standards Act minimum wage.

No contractor or subcontractor holding a service contract for any dollar amount shall pay any of its employees working on the contract less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206).

22.1003 Applicability.

22.1003–1 General.

This Subpart 22.10 applies to all Government contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted in 22.1003–3 and 22.1003–4 of this section, or any subcontract at any tier thereunder. This subpart does not apply to individual contract requirements for services in contracts not having as their principal purpose the furnishing of services. The nomenclature, type, or particular form of contract used by contracting agencies is not determinative of coverage.

22.1003–2 Geographical coverage of the Act.

The Act applies to service contracts performed in the United States (see 22.1001). The Act does not apply to contracts performed outside the United States.

22.1003–3 Statutory exemptions.

The Act does not apply to—

(a) Any contract for construction, alteration, or repair of public buildings or public works, including painting and decorating;

(b) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35–45);

(c) Any contract for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;

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

(e) Any contract for public utility services;

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

(g) Any contract for operating postal contract stations for the U.S. Postal Service.

22.1003–4 Administrative limitations, variations, tolerances, and exemptions.

(a) The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of the Act other than section 10 (41 U.S.C. 358). These will be made only in special circumstances where it

has been determined that the 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 the Act to protect prevailing labor standards (41 U.S.C. 353(b)). See 29 CFR 4.123 for a listing of administrative exemptions, tolerances, and variations. Requests for limitations, variances, tolerances, and exemptions from the Act shall be submitted in writing through contracting channels and the agency labor advisor to the Wage and Hour Administrator.

(b) In addition to the statutory exemptions cited in 22.1003–3 of this subsection, the Secretary of Labor has exempted the following types of contracts from all provisions of the Act:

(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 if it is not contemplated at the time the contract is made that the 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.

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

(4) Contracts as follows:

(i) Contracts principally for the maintenance, calibration, or repair of the following types of equipment are exempt, subject to the restrictions in subdivisions (b)(4)(ii), (b)(4)(iii), and (b)(4)(iv) of this subsection.

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

(B) Scientific equipment and medical apparatus or equipment if the application of micro-electronic 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;" and 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 subdivision (b)(4)(i)(A) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

(ii) The exemption set forth in this subparagraph (b)(4) of this subsection 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 (see 29 CFR 4.123(e)(1)(ii)(B)) for the maintenance, calibration, or repair of such commercial items.

(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 subdivision (b)(4)(ii) of this subsection. (See 22.1006(e).)

(iii)(A) Determinations of the applicability of this exemption shall be made in the first instance by the contracting officer before contract award. In determining 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.

(B) If any potential offerors would not qualify for the exemption, the contracting officer shall incorporate in the solicitation the Service Contract Act clause (see 22.1005 and 22.1006(a)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1007).

(iv) If the Department of Labor determines after contract award that any of the requirements for exemption in subparagraph (b)(4) of this subsection have 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.

22.1003–5 Some examples of contracts covered.

The following examples, while not definitive or exclusive, illustrate some of the types of services that have been found to be covered by the Act (see 29 CFR 4.130 for additional examples):

(a) Motor pool operation, parking, taxicab, and ambulance services.

(b) Packing, crating, and storage.

(c) Custodial, janitorial, housekeeping, and guard services.

(d) Food service and lodging.

(e) Laundry, dry-cleaning, linen-supply, and clothing alteration and repair services.

(f) Snow, trash, and garbage removal.

(g) Aerial spraying and aerial reconnaissance for fire detection.

(h) Some support services at installations, including grounds maintenance and landscaping.

(i) Certain specialized services requiring specific skills, such as drafting, illustrating, graphic arts, stenographic reporting, or mortuary services.

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

(k) Maintenance and repair of all types of equipment, for example, aircraft, engines, electrical motors, vehicles, and electronic, telecommunication, office and related business and construction equipment. (But see 22.1003–4(b)(4).)

(l) Operation, maintenance, or logistics support of a Federal facility.

(m) Data collection, processing and analysis services.

22.1003–6 Repair distinguished from remanufacturing of equipment.

(a) Contracts principally for remanufacturing of equipment which is so extensive as to be equivalent to manufacturing are subject to the Walsh-Healey Public Contracts Act, rather than to the Service Contract Act. Remanufacturing shall be deemed to be manufacturing when the criteria in either subparagraphs (a)(1) or (a)(2) of this subsection 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 component parts.

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

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

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

(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.

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

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

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

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

(ii) Outmoded parts are replaced.

(iii) The item or equipment is rebuilt or reassembled.

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

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

(b) Remanufacturing does not include the repair of damaged or broken equipment which does not require a complete teardown, overhaul, and rebuild as described in subparagraphs (a)(1) and (a)(2) of this subsection, 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 this type of work is subject to the Service Contract Act. Examples of such work include the following:

(1) 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.

(2) Repair of typewriters and other office equipment (but see 22.1003-4(b)(4)).

(3) Repair of appliances, radios, television sets, calculators, and other electronic equipment.

(4) Inspecting, testing, calibration, painting, packaging, lubrication, tune-up, or replacement of internal parts of equipment listed in subparagraphs (b)(1), (b)(2), and (b)(3) of this subsection.

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

22.1003-7 Questions concerning applicability of the Act.

If the contracting officer questions the applicability of the Act to an acquisition, the contracting officer shall request the advice of the agency labor advisor. Unresolved questions shall be submitted in a timely manner to the Administrator, Wage and Hour Division, for determination.

22.1004 Department of Labor responsibilities and regulations.

Under the Act, the Secretary of Labor is authorized and directed to enforce the provisions of the Act, make rules and regulations, issue orders, hold hearings, make decisions, and take other appropriate action. The Department of Labor has issued implementing regulations on such matters as—

(a) Service contract labor standards provisions and procedures (29 CFR Part 4, Subpart A);

(b) Wage determination procedures (29 CFR Part 4, Subpart B);

(c) Application of the Act (rulings and interpretations) (29 CFR Part 4, Subpart C);

(d) Compensation standards (29 CFR Part 4, Subpart D);

(e) Enforcement (29 CFR Part 4, Subpart E);

(f) Safe and sanitary working conditions (29 CFR Part 1925);

(g) Rules of practice for administrative proceedings enforcing service contract labor standards (29 CFR Part 6); and

(h) Practice before the Board of Service Contract Appeals (29 CFR Part 8).

22.1005 Clause for contracts of $2,500 or less.

The contracting officer shall insert the clause at 52.222-40, Service Contract Act of 1965, as amended—Contracts of $2,500 or Less, in solicitations and contracts if the contract is subject to the Act and is (a) for $2,500 or less or (b) for an indefinite dollar amount and the contracting officer knows in advance that the contract amount will not exceed $2,500.

22.1006 Clauses for contracts over $2,500.

(a) The contracting officer shall insert the clause at 52.222-41, Service Contract Act of 1965, as amended, in solicitations and contracts if the contract is subject to the Act and is (1) for over $2,500 or (2) for an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be $2,500 or less.

(b) The contracting officer shall insert the clause at 52.222-42, Statement of Equivalent Rates for Federal Hires, in solicitations and contracts if the contract amount is expected to be over $2,500 and the Act is applicable. (See 22.1016.)

(c)(1) The contracting officer shall insert the clause at 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts), or another clause which accomplishes the same purpose, in solicitations and contracts if the contract is expected to be a fixed-price service contract containing the clause at 52.222-41, Service Contract Act of 1965, as amended, and is a multiple year contract or is a contract with options to renew which exceeds the small purchase limitation. The clause may be used in contracts that do not exceed the small purchase limitation. The clause at 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts), applies to both contracts subject to area prevailing wage determinations and contracts subject to the incumbent contractor's collective bargaining agreement in effect during this contract's preceding contract period (see 22.1002-2 and 22.1002-3). Contracting officers shall ensure that contract prices or contract unit price labor rates are adjusted only to the extent that a contractor's increases or decreases in applicable wages and fringe benefits are made to comply with the requirements set forth in the clauses at 52.222-43 (subparagraphs (c) (1), (2) and (3)], or 52.222-44 (subparagraphs (b) (1) and (2)]. (For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The contractor actually paid $4.10. The new wage determination increases the minimum rate to $4.50. The contractor increases the rate actually paid to $4.75 per hour. The allowable price adjustment is $.40 per hour.)

(2) The contracting officer shall insert the clause at 52.222-44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, in solicitations and contracts if the contract is expected to be a fixed-price service contract containing the clause at 52.222-41, Service Contract Act of 1965, as amended, exceeds the small purchase limitation, and is not a multiple year contract or is not a contract with options to renew. The clause may be used in contracts that do not exceed the small purchase limitation. The clause at 52.222-44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, applies to both contracts subject to area prevailing wage determinations and contracts subject to contractor collective bargaining

agreements (see 22.1002-2 and 22.1002-3).

(3) The clauses prescribed in paragraph 22.1006(c)(1) cover situations in which revised minimum wage rates are applied to contracts by operation of law, or by revision of a wage determination in connection with (i) exercise of a contract option or (ii) extension of a multiple year contract into a new program year. If a clause prescribed in 16.203-4(d) is used, it must not conflict with, or duplicate payment under, the clauses prescribed in this paragraph 22.1006(c).

(d) The contracting officer shall insert the clause at 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits, if—

(1) The clause at 52.222-41 applies;

(2) The contract resulting from the solicitation succeeds a contract for substantially the same services to be performed in the same locality;

(3) The incumbent contractor has negotiated or is negotiating a collective bargaining agreement with some or all of its service employees; and

(4) All applicable Department of Labor wage determinations have been requested but not received.

(e)(1) The contracting officer shall insert the clause at 52.222-48, Exemption from Application of Service Contract Act Provisions, in any solicitation and resulting contract calling for the maintenance, calibration, and/or repair of ADP, scientific and medical, and office and business equipment if the contracting officer determines that the resultant contract may be exempt from Service Contract Act coverage as described at 22.1003-4(b)(4).

(2) If the successful offeror does not certify that the exemption applies, the contracting officer shall not insert the clause at 52.222-48 and instead shall insert in the contract (i) the applicable Service Contract Act clause(s) and (ii) the appropriate Department of Labor wage determination if the contract exceeds $2,500.

(f) The contracting officer shall insert the clause at 52.222-49, Service Contract Act—Place of Performance Unknown, if using the procedures prescribed in 22.1009-4.

22.1007 Requirement to submit Notice (SF 98/98a).

The contracting officer shall submit Standard Forms 98 and 98a (see 53.301-98 and 53.301-98a), "Notice of Intention to Make a Service Contract and Response to Notice" and "Attachment A" (both forms hereinafter referred to as "Notice"), together with any required supplemental information to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210, for the following service contracts:

(a) Each new solicitation and contract in excess of $2,500.

(b) Each contract modification which brings the contract above $2,500 and—

(1) Extends the existing contract pursuant to an option clause or otherwise; or

(2) Changes the scope of the contract whereby labor requirements are affected significantly.

(c) Each multiple year contract in excess of $2,500 upon—

(1) Annual anniversary date if the contract is subject to annual appropriations; or

(2) Biennial anniversary date if the contract is not subject to annual appropriations and its proposed term exceeds 2 years—unless otherwise advised by the Wage and Hour Division (see 22.1008-5).

22.1008 Procedures for preparing and submitting Notice (SF 98/98a).

22.1008-1 Preparation of Notice (SF 98/98a).

The contracting officer shall complete and submit the Notice in accordance with the instructions on the SF 98 and shall supplement it with information required under this section. Care should be taken to ensure that all required information is provided to avert return without action by the Department of Labor. The contracting officer shall retain a copy of the completed Notice and any required supplementary information until the signed and dated response to the Notice is received from the Department of Labor and placed in the contract file.

22.1008-2 Preparation of SF 98a.

(a) The SF 98a shall contain the following information concerning the service employees expected to be employed by the contractor and any known subcontractors in performing the contract:

(1) All classes of service employees to be utilized.

(i) If a wage determination is to be based on a collective bargaining agreement (CBA) (see 22.1002-3 and 22.1008-3), use the exact title shown in the CBA.

(ii) For other than subdivision (a)(1)(i) of this subsection—

(A) Use the exact title shown in the Wage and Hour Division's *Service Contract Act Directory of Occupations* (see paragraph (b) of this subsection).

(B) Provide an appropriate job title and job description if the Directory cannot be used.

(2) The estimated number of service employees in each class; and

(3) The wage rate that would be paid each class if employed by the agency and subject to the wage provisions of 5 U.S.C. 5341 or 5332 (see 22.1016).

(b)(1) The Wage and Hour Division's *Service Contract Act Directory of Occupations* (Directory) contains standard job titles and definitions (descriptions) for many commonly utilized service employee occupations. Contracting officers shall use this Directory to the maximum extent possible in listing service employee classes on the SF 98a. This usage will enhance the timely issuance of comprehensive wage determinations.

(2) If the job title contained in the Directory differs from that contained in the statement of work but the job definition (description) in the Directory and the statement of work match sufficiently, the contracting officer shall use the Directory job title.

(3) The latest edition of the Directory is available for sale by the Superintendent of Documents and may be ordered by calling (202) 783-3238 or writing to Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Contracting agencies, in accordance with agency procedures, are responsible for notifying their own personnel of a new edition of the Directory.

22.1008-3 Section 4(c) successorship with incumbent contractor collective bargaining agreement.

(a) Early in the acquisition cycle, the contracting officer shall determine whether section 4(c) of the Act affects the new acquisition. The contracting officer shall determine whether there is a predecessor contract and, if so, whether the incumbent prime contractor or its subcontractors and any of their employees have a collective bargaining agreement.

(b) Section 4(c) of the Act provides that a successor contractor must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) to service employees at least equal to those agreed upon by a predecessor contractor under the following conditions:

(1) The services to be furnished under the proposed contract will be substantially the same as services being furnished by an incumbent contractor whose contract the proposed contract will succeed.

(2) The services will be performed in the same locality.

(3) The incumbent prime contractor or subcontractor is furnishing such services

through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements.

(c) The application of section 4(c) of the Act is subject to the following limitations:

(1) Section 4(c) of the Act will not apply if the incumbent contractor enters into a collective bargaining agreement for the first time and the agreement does not become effective until after the expiration of the incumbent's contract.

(2) If the incumbent contractor enters into a new or revised collective bargaining agreement during the period of the incumbent's performance on the current contract, the terms of the new or revised agreement shall not be effective for the purposes of section 4(c) of the Act under the following conditions:

(i)(A) In sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement less than 10 days before bid opening and finds that there is not reasonable time still available to notify bidders (see 22.1012–3(a)); or

(B) For contractual actions other than sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement after award, provided that the start of performance is within 30 days of award (see 22.1012–3(b)); and

(ii) The contracting officer has given both the incumbent contractor and its employees' collective bargaining agent timely written notification of the applicable acquisition dates (see 22.1010).

(d) If section 4(c) of the Act applies, the contracting officer shall obtain a copy of any collective bargaining agreement between an incumbent contractor or subcontractor and its employees. Obtaining a copy of an incumbent contractor's collective bargaining agreement may involve coordination with the administrative contracting officer responsible for administering the predecessor contract. (Paragraph (m) of the clause at 52.222–41, Service Contract Act of 1965, as amended, requires the incumbent prime contractor to furnish the contracting officer a copy of each collective bargaining agreement.) The contracting officer shall submit a copy of each collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under each agreement with the Notice.

(e) Section 4(c) of the Act will not apply if the Secretary of Labor determines after a hearing that the wages and fringe benefits in the predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a similar character in the locality or are not the result of arm's length bargaining (see 22.1013 and 22.1021).

(f) If the services are being furnished at more than one location and the collectively bargained wage rates and fringe benefits are different at different locations or do not apply to one or more locations, the contracting officer shall identify the locations to which the agreements apply.

(g) If the collective bargaining agreement does not apply to all service employees under the contract, the contracting officer shall separately list on the SF 98a the service employee classifications (1) subject to the collective bargaining agreement and (2) not subject to any collective bargaining agreement.

22.1008–4 Procedures when place of performance is unknown. See 22.1009.

22.1008–5 Multiple-year contracts.

If the proposed contract is multiple year and is not subject to annual appropriations, the contracting officer shall furnish with the Notice a statement in writing describing the type of funding and giving the length of the performance period. Unless otherwise advised by the wage and hour division that a Notice must be filed on the annual anniversary date, the contracting officer shall submit a new Notice on each biannual anniversary date of the multiple year contract if its term is for a period in excess of 2 years.

22.1008–6 Contract modifications (options, extensions, changes in scope) and anniversary dates.

If the purpose of the Notice is to obtain a wage determination for an exercise of an option, an extension to the contract term, a change in scope (see 22.1007(b)(2)), or the anniversary date of a multiple year contract, the contracting officer shall fill in Box 2 of the SF 98 as follows:

(a) In the "Estimated solicitation date" subbox, indicate, as appropriate: "Mod-Exercise of Option"; "Mod-Extension"; "Mod-Change in Scope"; "Annual Anniversary"; or "Biennial Anniversary"; and

(b) In the "month/day/year" subbox, indicate the date the wage determination is required.

22.1008–7 Required time of submission of Notice.

(a) If the contract action is for a recurring or known requirement, the contracting officer shall submit the Notice not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) before the earlier of (1) issuance of any invitation for bids, (2) issuance of any request for proposals, (3) commencement of negotiations, (4) issuance of modification for exercise of option, contract extension, or change in scope, (5) annual anniversary date of a contract for more than 1 year subject to annual appropriations, or (6) each biennial anniversary date of a contract for more than 2 years not subject to annual appropriations unless otherwise advised by the Wage and Hour Division (see 22.1008–5).

(b) If the contract action is for a nonrecurring or unknown requirement for which the advance planning described in paragraph (a) of this subsection is not feasible, the contracting officer shall submit the Notice as soon as possible, but not later than 30 days before the contracting actions in paragraph (a) of this subsection. The contracting officer should indicate on the Notice that the requirement is nonrecurring or unknown and advance planning was not feasible.

(c) If exceptional circumstances prevent timely submission, as required by paragraphs (a) and (b) of this subsection, the contracting officer shall submit the Notice and the required supplemental information with a written statement of the reason for delay as soon as practicable.

(d) In an emergency situation requiring an immediate wage determination response, the contracting officer shall, in accordance with contracting agency procedures, contact the Wage and Hour Division by telephone for guidance before submitting the Notice.

22.1009 Place of performance unknown.

22.1009–1 General.

If the place of performance is unknown, the contracting officer may use the procedures in this section. The contracting officer should first attempt to identify the specific places or geographical areas where the services might be performed (see 22.1009–2) and then may follow the procedures either in 22.1009–3 or in 22.1009–4.

22.1009–2 Attempt to identify possible places of performance.

The contracting officer should attempt to identify the specific places or geographical areas where the services might be performed. The following may indicate possible places of performance:

(a) Locations of previous contractors and their competitors.

(b) The solicitation mailing list.

(c) Responses to a presolicitation notice (see 5.204).

22.1009-3 All possible places of performance identified.

(a) If the contracting officer can identify all the possible places or areas of performance (even though the actual place of performance will not be known until the successful offeror is chosen), the contracting officer, as required in 22.1008, shall submit the Notice to the Wage and Hour Division. If the number of places of performance exceeds the space available on the Notice, the contracting officer shall provide a listing by state-county-city/town in an attachment to the Notice.

(b) The Wage and Hour Division may issue a wage determination for each different geographical area of performance identified by the contracting officer, or in unusual situations it may issue a wage determination for one or more composite areas of performance. If there is a substantial number of places or areas of performance indicating the need for a wage determination for one or more composite areas of performance, the contracting officer should, before submitting the Notice, contact the Wage and Hour Division concerning the issuance of such a wage determination.

(c) If the contracting officer subsequently learns of any potential offerors in previously unidentified places before the closing date for submission of offers, the contracting officer shall follow one of the following procedures:

(1) Continue to follow the procedures in this subsection and:

(i) Submit Notices for the additional places of performance to the Wage and Hour Division, and

(ii) Amend the solicitation to include all wage determinations and, if necessary, extend the time for submission of final offers.

(2) Follow the procedures in 22.1009-4.

22.1009-4 All possible places of performance not identified.

If the contracting officer believes that there may be offerors interested in performing in unidentified places or areas, the contracting officer may use the following procedures:

(a) If the contracting officer has identified possible places or areas where services might be performed, the contracting officer shall submit the Notice to the Wage and Hour Division (see 22.1009-3 (a) and (b)).

(b) Include the following information in the Commerce Business Daily Notice (see 5.207(f)(4)):

(1) That the place of performance is unknown.

(2) The possible places or areas of performance for which the contracting officer has requested wage determinations.

(3) That the contracting officer will request wage determinations for additional possible places of performance if asked to do so in writing.

(4) The time and date by which requests for wage determinations for additional places must be received by the contracting officer.

(c) Insert the clause at 52.222-49, Service Contract Act—Place of Performance Unknown, in solicitations and contracts. Include the information required in the clause by subparagraphs (b)(2) and (b)(4) of this subsection. The closing date for receipt of offerors' requests for wage determinations for additional possible places of performance should allow reasonable time for potential offerors to review the solicitation and determine their interest in competing. Generally, 10 to 15 days from the date of issuance of the solicitation may be considered a reasonable period of time.

(d) The procedures in 14.304-1 shall apply to late receipt of offerors' requests for wage determinations for additional places of performance. However, late receipt of an offeror's request for a wage determination for additional places of performance does not preclude the offeror's competing for the proposed acquisition.

(e) If the contracting officer receives any timely requests for wage determinations for additional places of performance the contracting officer shall—

(1) Submit Notices for the additional places of performance to the Wage and Hour Division; and

(2) Amend the solicitation to include all wage determinations and, if necessary, extend the time for submission of final offers.

(f) If the successful offeror did not make a timely request for a wage determination and will perform in a place of performance for which the contracting officer therefore did not request a wage determination, the contracting officer shall—

(1) Award the contract;

(2) Request a wage determination; and

(3) Incorporate the wage determination in the contract, retroactive to the date of contract award and with no adjustment in contract price, pursuant to the clause at 52.222-49, Service Contract—Place of Performance Unknown.

22.1010 Notification to interested parties under collective bargaining agreements.

(a) The contracting officer should determine whether the incumbent prime contractor's or its subcontractors' service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the contracting officer shall give both the incumbent contractor and its employees' collective bargaining agent written notification of—

(1) The forthcoming successor contract and the applicable acquisition dates (issuance of solicitation, opening of bids, commencement of negotiations, award of contract, or start of performance, as the case may be); or

(2) The forthcoming contract modification and applicable acquisition dates (exercise of option, extension of contract, change in scope, or start of performance, as the case may be); or

(3) The forthcoming multiple year contract anniversary date (annual anniversary date or biennial date, as the case may be).

(b) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable annual or biennial anniversary date in order for the time-of-receipt limitations in 22.1012-3 (a) and (b) to apply. The contracting officer shall retain a copy of the notification in the contract file.

22.1011 Response to Notice by Department of Labor.

22.1011-1 Department of Labor action.

The Wage and Hour Division will mark, date, and sign the section of the SF 98 titled "Response to Notice" and return the signed original together with appropriate additional material (wage determination, position/classification descriptions, etc.). The Wage and Hour Division will take one of the following four actions:

(a) Issue and attach applicable wage determination(s); or

(b) Indicate that no wage determination is in effect for the locality of contract performance; or

(c) Indicate that the Service Contract Act is not applicable based on information submitted; or

(d) Return the Notice for additional information (see 22.1008-1).

22.1011-2 Requests for status or expediting of response.

Checking the status or the expediting of wage determination responses shall be made in accordance with contracting agency procedures.

22.1012 Late receipt or nonreceipt of wage determination.

22.1012-1 General.

The Wage and Hour Administrator, generally, will issue a wage determination or revision to it in response to a Notice. The contracting officer shall incorporate the determination or revision in the particular solicitation and contract for which the wage determination was sought.

22.1012-2 Response to timely submission of Notice—no collective bargaining agreement.

(a) If the contracting officer has not received a response from the Department of Labor within 60 days (or 30 days if a nonrecurring or unknown requirement), the contracting agency shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected.

(b) In sealed bidding, a revision of a wage determination shall not be effective if a collective bargaining agreement does not exist, the revision is received by the contracting agency less than 10 days before the opening of bids, and the contracting officer finds that there is not reasonable time to incorporate the revision in the solicitation.

(c) For contractual actions other than sealed bidding where a collective bargaining agreement does not exist, a revision of a wage determination received by the contracting agency after award of a new contract or a modification as specified in 22.1007(b) shall not be effective provided that the start of performance is within 30 days of the award or the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award or the specified modification, and if contract performance does not commence within 30 days of the award or the specified modification, the Department of Labor shall be notified and any revision received by the contracting agency not less than 10 days before commencement of the work shall be effective.

(d) The limitations in paragraphs (b) and (c) of this subsection shall apply only if a timely Notice required in 22.1008–7 (a) and (b) has been submitted.

22.1012-3 Response to timely submission of Notice—with collective bargaining agreement.

(a) In sealed bidding, a wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if the contracting agency has received notice of the terms of the new or changed collective bargaining agreement less than 10 days before bid opening and the contracting officer determines that there is not reasonable time to incorporate the new or changed terms of the collective bargaining agreement in the solicitation (see 52.222–47).

(b) For contractual actions other than sealed bidding, a wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a modification as specified in 22.1007(b), provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, 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 work shall be effective for purposes of the successor contract under section 4(c) of the Act.

(c) The limitations in paragraphs (a) and (b) of this subsection shall apply only if timely Notices and notifications required in 22.1008–7 and 22.1010 have been given.

(d) If the contracting officer has not received a response from the Department of Labor within 60 days (or 30 days if a nonrecurring or unknown requirement), the contracting agency shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected. If the Department of Labor is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the solicitation/contract action should proceed according to the following instructions:

(1) If a successorship/same locality/incumbent collective bargaining agreement situation exists, the contracting officer shall incorporate in the solicitation the wage and fringe benefit terms of the collective bargaining agreement, or the collective bargaining agreement itself, and the clause at 52.222–47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits.

(2) The terms of a new or changed collective bargaining agreement, negotiated by the predecessor contractor during the period of performance of the predecessor contract, will not apply to the successor contract under the conditions set forth in paragraphs (a), (b), and (c) of this subsection.

22.1012-4 Response to late submission of Notice—no collective bargaining agreement.

If the contracting officer has not filed the Notice within the time limits in 22.1008–7, and thus has not received a response from the Department of Labor, and a successorship/same locality/incumbent collective bargaining agreement situation does not exist, the contracting officer shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected. If the Department of Labor is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the contracting officer shall use the latest wage determination or revision, if any, incorporated in the existing contract. If any new or revised wage determination is received later in response to the Notice, the contracting officer shall include it in the solicitation or contract within 30 calendar days of receipt. If the contract has been awarded, the contracting officer shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating the wage determination or revision. The Administrator, Wage and Hour Division, may require retroactive application of the wage determination for a contractual action over $2,500 using more than five service employees. These provisions are not intended to alter the contracting officer's responsibility to make timely submissions as required in 22.1008–7.

22.1012-5 Response to late submission of Notice—with collective bargaining agreement.

If the contracting officer has not filed the Notice within the time limits in 22.1008–7, has not received a response from the Department of Labor, and a successorship/same locality/incumbent collective bargaining agreement situation exists, the contracting officer shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected. If the Department of Labor is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the contracting officer shall incorporate in the solicitation the wage and fringe benefit terms of the collective

bargaining agreement, or the collective bargaining agreement itself, and the clause at 52.222–47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits. If the contract has been awarded, an equitable adjustment following receipt of the wage determination or revision will not be required, since the wage determination or revision will be based on the economic terms of the collective bargaining agreement.

22.1013 Review of wage determination.

(a) *Based on incumbent collective bargaining agreement.* (1) If wages, fringe benefits, or periodic increases provided for in a collective bargaining agreement vary substantially from those prevailing for similar services in the locality, the contracting officer shall immediately contact the agency labor advisor to consider instituting the procedures in 22.1021.

(2) If the contracting officer believes that an incumbent or predecessor contractor's agreement was not the result of arm's length negotiations, the contracting officer shall contact the agency labor advisor to determine appropriate action.

(b) *Based on other than incumbent collective bargaining agreement.* Upon receiving a wage determination not predicated upon a collective bargaining agreement, the contracting officer shall ascertain—

(1) If the wage determination does not conform with wages and fringe benefits prevailing for similar services in the locality; or

(2) If the wage determination contains significant errors or omissions. If either subparagraph (b)(1) or (b)(2) of this section is evident, the contracting officer shall contact the agency labor advisor to determine appropriate action.

22.1014 Delay of acquisition dates over 60 days.

If any invitation for bids, request for proposals, bid opening, or commencement of negotiation for a proposed contract for which a wage determination was provided in response to a Notice has been delayed, for whatever reason, more than 60 days from such date as indicated on the submitted Notice, the contracting officer shall, in accordance with agency procedures, contact the Wage and Hour Division for the purpose of determining whether the wage determination issued under the initial submission is still current. Any revision of a wage determination received by the contracting agency as a result of that communication, or upon discovery by the Department of Labor of a delay, shall supersede the earlier response as the wage determination applicable to the particular acquisition subject to the time frames in 22.1012–2(a) and (b).

22.1015 Discovery of errors by the Department of Labor.

If the Department of Labor discovers and determines, whether before or after a contract award, that a contracting officer made an erroneous determination that the Service Contract Act did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract, the contracting officer, within 30 days of notification by the Department of Labor, shall include in the contract the clause at 52.222–41 and any applicable wage determination issued by the Administrator. If the contract is subject to section 10 of the Act (41 U.S.C. 358), the Administrator may require retroactive application of that wage determination. The contracting officer shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.

22.1016 Statement of equivalent rates for Federal hires.

(a) The statement required under the clause at 52.222–42, Statement of Equivalent Rates for Federal Hires, (see 22.1006(b)) shall set forth those wage rates and fringe benefits that would be paid by the contracting activity to the various classes of service employees expected to be utilized under the contract if 5 U.S.C. 5332 (General Schedule—white collar) and/or 5 U.S.C. 5341 (Wage Board—blue collar) were applicable.

(b) Procedures for computation of these rates are as follows:

(1) Wages paid blue collar employees shall be the basic hourly rate for each class. The rate shall be Wage Board pay schedule step two for nonsupervisory service employees and step three for supervisory service employees.

(2) Wages paid white collar employees shall be an hourly rate for each class. The rate shall be obtained by dividing the general pay schedule step one biweekly rate by 80.

(3) Local civilian personnel offices can assist in determining and providing grade and salary data.

22.1017 Notice of award.

Whenever an agency awards a service contract subject to the Act which may be in excess of $25,000 and that agency does not report the award to the Federal Procurement Data System, it shall furnish an original and one copy of Standard Form 99, Notice of Award of Contract (see 53.301–99) to the Wage and Hour Division, Employment Standards Administration, Department of Labor, unless it makes other arrangements with the Wage and Hour Division for notifying it of contract awards.

22.1018 Notification to contractors and employees.

The contracting officer shall take the following steps to ensure that service employees are notified of minimum wages and fringe benefits.

(a) As soon as possible after contract award, inform the contractor of the labor standards requirements of the contract relating to the Act and of the contractor's responsibilities under these requirements, unless it is clear that the contractor is fully informed.

(b) At the time of award, furnish the contractor Department of Labor Publication WH–1313, Notice to Employees Working on Government Contracts, for posting at a prominent and accessible place at the worksite before contract performance begins. The publication advises employees of the compensation (wages and fringe benefits) required to be paid or furnished under the Act and satisfies the notice requirements in paragraph (g) of the clause at 52.222–41, Service Contract Act of 1965, as amended.

(c) Attach any applicable wage determination to Publication WH–1313.

22.1019 Additional classes of service employees.

(a) If the contracting officer is aware that contract performance involves classes of service employees not included in the wage determination, the contracting officer shall require the contractor to classify the unlisted classes so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between the unlisted classifications and the classifications listed in the determination (see paragraph (c) of the clause at 52.222–41, Service Contract Act of 1965, as amended). The contractor shall initiate the conforming procedure before unlisted classes of employees perform contract work. The contractor shall submit Standard Form (SF) 1444, Request For Authorization of Additional Classification and Rate. The contracting officer shall review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' representative or the employees themselves together with the

agency recommendation) and all other pertinent information to the Wage and Hour Division. Within 30 days of receipt of the request, the Wage and Hour Division will (1) approve, modify, or disapprove the request when the parties are in agreement or (2) render a final determination in the event of disagreement among the parties. If the Wage and Hour Division will require more than 30 days to take action, it will notify the contracting officer within 30 days of receipt of the request that additional time is necessary.

(b) Some wage determinations will list a series of classes within a job classification family, for example, Computer Operators, level I, II, and III, or Electronic Technicians, level I, II, and III, or Clerk Typist, level I and II. Generally, level I is the lowest level. It is the entry level, and establishment of a lower level through conformance is not permissible. Further, trainee classifications may not be conformed. Helpers in skilled maintenance trades (for example, electricians, machinists, and automobile mechanics) whose duties constitute, in fact, separate and distinct jobs may also be used if listed on the wage determination, but may not 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. (See 29 CFR 4.152.)

(c) Subminimum rates for apprentices, student learners, and handicapped workers are permissible in accordance with paragraph (q) of the clause at 52.222–41, Service Contract Act of 1965, as amended.

22.1020 Seniority lists.

If a contract is performed at a Federal facility where employees may be hired/retained by a succeeding contractor, the incumbent prime contractor is required to furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with anniversary dates of employment, to the contracting officer no later than 10 days before contract completion. (See paragraph (n) of the clause at 52.222–41, Service Contract Act of 1965, as amended.) At the commencement of the succeeding contract, the contracting officer shall provide a copy of the list to the successor contractor for determining employee eligibility for vacation or other fringe benefits which are based upon length of service, including service with predecessor contractors if such benefit is required by an applicable wage determination.

22.1021 Substantial variance hearings.

(a) A contracting agency or other interested party may request a hearing on an issue presented in 22.1013(a). To obtain a hearing for the contracting agency, the contracting officer shall submit a request through appropriate channels (ordinarily the agency labor advisor) to Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington DC 20210, with sufficient data to support a prima facie showing that the rates at issue vary substantially from those prevailing for similar services in the locality. The request shall also include (1) the number of the wage determinations at issue, (2) name of contracting agency, (3) status of the acquisition and any estimated acquisition dates (e.g., bid opening, award, and commencement of performance), and (4) names and addresses, if known, of interested parties.

(b) Unless the Administrator determines that extraordinary circumstances exist, the Administrator will not consider requests for a hearing unless received as specified in subparagraphs (b)(1) and (b)(2) of this section—

(1) For sealed bid contracts, more than 10 days before the award of the contract;

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

22.1022 Withholding of contract payments.

Any violations of the clause at 52.222–40, Service Contract Act of 1965, as amended—Contracts of $2,500 or Less, or the clause at 52.222–41, Service Contract Act of 1965, as amended, renders the responsible contractor liable for the amount of any deductions, rebates, refunds, or underpayments (which includes nonpayment) of compensation due employees performing the contract. The contracting officer may withhold—or, upon written request of the Department of Labor from a level no lower than that of Assistant Regional Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor, shall withhold—the amount needed to pay such underpaid employees from accrued payments due the contractor on the contract, or on any other prime contract (whether subject to the Service Contract Act or not) with the contractor. The agency shall place the amount withheld in a deposit fund. Such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary (or authorized representatives), an Administrative Law Judge, or the Board of Service Contract Appeals. In addition, the Department of Labor has given blanket approval to forward withheld funds pending completion of an investigation or other administrative proceeding when disposition of withheld funds remains the final action necessary to close out a contract.

22.1023 Termination for default.

As provided by the Act, any contractor failure to comply with the requirements of the contract clauses related to the Act may be grounds for termination for default (see paragraph (k) of the clause at 52.222–41, Service Contract Act of 1965, as amended).

22.1024 Cooperation with the Department of Labor.

The contracting officer shall cooperate with Department of Labor representatives in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the Department. When asked, agencies shall furnish the Wage and Hour Administrator or a designee, any available information on contractors, subcontractors, their contracts, and the nature of the contract services. The contracting officer shall promptly refer, in writing to the appropriate regional office of the Department, apparent violations and complaints received. Employee complaints shall not be disclosed to the employer.

22.1025 Ineligibility of violators.

A list of persons or firms found to be in violation of the Act is contained in the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs (see 9.404). No Government contract may be awarded to any violator so listed because of a violation of the Act, or to any firm, corporation, partnership, or association in which the violator has a substantial interest, without the approval of the Secretary of Labor. This prohibition against award to an ineligible contractor applies to both prime and subcontracts.

22.1026 Disputes concerning labor standards.

Disputes concerning labor standards requirements of the contract are handled under paragraph (t) of the contract clause at 52.222–41, Service Contract Act of 1965, as amended, and not under the clause at 52.233–1, Disputes.

PART 25—FOREIGN ACQUISITION

21. Subpart 25.10, consisting of sections 25.1000 through 25.1005, is added to read as follows:

Subpart 25.10—Sanctions for Violations of Export Controls

Sec.
25.1000 Scope of subpart.
25.1001 Definitions.
25.1002 Policy.
25.1003 Exceptions.
25.1004 Procedures.
25.1005 Solicitation provision and contract clause.

Subpart 25.10—Sanctions for Violations of Export Controls

25.1000 Scope of subpart.

Section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100–418), August 23, 1988, referred to herein as "the Act," directs the President to impose (a) procurement sanctions on Toshiba Corporation and its subsidiary Toshiba Machine Company, and on Kongsberg Vaapenfabrikk and its subsidiary Kongsberg Trading Company, and (b) import sanctions on all products produced by Toshiba Machine Company and Kongsberg Trading Company. Executive Order 12661, dated December 27, 1988, imposed these sanctions. This subpart implements the procurement sanctions. Import sanctions are implemented through Department of Treasury regulations (but see 25.1004(c)).

25.1001 Definitions.

As used in this subpart—

"Component part," means any article which is not usable for its intended functions without being imbedded or integrated into any other product and which, if used in production of a finished product, would be substantially transformed in that process.

"Essential to United States products or production," means, with respect to component parts, those component parts which are produced by a sanctioned person, that are necessary for manufacture or processing of United States products, and for which there is no suitable alternative.

"Finished product," means any article which is usable for its intended function without being imbedded in or integrated into any other product. It does not include an article produced by a person, other than a sanctioned person, that contains parts or components of the sanctioned person if the parts or components have been substantially transformed during production of the finished product.

"Information and technology," includes instructions, drawings, blueprints, technical data, plans, software, computer programs, and other forms of intellectual property in any form or medium. Technology also includes component parts, finished products, or other articles if purchased solely to demonstrate such technology, where the only way to gain access to required technology is to purchase a product or article produced by a sanctioned person.

"Routine servicing and maintenance," means customary servicing and maintenance, including repairs or installation of spare parts or component parts. The term also includes the temporary importation of tools and equipment necessary to perform such servicing or maintenance, as well as reimportation of products exported for routine servicing and maintenance.

"Sanctioned person," means a company or other foreign person upon whom prohibitions have been imposed.

"Spare part," means any individual piece, part, or subassembly which is intended for the logistic support or repair of a finished product and not as a finished product itself.

"Substantially transformed," when referring to a component part or finished product, means that the part or product has been subjected to a substantial manufacturing or processing operation by which the part or product is converted or combined into a new and different article of commerce having a new name, character, *and* use.

"Suitable alternative," means an article (a) that can be substituted for an article produced by a sanctioned person, (b) that will perform the same functions or is capable of the same use, and (c) is available at a competitive price.

25.1002 Policy.

(a) During the period beginning December 28, 1988, and ending December 28, 1991, all executive agencies, departments, and instrumentalities of the United States Government are prohibited from contracting with, or procuring (including rental and lease/purchase) directly or indirectly the products or services of, (1) Toshiba Corporation, (2) Kongsberg Vaapenfabrikk, (3) Toshiba Machine Company, or (4) Kongsberg Trading Company.

(b) The prohibition also applies to subsidiaries, successor entities, or joint ventures of Toshiba Machine Company or Kongsberg Trading Company. The prohibition generally does not apply to subsidiaries, successor entities, or joint ventures of Toshiba Corporation or of Kongsberg Vaapenfabrikk, except when the head of the agency or designee determines that such entities have been formed for the specific purpose of circumventing the prohibition.

(c) Contracts awarded to, or contracts involving the provision of products or services of, any sanctioned person, which were awarded on or after June 30, 1987, should be cancelled or terminated (in whole or in part) as soon as practicable, unless one of the exceptions in 25.1003 applies. For such contracts awarded prior to June 30, 1987, which contain options to increase quantities or period of performance, the options should not be exercised unless one of the exceptions in 25.1003 applies.

25.1003 Exceptions.

The prohibition in 25.1002 shall not apply when—

(a) The Secretary of Defense or designee determines that, in the case of procurement of defense articles or defense services—

(1) The exercise of options (under contracts or subcontracts, entered into prior to December 28, 1988) are for production quantities necessary to satisfy U.S. operational military requirements;

(2) The sanctioned person is a sole source supplier of essential defense articles or services and no alternative supplier can be identified; or

(3) Such articles or services are essential to the national security under defense coproduction agreements.

(b) The head of the agency or designee determines that the procurement is for—

(1) Products or services provided under contracts entered into before June 30, 1987 (but see 25.1002(c) regarding the exercise of options);

(2) Spare parts;

(3) Component parts, but not finished products, essential to U.S. products or production;

(4) Routine servicing and maintenance of products; or

(5) Information and technology.

(c) The products or services of a sanctioned person are acquired from a nonsanctioned person and the contractor agrees that—

(1) The products provided are designed to the specifications of a nonsanctioned person and marketed

under the trademark, brand or name of that person;

(2) The business relationship between the nonsanctioned person and the sanctioned person clearly existed prior to June 30, 1987; and

(3) The nonsanctioned person is not directly or indirectly owned by a sanctioned person.

(d) Components of a sanctioned person have been substantially transformed during manufacture of a finished product of a nonsanctioned person.

25.1004 Procedures.

(a) Determinations required by 25.1003 (a) or (b) shall be in a format established by agency regulations. The determination shall include a description of the article or service, the quantities of articles, and the scope and period of performance of such services.

(b) The contract file shall include the determination and supporting rationale to permit an award based on the exceptions in 25.1003.

(c) The clause prescribed in 25.1005 reminds the contractor of its responsibility for complying with applicable import regulations. To facilitate this compliance, the contracting officer shall provide the contractor a copy of any determination made under 25.1003(a) so that the contractor may provide this determination to the U.S. Customs Service pursuant to Department of Treasury Regulation 12.143. However, a separate determination by the Secretary of the Treasury or designee is required for an exception to the import sanctions imposed upon the products listed in 25.1003(b), and the contractor is responsible for obtaining this determination.

25.1005 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.225–12, Notice of Restrictions on Contracting with Sanctioned Persons, in all solicitations.

(b) The contracting officer shall insert the clause at 52.225–13, Restrictions on Contracting with Sanctioned Persons, in all solicitations and contracts.

PART 32—CONTRACT FINANCING

32.908 [Amended]

22. Section 32.908 is amended by revising the section title to read "32.908 Contract clauses".

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.101 [Amended]

23. Section 33.101 is amended by removing in the definition "Interested party" the word "could" and inserting in its place "would".

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.102 [Amended]

24. Section 36.102 is amended by removing the word "and" at the end of paragraph (b); and by removing the period at the end of paragraph (c) and inserting in its place, "; and".

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

25. Section 44.303(c) is revised to read as follows:

44.303 Extent of review.

* * * * *

(c) Methods of evaluating subcontractor responsibility, including the contractor's use of the list of Parties Excluded from Procurement Programs (see 9.404) and, if the contractor has subcontracts with parties on the list, the documentation, systems, and procedures the contractor has established to protect the Government's interests (see 9.405–2).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

26. Section 52.209–5 is added to read as follows:

52.209–5 Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.

As prescribed in 9.409(a), insert the following provision:

Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters (May 1989)

(a)(1) The Offeror certifies, to the best of its knowledge and belief, that—

(i) The Offeror and/or any of its Principals—

(A) Are ( ) are not ( ) presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have ( ) have not ( ), within a 3-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; and

(C) Are ( ) are not ( ) presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision.

(ii) The Offeror has ( ) has not ( ), within a 3-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under section 1001, title 18, United States Code.

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the certification will be considered in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

27. Section 52.209–6 is added to read as follows:

52.209–6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment.

As prescribed in 9.409(b), insert the following clause:

Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment (May 1989)

(a) The Government suspends or debars Contractors to protect the Government's interests. Contractors shall not enter into any subcontract equal to or in excess of $25,000 with a Contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a Contractor intends to subcontract with a party that is debarred, suspended, or proposed for debarment (see FAR 9.404 for information on the list of Parties Excluded from Procurement Programs), a corporate officer or designee of the Contractor shall notify the Contracting Officer, in writing, before entering into such subcontract. The notice must include the following:

(1) The name of the subcontractor;

(2) The Contractor's knowledge of the reasons for the subcontractor being on the list of Parties Excluded from Procurement Programs;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement Programs; and

(4) The systems and procedures the Contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(b) The Contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see FAR Subpart 44.3).

(End of clause)

28. Part 52 is amended by adding consecutively sections 52.222-40 through 52.222-44 and 52.222-47 through 52.222-49, and the authority citation continues to read as follows:

Sec.

52.222-40 Service Contract Act of 1965, as Amended—Contracts of $2,500 or Less.

52.222-41 Service Contract Act of 1965, as Amended.

52.222-42 Statement of Equivalent Rates for Federal Hires.

52.222-43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts).

52.222-44 Fair Labor Standards Act and Service Contract Act—Price Adjustment.

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52.222-47 SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA).

52.222-48 Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain ADP, Scientific and Medical, and/or Office and Business Equipment—Contractor Certification.

52.222-49 Service Contract Act—Place of Performance Unknown.

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Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2453(c).

52.222-40 Service Contract Act of 1965, as Amended—Contracts of $2,500 or Less.

As prescribed in 22.1005, insert the following clause:

Service Contract Act of 1965, as Amended—Contracts of $2,500 or Less (May 1989)

Except to the extent that an exemption, variation, or tolerance would apply if this contract were in excess of $2,500, the Contractor and any subcontractor shall pay all employees working 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 (29 U.S.C. 201-206). Regulations and interpretations of the Service Contract Act of 1965, as amended, are contained in 29 CFR Part 4.

(End of clause)

52.222-41 Service Contract Act of 1965, as Amended.

As prescribed in 22.1006(a), insert the following clause:

Service Contract Act of 1965, as Amended (May 1989)

(a) *Definitions.* "Act," as used in this clause, means the Service Contract Act of 1965, as amended (41 U.S.C. 351, et seq.).

"Contractor," as used in this clause or in any subcontract, shall be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

"Service employee," as used in this clause, 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 these terms are defined in Part 541 of Title 29, Code of Federal Regulations, as revised. It includes all such persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

(b) *Applicability.* This contract is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor (29 CFR Part 4). This clause does not apply to contracts or subcontracts administratively exempted by the Secretary of Labor or exempted by 41 U.S.C. 356, as interpreted in Subpart C of 29 CFR Part 4.

(c) *Compensation.* (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 a wage determination is attached to this contract, the Contractor shall classify 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) 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 paragraph (c).

(ii) This conforming procedure shall be initiated by the Contractor prior to the performance of contract work by the unlisted class of employee. The Contractor shall submit Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate, to the Contracting Officer no later than 30 days after the unlisted class of employee performs any contract work. The Contracting Officer shall review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' authorized representatives or the employees themselves together with the agency recommendation), and all pertinent information to the Wage and Hour Division, Employment Standards Administration U.S. Department of Labor. 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 paragraph (c) of this clause, a new conformed wage rate and fringe benefits may be assigned to the 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 subdivision (c)(2)(ii) of this clause 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 under this subparagraph (c)(2) of this clause 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 the 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 subparagraph (c)(2) of this clause, 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 or classes of employees commenced contract work.

(3) *Adjustment of Compensation.* If 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 under this contract shall be subject to adjustment after 1 year and not less often than once every 2 years, under wage determinations issued by the Wage and Hour Division.

(d) *Obligation to Furnish Fringe Benefits.* The Contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined under subparagraph (c)(2) of this clause by furnishing equivalent combinations of bona fide fringe benefits, or by making equivalent or differential cash payments, only in accordance with Subpart D of 29 CFR Part 4.

(e) *Minimum Wage.* 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 this contract (regardless of whether the person is a service employee) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938. Nothing in this clause shall relieve the Contractor or any subcontractor of any other obligation under law or contract for payment of a higher wage to any employee.

(f) *Successor Contracts.* If this contract succeeds a contract subject to the Act 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 agreement, 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 29 CFR 4.1b(b) apply or unless the Secretary of Labor or the Secretary's authorized representative finds, after a hearing as provided in 29 CFR 4.10 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 29 CFR 4.11, 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 determination 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.

(g) *Notification to Employees.* 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.

(h) *Safe and Sanitary Working Conditions.* 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, hazardous, or dangerous to the health or safety of the service employees. The Contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR Part 1925.

(i) *Records.* (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, and make them available for inspection and transcription by authorized representatives of the Wage and Hour Division, Employment Standards Administration, a record of the following:

(i) For each employee subject to the Act—

(A) Name and address and social security number;

(B) Correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of payments in lieu of fringe benefits, and total daily and weekly compensation;

(C) Daily and weekly hours worked by each employee; and

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

(ii) For those classes of service employees not included in any wage determination attached to this contract, wage rates or fringe benefits determined by the interested parties or by the Administrator or authorized representative under the terms of paragraph (c) of this clause. A copy of the report required by subdivision (c)(2)(ii) of this clause will fulfill this requirement.

(iii) Any list of the predecessor Contractor's employees which had been furnished to the Contractor as prescribed by paragraph (n) of this clause.

(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 these records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce these records, the Contracting Officer, upon direction of the Department of Labor and notification to the Contractor, shall take action to cause suspension of any further payment or advance of funds until the 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.

(j) *Pay Periods.* 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. These payments shall be made no later than one pay period following the end of the regular pay period in which the wages were earned or accrued. A pay period under this Act may not be of any duration longer than semi-monthly.

(k) *Withholding of Payments and Termination of Contract.* 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 Contracting Officer 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 this clause 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.

(l) *Subcontracts.* The Contractor agrees to insert this clause in all subcontracts subject to the Act.

(m) *Collective Bargaining Agreements Applicable to Service Employees.* 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.

(n) *Seniority List.* 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 (29 CFR 4.173), the incumbent Prime Contractor shall furnish 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.

(o) *Rulings and Interpretations.* Rulings and interpretations of the Act are contained in Regulations, 29 CFR Part 4.

(p) *Contractor's Certification.* (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 under 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 under 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.

(q) *Variations, Tolerances, and Exemptions Involving Employment.* Notwithstanding any of the provisions in paragraphs (b) through (o) of this clause, 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 Pub. L. 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 Act without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a)(2) of the 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 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 29 CFR Parts 525 and 528.

(r) *Apprentices.* 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.

(s) *Tips.* An employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips may have the amount of these 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. However, the amount of credit shall not exceed $1.34 per hour beginning January 1, 1981. To use this provision—

(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; and

(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.

(t) *Disputes Concerning Labor Standards.* The U.S. Department of Labor has set forth in 29 CFR Parts 4, 6, and 8 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. 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.

(End of clause)

52.222-42 Statement of Equivalent Rates for Federal Hires.

As prescribed in 22.1006(b), insert the following clause:

Statement of Equivalent Rates for Federal Hires (May 1989)

In compliance with the Service Contract Act of 1965, as amended, and the regulations of the Secretary of Labor (29 CFR Part 4), this clause identifies the classes of service employees expected to be employed under the contract and states the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C. 5341 or 5332.

This Statement is for Information Only: It Is Not a Wage Determination

Employee class	Monetary wage—Fringe benefits
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

(End of clause)

52.222-43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts).

As prescribed in 22.1006(c)(1), insert the following clause:

Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple year and Option Contracts) (May 1989)

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The wage determination, issued under the Service Contract Act of 1965, as amended, (41 U.S.C. 351, et seq.), by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract. If no such determination has been made applicable to this contract, then the Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206) current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract.

(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The Contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour;

(2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or

(3) An amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

(e) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead, or profit.

(f) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the Contracting Officer. The Contractor shall promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice shall contain a statement of the amount claimed and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

(g) The Contracting Officer or an authorized representative shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor until the expiration of 3 years after final payment under the contract.

(End of clause)

52.222-44 Fair Labor Standards Act and Service Contract Act—Price Adjustment.

As prescribed in 22.1006(c)(2), insert the following clause:

Fair Labor Standards Act and Service Contract Act—Price Adjustment (May 1989)

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to Contractor collective bargaining agreements.

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The contract price or contract unit price labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with—

(1) An increased or decreased wage determination applied to this contract by operation of law; or

(2) An amendment to the Fair Labor Standards Act of 1938 that is enacted subsequent to award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

(d) Any such adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (b) of this clause, and to the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance; it shall not otherwise include any amount for general and administrative costs, overhead, or profit.

(e) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after the effective date of the wage change, unless this period is extended by the Contracting Officer in writing. The Contractor shall promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice shall contain a statement of the amount claimed and any relevant supporting data that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

(f) The Contracting Officer or an authorized representative shall, until the expiration of 3 years after final payment under the contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor.

(End of clause)

52.222-47 SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA).

As prescribed in 22.1006(d) and 22.1012-3(d)(1), insert the following clause:

Service Contract Act (SCA) Minimum Wages and Fringe Benefits (May 1989)

An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the bidders/offerors shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent Contractor _____ and the _____ (union). If the economic terms of the collective bargaining agreement or the collective bargaining agreement itself is not attached to the solicitation, copies can be obtained from the Contracting Officer. Pursuant to Department of Labor Regulation, 29 CFR 4.1b and paragraph (g) of the clause at 52.222-41, Service Contract Act of 1965, as amended, the economic terms of that agreement will apply to the contract resulting from this solicitation.

notwithstanding the absence of a wage determination reflecting such terms, unless it is determined that the agreement was not the result of arm's length negotiations or that after a hearing pursuant to section 4(c) of the Act, the economic terms of the agreement are substantially at variance with the wages prevailing in the area.

(End of clause)

52.222-48 Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain ADP, Scientific and Medical, and/or Office and Business Equipment—Contractor Certification.

As prescribed in 22.1006(e)(1), insert the following clause:

Exemption From Application of Service Contract Act Provisions (May 1989)

(a) The following certification shall be checked:

Certification

The offeror certifies ( )/does not certify ( ) that: (i) The items of equipment to be serviced under this contract 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; (ii) 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 certain ADP, scientific and medical, and/or office and business equipment. 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 (iii) 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.

(b) If a negative certification is made and a Service Contract Act wage determination is not attached to the solicitation, the Contractor shall notify the Contracting Officer as soon as possible.

(c) Failure to execute the certification in paragraph (a) of this clause or to contact the Contracting Officer as required in paragraph (b) of this clause may render the bid or offer nonresponsive.

(End of clause)

52.222-49 Service Contract Act—Place of Performance Unknown.

As prescribed in 22.1006(f) and 22.1009-4(c), insert the following clause:

Service Contract Act—Place of Performance Unknown (May 1989)

(a) This contract is subject to the Service Contract Act, and the place of performance was unknown when the solicitation was issued. In addition to places or areas identified in wage determinations, if any, attached to the solicitation, wage determinations have also been requested for the following: _____ (insert places or areas). The Contracting Officer will request wage determinations for additional places or areas of performance if asked to do so in writing by _____ (insert time and date).

(b) Offerors who intend to perform in a place or area of performance for which a wage determination has not been attached or requested may nevertheless submit bids or proposals. However, a wage determination shall be requested and incorporated in the resultant contract retroactive to the date of contract award, and there shall be no adjustment in the contract price.

(End of clause)

29. Section 52.225-12 is added to read as follows:

52.225-12 Notice of Restrictions on Contracting With Sanctioned Persons.

As prescribed in 25.1005(a), insert the following provision:

Notice of Restrictions on Contracting With Sanctioned Persons (May 1989)

(a) Statutory prohibitions have been imposed on contracting with sanctioned persons, as specified in Federal Acquisition Regulation (FAR) 52.225-13, Restrictions on Contracting with Sanctioned Persons.

(b) By submission of this offer, the Offeror represents that no products or services, except those listed in this paragraph (b), delivered to the Government under any contract resulting from this solicitation will be products or services of a sanctioned person, as defined in the clause referenced in paragraph (a) of this provision, unless one of the exceptions in paragraph (d) of the clause at FAR 52.225-13 applies.

Product or service	Sanctioned person
.....	.....
.....	.....
.....	.....

(List as necessary)

(End of provision)

30. Section 52.225-13 is added to read as follows:

52.225-13 Restrictions on Contracting With Sanctioned Persons.

As prescribed in 25.1005(b), insert the following clause:

Restrictions on Contracting With Sanctioned Persons (May 1989)

(a) *Definitions.* (1) "Component part," means any article which is not usable for its intended functions without being imbedded or integrated into any other product and which, if used in production of a finished product, would be substantially transformed in that process.

(2) "Finished product," means any article which is usable for its intended function without being imbedded in, or integrated into, any other product. It does not include an article produced by a person, other than a sanctioned person, that contains parts or components of the sanctioned person if the parts or components have been substantially transformed during production of the finished product.

(3) "Sanctioned person," means a company or other foreign person upon whom prohibitions have been imposed.

(4) "Substantially transformed," when referring to a component part or finished product, means that the part or product has been subjected to a substantial manufacturing or processing operation by which the part or product is converted or combined into a new and different article of commerce having a new name, character, and use.

(b) *General.* Section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100-418) and Executive Order 12661, effective December 28, 1988, impose, for a period of 3 years, with certain exceptions, a prohibition on contracting with, or procuring (including rental and lease/purchase) directly or indirectly the products or services of (1) Toshiba Machine Company, (2) Kongsberg Trading Company, (3) Toshiba Corporation, or (4) Kongsberg Vaapenfabrikk. The Act and Executive Order also prohibit, for the same 3-year period, the importation into the United States of all products produced by Toshiba Machine Company and Kongsberg Trading Company. These prohibitions also apply to subsidiaries, successor entities or joint ventures of Toshiba Machine Company or Kongsberg Trading Company.

(c) *Restriction.* Unless listed by the Contractor in its offer, in the solicitation provision at FAR 52.225-12, Notice of Restrictions on Contracting with Sanctioned Persons, or unless one of the exceptions in paragraph (d) of this clause applies, the Contractor agrees that no products or services delivered to the Government under this contract will be products or services of a sanctioned person.

(d) *Exceptions.* The restrictions apply—

(1) To finished products of nonsanctioned persons containing components of a sanctioned person if these components have been substantially transformed during the manufacture of the finished product.

(2) To products or services of a sanctioned person provided—

(i) The products are designed to the specifications of a nonsanctioned person marketed under the trademark, brand or name of the nonsanctioned person;

(ii) The business relationship between the nonsanctioned person and the sanctioned

person clearly existed prior to June 30, 1987; and

(iii) The nonsanctioned person is not directly or indirectly owned by a sanctioned person.

(3) If a determination has been made in accordance with FAR 25.1003 (a) or (b).

(e) *Award.* Award of any contract resulting from this solicitation will not affect the Contractor's obligation to comply with importation regulations of the Secretary of the Treasury.

(End of clause)

[FR Doc. 89-10847 Filed 5-5-89; 8:45 am]

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federal register

Monday
May 8, 1989

Part V

Federal Communications Commission

47 Part 1 et al.

Policy and Rules Concerning Rates for Dominant Carriers; Final Rule and Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 61, and 65

[CC Docket No. 87-313, FCC 89-91]

RIN 3060-AE38

Policy and Rules Concerning Rates for Dominant Carriers

AGENCY: Federal Communications Commission (FCC).

ACTION: Final rules.

SUMMARY: The Commission has adopted a Report and Order finding that incentive regulation constitutes an improvement over rate of return regulation for AT&T and local exchange carriers. The Report and Order implements a form of incentive regulation, referred to as "price caps," for AT&T. This action results in the replacement of the rate of return regulatory model with one that directly limits rates by means of price caps. The Commission has found that the price cap method of regulation will promote efficiency and innovation, and will benefit consumers more effectively than rate of return regulation.

EFFECTIVE DATE: May 17, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Mary Brown, Common Carrier Bureau, (202) 632-5550.

SUPPLEMENTARY INFORMATION:

Background

Notice of Proposed Rulemaking, In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313. *Adopted:* August 4, 1987. *Released:* August 21, 1987. 52 FR 33962 (Sept. 9, 1987). By the Commission. Further Notice of Proposed Rulemaking, In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313. *Adopted:* May 12, 1988. *Released:* May 23, 1988. 53 FR 22356 (June 15, 1988). By the Commission.

Summary of Report and Order

This is a summary of the Commission's *Report and Order* in *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket No. 87-313, FCC 89-91, Adopted March 16, 1989, and Released April 17, 1989. By the Commission.

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 2100 M Street N.W., Suite 140, Washington, DC 20037.

I. In General

1. This Commission has concluded that incentive regulation for AT&T local exchange carriers (LECs) constitutes an improvement over traditional rate of return regulation in terms of efficiency incentives, incentives to innovate, disincentives to engage in cost shifting, lower administrative costs, and consumer benefits. We find that rate of return regulation encourages rate base padding and excessive expense levels, that it does not encourage carrier innovation in the provision of new services and products, that it encourages cross-subsidization and other forms of inefficient pricing, and that it places unnecessary administrative burdens on carriers and this Commission. By focusing in the first instance on limiting prices rather than profits, incentive regulation should reverse the tendency of rate of return regulated firms to engage in inefficient behavior. We recognize that achievement of the benefits of incentive regulation depends upon proper implementation. We here adopt final rules implementing a form of incentive regulation, referred to as "price caps," for AT&T.

2. We conclude that price caps for AT&T will more closely replicate the incentives to efficiency that characterize a competitive market than will continued rate of return regulation. By limiting the rates AT&T may charge, rather than its rate of return, price caps will drive AT&T to avoid unnecessary costs, invest in efficiency enhancing technology, and employ innovative service approaches in order to earn the greatest levels of return within the applicable rate limitations. The system of price cap regulation that we have adopted guarantees that ratepayers obtain their share of expected productivity gains first, with carriers retaining any additional profits they may generate. Thus, both ratepayers and carriers will be better off than under rate of return regulation.

3. We find that in an environment that is in transition from monopoly to full competition, rate of return regulation has become so dysfunctional that incentive regulation represents a substantial and needed improvement over existing regulation. In addition, the presence of competition for many of AT&T's services means that regulation, in whatever form, is not the only check on AT&T's ability to set its prices. Finally, we affirm our view that competition and incentive regulation are complementary and that competition must be a factor in shaping the form of incentive regulation for AT&T.

4. We conclude that price cap regulation is unlikely to result in either a decline in service quality, or an increase in misallocation of costs between the state and interstate jurisdictions. There are a number of constraints on AT&T's ability to degrade its quality of service, including competition, Commission monitoring, and performance standards incorporated in tariffs. In areas where interexchange competition is limited, *i.e.,* non-equal access areas, we conclude that additional monitoring is required to ensure that service quality does not decline. In addition, while the possibility of cost-shifting between jurisdictions is inherent in a bifurcated regulatory system, we conclude that the combination of the separations rules, Commission monitoring associated with our automated reporting requirements (ARMIS), and state monitoring will be effective in identifying and correcting misallocation of costs to either the state or the interstate jurisdiction.

II. Operation of Price Cap Regulation for AT&T

A. In General

5. Price cap regulation is mandatory for AT&T, and AT&T will be required to file price cap tariffs on an annual basis. We require that AT&T file its first price cap tariff May 17, 1989, to be effective July 1, 1989, and thereafter to file its annual tariffs effective July 1, on not less than 45 days' notice. Price cap filings must be accompanied by price cap indexes (PCIs) (which reflect changes in costs associated with the provision of service groupings, or baskets), actual price indexes (APIs) (which reflect changes in aggregate rate levels for baskets), and service band indexes (SBIs) (which reflect changes in rates for service categories within each basket). As long as AT&T's proposed rate level changes are within applicable cap and band limitations, the tariff filings will be presumed lawful, and except for the 45-day annual filing, may take effect in 14 days.

B. AT&T Services Subject to Price Cap Regulation

6. All of AT&T's existing services will be subject to price cap regulation with the exception of Tariff 5, Tariff 11, Tariff 12, Tariff 15, and Tariff 16 services, and services subject to separate accounting requirements (Accunet Packet

Switching, Non-IMTS, and Skynet KU). Tariff 5 services are special construction services, and Tariff 11 is AT&T's access flow-through tariff. Tariff 12, Tariff 15, and Tariff 16, in their present configurations, are custom tariffs, for which price cap treatment is not appropriate.

7. Each of AT&T's capped services will be placed in one of three baskets. Each basket has its own PCI, which acts as a ceiling on the basket's aggregate rates. The API is the value of aggregate rates in a basket. Under price caps, a basket's API must never exceed its PCI, absent an extraordinary showing. Furthermore, within each basket, serevices will be assigned to service categories, the prices of which are subject to annual restrictions on upward and downward movements, as measured by SBIs.

8. The first basket will consist of residential and small business services, divided into six service categories: (1) Domestic day; (2) Domestic evening; (3) Domestic night/weekend; (4) International MTS; (5) Operator and credit card services; and (6) Reach Out America. AT&T forfeits streamlined treatment if it raises the rates of the Domestic evening or Domestic night/weekend MTS service categories by more than 4 percent annually relative to the change in the PCI, or if it raises any other service category in this basket by more than 5 percent per year relative to the PCI. AT&T also forfeits streamlined treatment if it lowers rates for any service category in the basket by more than 5 percent relative to the PCI. In addition, AT&T must calculate an average residential rate from among the services in the basket, and ensure that the average residential rate does not increase by more than 1 percent per year after adjusting for changes in the PCI.

9. The second basket consists of all 800 Services, divided into four service categories: (1) Readyline 800; (2) AT&T 800; (3) Megacom 800; and (4) all other 800. The third basket consists of all remaining capped services, divided into seven service categories: (1) Pro America I, II, and III; (2) WATS; (3) Megacom; (4) SDN; (5) other switched; (6) voice grade private line and below; and (7) other private line. Upper and lower bands of 5 percent shall apply to each of the service categories in these baskets. Thus, rate increases or decreases that exceed 5 percent per year relative to the PCI will not be afforded streamlined review.

C. Operation of the Price Cap Index

10. The price cap index, or PCI, is an index of change in the cost of factors of production (*i.e.*, inflation), AT&T productivity, and certain carrier-specific cost factors that are beyond AT&T's control. The PCI for each basket of services acts as a ceiling above which that basket's index of actual prices—the API—cannot go without an extraordinary showing. Cost changes due to the inflation and productivity components of the PCI formula are reflected in annual index adjustments. The inflation component is represented by the Gross National Product Price Index (GNP–PI), a broad-based index of price changes in all sectors of the economy, published by the U.S. Department of Commerce. The productivity factor adjusts for the fact that AT&T's productivity historically has exceeded that of the economy. We conclude that the productivity offset for AT&T should be 2.5 percent. To ensure that ratepayers benefit from price cap regulation, and share in the gains from the efficiency improvements we expect will result from price cap regulation, we adjust the productivity offset upward by 0.5 percent, known as the Consumer Productivity Dividend (CPD), to reach a total productivity factor of 3.0 percent for use in the PCI formula.

11. Price cap levels will also vary with changes in certain "exogenous" costs, that is, costs which are beyond the control of AT&T and which affect the telecommunications sector, rather than the economy as a whole. We treat as exogenous the following: changes in access charges paid by AT&T to the LECs; changes in interstate costs caused by changes in the Separations Manual and the Uniform System of Accounts (USOA); changes in costs due to the completion of the amortization of depreciation reserve deficiencies; and changes in costs caused by reallocation of investment from regulated to nonregulated activities pursuant to § 64.901 of the Commission's Rules, 47 CFR 64.901. AT&T may request exogenous treatment of changes in costs due to changes in the tax laws, or any other cost changes that are beyond AT&T's control, and that affect AT&T's costs disproportionately relative to the economy as a whole.

12. AT&T must file adjustments to its PCIs each year in connection with its annual price cap tariff filing. In addition, AT&T must update its PCIs to account for mid-year exogenous costs changes. The PCI formula provides for price cap adjustments as follows:

$$PCI_t = PCI_{t-1}[1 + w(GNP\text{–}PI - X) + \Delta Y/R + \Delta Z/R]$$

where

GNP–PI = the percentage change in the GNP–PI,

X = productivity factor of 3.0%,

ΔY = (new access rate—access rate at the time the PCI was updated to PCI_{t-1}) x base period demand,

ΔZ = the dollar effect of current regulatory changes, when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations,

R = base period quantities for each rate element "i," multiplied by the price for each rate element "i" at the time the PCI was updated to PCI_{t-1},

w = R—(access rates in effect at the time the PCI was updated to PCI_{t-1} x base period demand) + ΔZ, all divided by R,

PCI_t = the new PCI value, and

PCI_{t-1} = the immediately preceding PCI value.

The (GNP–PI – X) component will be the same for each basket, while the "ΔY" and "ΔZ" variables will vary by basket, depending on the impact of regulatory changes and changes in access charges on the cost of providing the particular services in each basket. The base period used in index adjustments is the 12-month period ending 6 months prior to the effective date of the annual price cap filing.

13. In light of the important role we assign to the design and composition of baskets in protecting consumers of MTS and other services over which AT&T retains significant market power, it is essential that AT&T properly allocate exogenous cost changes, including changes in access costs, among baskets. With respect to non-traffic sensitive access costs, AT&T must first calculate the net change in such costs, at base period demand, associated with all of its capped services. AT&T must then allocate this amount among its baskets according to the proportion of total base period non-traffic sensitive minutes of access (both originating and terminating) associated with each basket. Similarly, AT&T must allocate the change in its total traffic sensitive access costs (calculated at base period demand) among baskets in proportion to their share of total base period traffic sensitive minutes. We require that changes in special access costs (calculated at base period demand) be assigned directly to the baskets in which those costs are incurred. With respect to exogenous cost changes reflected in the PCI's "Z" variable, we require that such changes be allocated on a cost causative basis.

D. Comparing Rates to the PCI

14. The actual price index, or API, measures the incremental change in the aggregate price of each basket of services each time AT&T proposes rate revisions. The API formula requires the summation of the weighted ratios of

proposed prices and existing prices, as follows:

$API_t = API_{t-1}[\Sigma_i v_i(p_t/p_{t-1})_i]$

where

API_t = the proposed API value,

API_{t-1} = the existing API value,

p_t = the proposed price for rate element "i,"

p_{t-1} = the existing price for rate element "i," and

v_i = the current estimated revenue weight for rate element "i," calculated as the ratio of the base period demand for the rate element "i" priced at the existing rate, to the base period demand for the entire basket of services priced at existing rates.

15. New services will be brought under price caps at the first annual price cap tariff filing following the completion of the base period in which they become effective, and the API will be adjusted to reflect the impact of a new service on a basket's aggregate rates at that time. To make this adjustment, the demand for the new service during the base period must be included in determining the weights used in calculating the API. The proportional change between existing rates (including that of the new service) and proposed rates (including that of the new service), weighted according to base period demand and existing prices, is multiplied against the existing API value to produce the new API, which incorporates the new service. For restructured services, in its API calculation, AT&T must convert existing rates into rates of equivalent value under the proposed structure, and then compare the existing rates that have been converted to reflect restructuring to the proposed restructured rates.

16. AT&T must establish subindexes within each basket to measure the movement in the revenue-weighted aggregate prices of the groups of rate elements that comprise the banded service categories. Each such service band index, or SBI, shall be calculated by using essentially the same formula as we are adopting for the API:

$SBI_t = SBI_{t-1}[\Sigma_i v_i(p_t/p_{t-1})_i]$

where

SBI_t = the proposed SBI value,

SBI_{t-1} = the existing SBI value,

p_t = the proposed price for rate element "i,"

p_{t-1} = the existing price for rate element "i," and

v_i = the current estimated revenue weight for rate element "i," calculated as the ratio of the base period demand for the rate element "i" priced at the existing rate, to the base period demand for the entire group of rate elements comprising the service category priced at existing rates.

E. Establishing Initial Index Values

17. We conclude that reliance on AT&T's existing rates is the most reasonable option for initially determining compliance with the price cap system. As a general matter, AT&T is earning less than its authorized rate of return. In addition, we have investigated nearly all of AT&T's existing rates and concluded that they are not unlawful. Many of AT&T's existing rates were set in the context of competitive pressure from other carriers, which contributes to the reasonableness of using them as a starting point for price cap regulation. The use of existing rates as a starting point is the most expeditious means of generating the ratepayer benefits promised by incentive regulation, and is a superior alternative to conducting a pre-price cap rate case. Finally, the operation of the price cap formulas and procedural mechanisms will exert downward pressure on the aggregate prices in each basket, and will produce price cap rates that will be within the zone of reasonableness.

18. AT&T's pre-price cap APIs and PCIs will be initialized with an assigned value of 100, corresponding to the rates and costs in effect on December 31, 1988, the last day of the pre-price cap base period. To the extent that costs change during the interim between December 31, 1988, and July 1, 1989, such changes must be reflected in the PCI formula adjustments that are made in the initial price cap filing. The base period during the first price cap tariff year shall be the period from January 1, 1988, through December 31, 1988.

F. Evaluation of Price Cap Rates

1. Annual Filings

19. AT&T is required to make annual filings demonstrating compliance with the price cap rules. These filings shall be effective on 45 days' notice. Since LECs are required to file their annual access tariffs on 90 days' notice, this schedule permits AT&T to incorporate the cost effects of those filings in its own annual filing.

2. Within-Band Rate Level Changes

20. Rate level changes that produce an API less than or equal to the PCI, and rates within applicable price bands, qualify for streamlined treatment. Tariffs proposing such rate level changes shall be filed on 14 days' notice, and will be presumed lawful. In lieu of traditional cost support, streamlined filings need be supported only by the calculations necessary to demonstrate that the proposed rates are within the limits set by the PCI and the pricing limitations. Petitioners seeking suspension of a streamlined filing must meet a stringent four-part test. We require petitioners to demonstrate: (1) A high probability that the tariff would be found unlawful after investigation; (2) that suspension would not substantially harm other interested parties; (3) that irreparable injury would result if suspension did not issue; and (4) that suspension would not otherwise be contrary to the public interest.

3. Above-Band Rates

21. We conclude that above-band rates raise questions about the distribution of rate increase burdens that require the fullest possible consideration by interested parties and by this Commission. Therefore, we require that above-band rates must be filed on 90 days' notice, with a likelihood of suspension. The justness and reasonableness of above-band rates will be assessed in light of the overall price cap scheme, and AT&T will be required to make a "substantial cause" showing, which will usually involve a detailed and specific cost justification of the proposed increase.

4. Above-Cap Rates

22. Tariffs proposing above-cap rates shall be filed on 90 days' notice, will generally be suspended, and must be accompanied by cost support data demonstrating that the rates are just and reasonable. In its cost showing, AT&T must assign costs to rate elements, or to the lowest possible level, and make a detailed explanation of the reasons for the prices of all rate elements to which it does not assign costs. In addition, AT&T must explain the allocation of costs within each basket, and the allocation of costs among baskets.

5. Below-Band Rates

23. We conclude that below-band rates may raise questions of predatory activity that are not suited to streamlined review. As a result, we require that tariffs proposing below-band rates must be filed on 45 days' notice, and must be accompanied by a showing that the rates cover the cost of service and are otherwise just and reasonable. For the purpose of initial review of such tariff filings, we adopt the average variable cost standard as a benchmark for determining whether a proposed rate decrease should be investigated and/or suspended. The average variable cost of a service must, at a minimum, include all access charges and billing and collection costs attributable to that service, as well as other non-fixed costs which would not be incurred if the service were not offered.

6. New and Restructured Services

24. We conclude that new and restructured services must receive special treatment because they present possible means of avoiding price cap pricing restrictions. The general principle for distinguishing between new and restructured services is that new services add to the range of options available to customers, while restructured services simply represent rearrangements of existing services. New services will be outside the cap initially. Tariffs proposing new services should be filed on 45 days' notice, with supporting information and data to demonstrate compliance with a net revenue test. Under this test, a new service, and each unbundled element thereof, must be projected to increase AT&T's net revenues for services subject to price cap regulation within the lesser of 24 months from the incorporation of the service into an annual price cap filing, or 36 months from the effective date of the service. AT&T must include new services in the cap in the first annual price cap tariff filing after the completion of the base year in which the new service becomes effective.

25. Tariffs proposing restructured services are much more likely to raise issues of discrimination than tariffs proposing only rate level changes. We therefore conclude that tariffs proposing restructured rates must be filed on 45 days' notice. AT&T will be required to demonstrate continued compliance with both the PCI and the bands.

G. Effect of Incentive Regulation on Existing Commission Policies

26. Under price cap regulation, we will retain existing Commission policies and rules that foster competition and prevent discrimination, and other market rules and implementing regulations. Furthermore, this Commission continues to be committed to geographic rate averaging. We conclude that in implementing price cap regulation for AT&T, we have taken no action that would put geographic rate averaging at risk. We find it unnecessary at this time explicitly to prohibit rate deaveraging through the exercise of our rulemaking authority. However, given our strong commitment to geographically averaged rates as a tool to promote universal service, we pledge to subject proposals by AT&T to deaverage rates to the full 90-day notice period permitted by section 203 of the Communications Act, and to suspend such filings for the full five-month period permitted by section 204 of the Act. In the course of the resulting investigation, AT&T would bear the burden of justifying the proposal to deaverage rates.

27. We also conclude that the implementation of price cap regulation will be enhanced by the continuation of existing market rules, implementing regulations, such as Open Network Architecture (ONA) and the joint cost rules, and the USOA and separations rules. We will also retain existing complaint procedures. We conclude that the Interim Cost Allocation Manual (ICAM) should be discontinued because it requires fully distributed costing between broad service categories, and would therefore be inconsistent with the price cap system we have devised. We will continue to enforce the Part 63 rules regarding extension of lines and discontinuance of service. We retain our current Part 65 rules with certain modifications, including an exemption for AT&T from targeting its rates to a prescribed rate of return, and a requirement that AT&T file an annual rate of return report of its total interstate rate of return.

H. Monitoring and Performance Review

28. During the initial four years of price cap regulation, we will monitor AT&T's performance, with particular attention to its prices, earnings, quality of service, and technological progressiveness. AT&T will file ARMIS reports on a quarterly basis, including information on: revenues, expenses, and taxes for purposes of tracking cost allocations between regulated and non-regulated activities; revenues and expenses by state and interstate jurisdictions; and switched messages, conversation minutes, and access minutes. In addition, we continue to require AT&T to file Form 492, which contains information on revenues, investment, expenses, and the earned rate of return, but we will require that information to be filed on a total interstate basis only. We will also continue to collect semi-annual reports on quality of service, and will continue to scrutinize the information AT&T files in connection with its annual section 214 authorization application.

29. In addition to monitoring price cap regulation through the collection of data, our review of tariffs, and the complaint process, we will review AT&T's performance in a comprehensive manner beginning at the end of the third year from the inaugural date of price cap regulation. The review will be completed before the end of the fourth year of price caps. Should it become apparent to us before this review that the price cap program is not achieving its goals, we will initiate an earlier review. The performance review will consist of a comprehensive examination of the effects of price cap regulation, and will consider all available measures of market and carrier performance, including, but not limited to, actual prices, achieved rate of return, quality of service, and technological progressiveness. Underachievement or overachievement with respect to any measures of performance related to price cap regulation may result in changes to the productivity offset or other adjustments. Finally, we conclude that no retroactive payments should be exacted from AT&T for its productivity gains under price caps, as such retroactive treatment would unduly diminish AT&T's incentive to exceed an established target.

III. Legal Authority

30. We conclude that our price cap plan for AT&T is within our statutory authority, and that based on the administrative record established in this proceeding, adoption of price cap rules is in the public interest, as defined in the Communications Act and relevant judicial precedent. The Communications Act does not compel us to employ rate of return regulation, or any other particular regulatory model, in carrying out our statutory mandate, but rather provides this Commission with an array of regulatory powers and broad discretion to determine how best to use them in the public interest. Our broad discretion extends to selecting methods to make and oversee rates. Ultimately, the substantive mandate under which we operate requires only that we select a ratemaking approach that is capable of keeping rates in the zone of reasonableness, or of detecting and correcting for the failure of market forces to do so. The price cap plan for AT&T fulfills the Communications Act's substantive requirement of ensuring just, reasonable, and non-discriminatory rates, and does so in a cautious, evolutionary manner.

31. Notwithstanding that our price cap system continues to monitor and consider profit levels to ensure that they are not excessive, it is also a system designed to permit greater earnings flexibility than a strict rate of return regime. This design is based upon the fundamental premise underlying incentive regulation and the benefits it will produce for ratepayers—that it is the potential to increase earnings that drives companies to improve their efficiency. We believe this approach to rate regulation is fully consistent with our statutory mandate to ensure just and reasonable rates.

32. We are implementing price caps through the establishment of suspension and no-suspension zones, and through modifications to our current tariff filing procedures. A decision by this Commission to permit a tariff to take effect without suspension is an exercise of this Commission's discretionary authority, and constitutes a preliminary decision within our exclusive discretion. Pursuant to this discretionary suspension power, we may establish guidelines expressing a tentative opinion about the location of the line between reasonable and unreasonable rates. This Commission need not prescribe rates in order to establish no-suspension zones. Moreover, we conclude that our price cap rules do not constitutes *de facto* rate prescription without the required hearing.

IV. Paperwork Reduction Act Analysis

33. On June 14, 1988, after the release of the *Further Notice* in this proceeding, this Commission requested that the Office of Management and Budget (OMB) review the proposed information collection requirements for compliance with the Paperwork Reduction Act of 1980. On August 15, 1988, OMB commented on this Commission's proposed information collection requirements. OMB stated that the *Further Notice* failed to demonstrate the practical utility of some of the reporting requirements proposed in this Commission's request, and found that the information collections were not the minimum necessary to meet the objectives of the proposed rules. In commenting on this Commission's request, OMB listed a series of concerns that it asked this Commission to address. AT&T is currently the only carrier subject to price cap regulation. Therefore, the price cap information collection requirements contained in this Report and Order are not subject to the requirements of section 3507 of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3507). Nevertheless, OMB's concerns have been addressed in the context of this Commission's final Report and Order adopting and implementing price cap regulation for AT&T.

V. Ordering Clauses

34. Accordingly, *it is ordered* That, pursuant to sections 4(i), 4(j) 201–205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. 154(i), 154(j), 201–205, 303(r), 403, and section 553 of Title 5, United States Code, that Part 1, Part 61, Part 65, and §§ 1.773(a)(1), 61.11, 61.12, 61.13, 61.14, 61.15, 61.16, 61.17, 61.18, 61.19, 61.20, 61.21, 61.22, 61.23, 61.24, 61.25, 61.26, 61.32, 61.33, 61.38, 61.58, 65.1, 65.600, 65.701, 65.703 of this Commission's Rules, 47 C.F.R. Part 1, Part 61, Part 65, §§ 1.773(a)(1), 61.11, 61.12, 61.13, 61.14, 61.15, 61.16, 61.17, 61.18, 61.19, 61.20, 61.21, 61.22, 61.23, 61.24, 61.25, 61.26, 61.32, 61.33, 61.38, 61.58, 65.1, 65.600, 65.701, 65.703, are amended as set forth in Appendix B to this Order, and that Part 1 and Part 61 of this Commission's Rules are amended by adding §§ 61.3, 61.41, 61.42, 61.43, 61.44, 61.45, 61.46, 61.47, and 61.48 as set forth in this Order.

35. *It is further ordered,* That the motion to accept late-filed comments submitted by the National Association of Regulatory Utility Commissioners is granted.

36. *It is further ordered,* That the motion to accept late-filed reply comments submitted by the United Church of Christ Office of Communications is granted.

37. *It is further ordered,* That the motion to pursue further investigation submitted by the Florida Public Counsel is granted in part and denied in part to the extent indicated herein.

38. *It is further ordered,* That the motion for further proceedings submitted by the Competitive Telecommunications Association, the Consumer Federation of America, the International Communications Association, the National Association of Regulatory Utility Commissioners, and MCI Telecommunications Corporation is granted in part and denied in part to the extent indicated herein.

39. *It is further ordered,* That pursuant to § 1.427(b) of this Commission's Rules, 47 CFR 1.427(b), the rules amendments adopted in paragraph 913, *supra,* shall be effective on May 17, 1989. Good cause exists to make these rules amendments effective less than 30 days from publication in the **Federal Register**, in that we wish to begin obtaining the public benefits of price cap regulation enumerated *supra* with tariff filings to become effective on July 1, 1989, on not less than 45 days' notice. In order to accommodate this schedule, AT&T must file its initial price cap tariffs pursuant to the rules amendments adopted herein on or before May 17, 1989. As of May 17, 1989, the public will have had 30 days' actual notice of the rules amendments adopted herein, beginning with the release of this Report and Order and Second Further Notice of Proposed Rulemaking.

List of Subjects

47 CFR Part 1

Administrative practice and procedure.

47 CFR Part 61

Communications common carriers, Reporting and recordkeeping requirements, Telephone, Price cap tariff filing and review procedures.

47 CFR Part 65

Administrative practice and procedure, Communications common carriers, Reporting and recordkeeping requirement.

For the reasons set forth in the preamble, Title 47, Parts 1, 61, and 65 of the Code of Federal Regulations are amended as follows:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.773 is amended by adding a new paragraph (a)(1)(iv) to read as follows:

§ 1.773 Petitions for suspension or rejection of new tariff filings.

(a) * * *

(1) * * *

(iv) For the purposes of this section, tariff filings made pursuant to § 61.49(b) by carriers subject to price cap regulation will be considered *prima facie* lawful, and will not be suspended by the Commission unless the petition shows that the support information required in § 61.49(b) was not provided, or unless the petition requesting suspension shows each of the following:

(A) That there is a high probability the tariff would be found unlawful after investigation;

(B) That the suspension would not substantially harm other interested parties;

(C) That irreparable injury will result if the tariff filing is not suspended; and

(D) That the suspension would not otherwise be contrary to the public interest.

* * * * *

PART 61—TARIFFS

2. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

3. Section 61.3 is added to read as follows:

§ 61.3 Definitions.

(a) *Act.* The Communications Act of 1934 (48 Stat. 1004; 47 U.S.C. Chapter 5), as amended.

(b) *Actual Price Index* (API). An index of the level of aggregate rate element rates in a basket, which index is calculated pursunt to § 61.46.

(c) *Association.* This term has the meaning given it in § 69.2(d).

(d) *Band.* A zone of pricing flexibility for a service category, which zone is calculated pursuant to § 61.47.

(e) *Base period.* The 12-month period ending six months prior to the effective date of annual price cap tariffs.

(f) *Basket.* Any class or category of tariffed services:

(1) Which is established by the Commission pursuant to price cap regulation;

(2) The rates of which are reflected in an Actual Price Index; and

(3) The related costs of which are reflected in a Price Cap Index.

(g) *Change in rate structure.* A restructuring or other alternation of the rate components for an existing service.

(h) *Charges.* The price for service based on tariffed rates.

(i) *Commercial contractor.* The commercial firm to whom the Commission annually awards a contract to make copies of Commission records for sale to the public.

(j) *Commission.* The Federal Communications Commission.

(k) *Concurring carrier.* A carrier (other than a connecting carrier) subject to the Act which concurs in and assents to schedules of rates and regulations filed on its behalf an issuing carrier or carriers.

(l) *Connecting carrier.* A carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier.

(m) *Corrections.* The remedy of errors in typing, spelling, or punctuations.

(n) *Dominant carrier.* A carrier found by the Commission to have market power (i.e., power to control prices).

(o) *GNP Price Index* (GNP–PI). The estimate of the "Fixed-Weighted Price Index for Gross National Product, 1982 Weights" published by the United States Department of Commerce, which the Commission designates by Order.

(p) *Issuing carrier.* A carrier subject to the Act that publishes and files a tariff or tariffs with the Commission.

(q) *Local Exchange Carrier.* A telephone company that provides telephone exchange service as defined in section 3(r) of the Act.

(r) *New service offering.* A tariff filing that provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers.

(s) *Non-dominant carrier.* A carrier not found to be dominant.

(t) *Other participating carrier.* A carrier subject to the Act that publishes a tariff containing rates and regulations applicable to the portion or through service it furnishes in conjunction with another subject carrier.

(u) *Price Cap Index* (PCI). An index of costs facing carriers subject to price cap regulation, which index is calculated for each basket pursuant to § 61.44.

(v) *Price cap regulation.* A method of regulation of dominant carriers provided in §§ 61.41 through 61.49.

(w) *Price cap tariff.* Any tariff filing involving a service that is within a price cap basket, or that requires calculations pursuant to § 61.44, § 61.46, or § 61.47.

(x) *Productivity factor.* An adjustment factor (3.0 percent) used to make annual adjustments to the Price Cap Index to reflect the margin by which a carrier subject to price cap regulation is expected to improve its productivity relative to the economy as a whole.

(y) *Rate.* The tariffed price per unit of service.

(z) *Rate increase.* Any change in a tariff which results in an increased rate or charge to any of the filing carrier's customers.

(aa) *Rate level change.* A tariff change that only affects the actual rate associated with a rate element, and does not affect any tariff regulations or any other wording of tariff language.

(bb) *Regulations.* The body of carrier prescribed rules in a tariff governing the offering of service in that tariff, including rules, practices, classifications, and definitions.

(cc) *Restructured service.* An offering which represents the modification of a method of charging or provisioning a service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to customers.

(dd) *Service Band Index* (SBI). An index of the level of aggregate rate element rates in a service category, which index is calculated pursuant to § 61.47.

(ee) *Service category.* Any group of rate elements subject to price cap regulation, which group is subject to a band.

(ff) *Supplement.* A publication filed as part of a tariff for the purpose of suspending or cancelling that tariff, or tariff publication and numbered independently from the tariff page series.

(gg) *Tariff.* Schedules of rates and regulations filed by common carriers.

(hh) *Tariff publication, or publication.* A tariff, supplement, revised page, additional page, concurrence, notice of revocation, adoption notice, or any other schedule of rates or regulations.

(ii) *Text change.* A change in the text of a tariff which does not result in a change in any rate or regulation.

(jj) *United States.* The several States and Territories, the District of Columbia, and the possessions of the United States.

§§ 61.11 through 61.26 [Removed and Reserved]

4. Sections 61.11, 61.12, 61.13, 61.14, 61.15, 61.16, 61.17, 61.18, 61.19, 61.20, 61.21, 61.22, 61.23, 61.24, 61.25, and 61.26 are removed and reserved.

5. The fifth sentence of § 61.32 is revised to read as follows:

§ 61.32 Method of filing publications.

* * * Simultaneously with the filing of the publications and by the same means, the issuing carrier must send a copy of the publication, supporting information specified in § 61.38, or, as appropriate, § 61.49, and transmittal letter to the commercial contractor (at its office on Commission premises) and the Chief, Tariff Review Branch. * * *

6–7. Section 61.33 is amended to redesignate paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), to add a new paragraph (c) and to revise newly redesignated paragraph (d) to read as follows:

§ 61.33 Letters of transmittal.

* * * * *

(c) In addition to the requirements set forth in paragraph (a) of this section, any carrier filing a price cap tariff must include in the letter of transmittal a statement that the filing is made pursuant to § 61.49.

(d) In addition to the requirements set forth in paragraphs (a), (b), and (c) of this section, the letter of transmittal must specifically reference by number any special permission necessary to implement the tariff publication. Special permission must be granted prior to the filing of the tariff publication, and may not be requested in the transmittal letter.

* * * * *

8. Section 61.38(a) is amended by adding a new sentence at the end to read as follows:

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42 (a), (b), and (d), which filings are

submitted by carriers subject to price cap regulation.

* * * * *

9. Sections 61.41 through 61.49 are added to read as follows:

§ 61.41 Price cap requirements generally.

Sections 61.42 through 61.49 apply to dominant interexchange carriers, as specified by Commission order.

§ 61.42 Price cap baskets and service categories.

(a) Each dominant interexchange carrier subject to price cap regulation shall establish three baskets as follows:

(1) A residential and small business services basket;

(2) An 800 service basket; and

(3) A business services basket.

(b) (1) The residential and small business basket shall contain such services as the Commission shall permit or require, including the following service categories:

(i) Domestic day MTS;

(ii) Domestic evening MTS;

(iii) Domestic night/weekend MTS;

(iv) International MTS;

(v) Operator and credit card services; and

(vi) Reach Out America.

(2) The 800 service basket shall contain such services as the Commission shall permit or require, including the following service categories:

(i) Readyline 800;

(ii) AT&T 800;

(iii) Megacom 800; and

(iv) Other 800.

(3) The business services basket shall contain such services as the Commission shall permit or require, including the following service categories:

(i) ProAmerica I, II, and III;

(ii) WATS;

(iii) Megacom;

(iv) SDN;

(v) Other switched;

(vi) Voice grade private line and below; and

(vii) Other private line.

(c) Dominant interexchange carriers subject to price cap regulations shall exclude the following offerings from their price cap baskets:

(1) Special construction services;

(2) American Telephone and Telegraph Company Tariff F.C.C. No. 11 services;

(3) Such custom tariff services as the Commission may specify; and

(4) Such other services as the Commission may specify.

(d) New services, other than those within the scope of paragraph (c) of this section, must be included in the affected basket at the first annual price cap tariff filing following completion of the base period in which they are introduced. To the extent that such new services are permitted or required to be included in new or existing service categories within the assigned basket, they shall be so included at the first annual price cap tariff filing following completion of the base period in which they are introduced.

§ 61.43 Annual price cap filings required.

Carriers subject to price cap regulation shall submit annual price cap tariff filings that propose rates for the upcoming year, that make appropriate adjustments to their PCI, API, and SBI values pursuant to §§ 61.44, 61.46, and 61.47, and that incorporate the costs and rates of new services into the PCI, API, or SBI calculations pursuant to §§ 61.44(g), 61.46(b), and 61.47 (b) and (c). Carriers may propose rate or other tariff changes more often than annually, consistent with the requirements of § 61.59.

§ 61.44 Adjustments to the PCI.

(a) Carriers subject to price cap regulation shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year access and exogenous cost changes.

(b) Subject to paragraph (d) of this section, adjustments to each basket's PCI shall be made pursuant to the following formula:

$$PCI_t = PCI_{t-1}[1 + w(GNP\text{-}PI - X) + \Delta Y/R + \Delta Z/R]$$

where

GNP–PI = the percentage change in the GNP–PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year,

X = productivity factor of 3.0%,

ΔY = (new access rate—access rate at the time the PCI was updated to PCI_{t-1}) × (base period demand),

ΔZ = the dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations,

R = base period quantities for each rate element "i", multiplied by the price for each rate element "i" at the time the PCI was updated to PCI_{t-1},

w = R − (access rate in effect at the time the PCI was updated to PCI_{t-1} × base period demand) + ΔZ, all divided by R,

PCI_t = the new PCI value, and

PCI_{t-1} = the immediately preceding PCI value.

(c) The exogenous cost changes represented by the term "ΔZ" in the formula detailed in paragraph (b) of this section, shall be limited to those cost changes that the Commission shall permit or require, and include those caused by:

(1) the completion of the amortization of depreciation reserve deficiencies;

(2) Changes in the Uniform System of Accounts;

(3) Changes in the Separations Manual;

(4) The reallocation of investment from regulated to nonregulated activities pursuant to § 64.901; and

(5) Such tax law changes and other extraordinary exogenous cost changes as the Commission shall permit or require.

These exogenous cost changes shall be apportioned on a cost-causative basis between price cap services as a group, and excluded services as a group. Exogenous cost changes thus attributed to price cap services shall be further apportioned on a cost-causative basis among price cap baskets.

(d) In calculating the "ΔY" variable in the formula detailed in paragraph (b) of this section:

(1) The net change in total non-traffic sensitive access costs for all capped services (in all baskets), calculated at base period demand, shall be allocated among the baskets in proportion to each basket's share of total base period non-traffic sensitive minutes of access (both originating and terminating);

(2) The net change in total traffic sensitive access costs for all capped services (in all baskets), calculated at base period demand, shall be allocated among the baskets in proportion to each basket's share of total base period traffic sensitive minutes of access; and

(3) Changes in special access costs in each basket, calculated at base period demand, shall be assigned directly to the baskets in which such costs are incurred.

(e) In calculating the "w" variable in the formula detailed in paragraph (b) of this section, the access costs that must be subtracted from the "R" variable shall be apportioned among the baskets in a manner that is consistent with the methodology provided in paragraph (d) of this section for calculating the "ΔY" in each basket.

(f) The "w(GNP–PI − X)" component of the PCI formula shall be employed only in the adjustment made in connection with the annual price cap filing.

(g) The exogenous cost changes and changes in access costs caused by new services subject to price cap regulation must be included in the appropriate PCI calculations under paragraph (b) of this section beginning at the first annual price cap tariff filing following

completion of the base period in which they are introduced.

(h) In the event that a price cap tariff becomes effective, which tariff results in an API value (calculated pursuant to § 61.46) that exceeds the currently applicable PCI value, the PCI value shall be adjusted upward to equal the API value.

§ 61.45 [Reserved]

§ 61.46 Adjustments to the API.

(a) In connection with any price cap tariff filing proposing rate changes, the carrier must calculate an API for each affected basket pursuant to the following methodology:

$API_t = API_{t-1} [\Sigma_i v_i (P_t/P_{t-1})_i]$

where

API_t = the proposed API value,

API_{t-1} = the existing API value,

P_t = the proposed price for rate element "i,"

P_{t-1} = the existing price for rate element "i," and

v_i = the current estimated revenue weight for rate element "i," calculated as the ratio of the base period demand for the rate element "i" priced at the existing rate, to the base period demand for the entire basket of services priced at existing rates.

(b) New services subject to price cap regulation must be included in the appropriate API calculations under paragraph (a) of this section beginning at the first annual price cap tariff filing following completion of the base period in which they are introduced. This index adjustment requires that the demand for the new service during the base period must be included in determining the weights used in calculating the API.

(c) Any price cap tariff filing proposing rate restructuring shall require an adjustment to the API pursuant to the general methodology described in paragraph (a) of this section. This adjustment requires the conversion of existing rates into rates of equivalent value under the proposed structure, and then the comparison of the existing rates that have been converted to reflect restructuring to the proposed restructured rates. This calculation may require use of carrier data and estimation techniques to assign customers of the preexisting service to those services (including the new restructured service) that will remain or become available after restructuring.

§ 61.47 Adjustments to the SBI; pricing bands.

(a) In connection with any price cap tariff filing proposing changes in the rates of service categories, the carrier must calculate an SBI value for each affected service category pursuant to the following methodology:

$SBI_t = SBI_{t-1} [\Sigma_i v_i (P_t/P_{t-1})_i]$

where

SBI_t = the proposed SBI value,

SBI_{t-1} = the existing SBI value,

P_t = the proposed price for rate element "i,"

P_{t-1} = the existing price for rate element "i," and

v_i = the current estimated revenue weight for rate element "i," calculated as the ratio of the base period demand for the rate element "i" priced at the existing rate, to the base period demand for the entire group of rate elements comprising the service category priced at existing rates.

(b) New services that are added to existing service categories must be included in the appropriate SBI calculations under paragraph (a) of this section beginning at the first annual price cap tariff filing following completion of the base period in which they are introduced. This index adjustment requires that the demand for the new service during the base period must be included in determining the weights used in calculating the SBI.

(c) In the event that the introduction of a new service requires the creation of a new service category, a new SBI must be established for that service category beginning at the first annual price cap tariff filing following completion of the base period in which the new service is introduced. The new SBI should be initialized at a value of 100, corresponding to the service category rates in effect the last day of the base period, and thereafter should be adjusted as provided in paragraph (a) of this section.

(d) Any price cap tariff filing proposing rate restructuring shall require an adjustment to the affected SBI pursuant to the general methodology described in paragraph (a) of this section. This adjustment requires the conversion of existing rates in the rate element group into rates of equivalent value under the proposed structure, and then the comparison of the existing rates that have been converted to reflect restructuring to the proposed restructured rates. This calculation may require use of carrier data and estimation techniques to assign customers of the preexisting service to those services (including the new restructured service) that will remain or become available after restructuring.

(e) Pricing bands shall be established each tariff year for each service category within a basket. Except as provided in paragraph (f) of this section, each band shall limit the pricing flexibility of the service category, as reflected in its SBI, to an annual increase or decrease of five percent, relative to the percentage change in the PCI for that basket, measured from the levels in effect on the last day of the preceding tariff year.

(f) The upper pricing bands for the evening MTS and night/weekend MTS service categories shall limit the annual upward pricing flexibility for those service categories, as reflected in their SBIs, to four percent, relative to the percentage change in the PCI for the residential and small business services basket, measured from the last day of the preceding tariff year.

(g) Dominant interexchange carriers subject to price cap regulation shall calculate a composite average rate for services contained in the residential and small business services basket that are purchased by residential customers. Notwithstanding paragraphs (e) and (f) of this section, the annual upward pricing flexibility for this composite average rate shall be limited to one percent, relative to the percentage change in the PCI for the residential and small business services basket, measured from the last day of the preceding tariff year.

§ 61.48 Transition rules for price cap formula calculations.

(a) Dominant interexchange carriers subject to price cap regulation shall file initial price cap tariffs May 17, 1989, to be effective July 1, 1989.

(b) In connection with the initial price cap tariff filing described in paragraph (a) of this section, each PCI, API, and SBI shall be assigned an initial value prior to adjustment of 100, corresponding to the costs and rates in effect as of December 31, 1988.

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

(a) Each price cap tariff filing must be accompanied by supporting materials sufficient to calculate required adjustments to each PCI, API, and SBI pursuant to the methodologies provided in §§ 61.44, 61.46, and 61.47.

(b) Each price cap tariff filing that proposes rates that are within applicable bands established pursuant to § 61.47, and that results in an API value that is equal to or less than the applicable PCI value, must be accompanied by supporting materials sufficient to establish compliance with the applicable bands, and to calculate the necessary adjustment to the affected APIs and SBIs pursuant to §§ 61.46 and 61.47, respectively.

(c) Each price cap tariff filing that proposes rates above the applicable band limits established in §§ 61.47 (e) and (f), or above the limit on composite average residential rates established in

§ 61.47(g), must be accompanied by supporting materials establishing substantial cause for the proposed rates.

(d) Each price cap tariff filing that proposes service category rates below applicable band limits established in § 61.47(e), must be accompanied by supporting materials establishing that the rates cover the service category's average variable cost.

(e) Each price cap tariff filing that proposes rates that will result in an API value that exceeds the applicable PCI value must be accompanied by: (1) An explanation of the manner in which all costs have been allocated among baskets; and (2) within the affected basket, a cost assignment slowing down to the lowest possible level of disaggregation, including a detailed explanation of the reasons for the prices of all rate elements to which costs are not assigned.

(f) Each price cap tariff filing that proposes restructuring of existing rates must be accompanied by supporting materials sufficient to make the adjustments to each affected API and SBI required by §§ 61.46(c) and 61.47(d), respectively.

(g) Each tariff filing that introduces a new service that will later be included in a basket must be accompanied by cost data sufficient to establish that the new service, and each unbundled element thereof, will generate a net revenue increase—measured against revenues generated from all services subject to price cap regulation, and calculated based upon present value—within the lesser of a 24-month period after an annual price cap tariff including the new service takes effect, or 36 months from the date the new service becomes effective. Each such tariff filing must also be accompanied by data sufficient to make the API and PCI calculations required by §§ 61.46(b) and 61.44(g), and, as necessary, to make the SBI calculations provided in §§ 61.47 (b) or (c).

10–11. Section 61.58 is amended to redesignate paragraph (c) as paragraph (d), to add a new paragraph (c) and to revise the introductory text of newly redesignated paragraph (d)(1) to read as follows:

§ 61.58 Notice requirements.

* * * * *

(c) *Carriers subject to price cap regulation.* This paragraph applies only to carriers subject to price cap regulation. Such carriers must file tariffs according to the following notice periods.

(1) For annual adjustments to the PCI, API, and SBI values under §§ 61.44, 61.46, and 61.47, respectively, tariff filings must be made on at least 45 days' notice.

(2) Tariff filings that alter rate levels only, and that do not cause any API to exceed any applicable PCI pursuant to calculations provided for in § 61.46; and do not cause any SBI to exceed its banding limitations established in § 61.47, must be made on at least 14 days' notice.

(3) Tariff filings that will cause any API to exceed its applicable PCI pursuant to calculations provided for in § 61.46, that will cause any SBI to exceed its upper banding limitations established in §§ 61.47 (e) and (f), or that will cause the composite average residential rate to exceed its limitation on upward pricing flexibility established in § 61.47(g), must be made on at least 90 days' notice.

(4) Tariff filings that will cause any SBI to decrease below its lower banding limit established in § 61.47(e), must be made on at least 45 days' notice.

(5) Tariff filings involving a change in rate structure of a service included in a basket listed in § 61.42(a), or the introduction of a new service within the scope of § 61.42(d), must be made on at least 45 days' notice.

(6) The required notice for tariff filings involving services included in § 61.42(c), or involving changes to tariff regulations, shall be that required in connection with such filings by dominant carriers that are not subject to price cap regulation.

(d) *Other carriers.* (1) Tariff filings in the instances specified in paragraphs (d)(1) (i), (ii), and (iii) of this section must be made on at least 15 days' notice.

* * * * *

PART 65—INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.1 is revised to read as follows:

§ 65.1 Application of Part 65.

This part establishes procedures and methodologies for Commission prescription of interstate rates of return. This part shall apply to those interstate services and carriers as the Commission shall designate by Order. This part and the existing rate of return prescription shall not apply to dominant interexchange carriers subject to §§ 61.41 through 61.49, except as set forth in §§ 65.600(c), 65.701(c), and 65.703(g).

3. Section 65.600 is amended by revising paragraph (c) to read as follows:

§ 65.600 Rate of return reports.

* * * * *

(c) Each interexchange carrier subject to §§ 61.41 through 61.49 shall file with the Commission, within three (3) months after the end of each calendar year, the total interstate rate of return for that year for all interstate services subject to regulation by the Commission. Each such filing shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base. A copy of the filing shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

4. Section 65.701 is amended by adding a new paragraph (c) to read as follows:

§ 65.701 Period of review.

* * * * *

(c) Notwithstanding other provisions in this subpart, the final period of review for any dominant interexchange carrier subject to price cap regulation (as defined in § 61.3(v)) shall end on June 30, 1989.

5. Section 65.703 is amended by revising paragraphs (a) and (f), and by adding a new paragraph (g) to read as follows:

§ 65.703 Refunds.

(a) For carriers not subject to §§ 61.41 through 61.49, refunds shall be effected automatically if a carrier's earnings for any category of services, as set forth in § 65.702, exceed the maximum allowable rate of return. In determining whether a carrier's earnings exceed the maximum allowable rate of return, the reports filed by a carrier shall be deemed conclusively binding on the carrier.

* * * * *

(f) For interexchange carriers subject to this Part, but not subject to §§ 61.41 through 61.49, tariffs reflecting the revenue requirement reductions effectuating the refund shall be filed on 45 days' notice on later than 60 days after submission of the final report for the earnings review period.

(g) For carriers subject to §§ 61.41 through 61.49, refund obligations incurred prior to the date their tariffs filed pursuant to §§ 61.41 through 61.49 take effect for the first time, shall be effectuated by an adjustment to the applicable Actual Price Index, Service Band Index, and Price Cap Index (as

defined in § 61.3). Carriers making an adjustment to effectuate any outstanding refund requirements from the final enforcement period shall make such adjustments no later than during the next scheduled annual price cap adjustment tariff filing following the submission of the final enforcement report. The adjustment shall be designed to complete the required refund within 12 months, following which the Actual Price Index, the Service Band Index, or the Price Cap Index shall be adjusted to remove the effect of the adjustment.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

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