Top Ten Service Contract Act Mistakes and How to Avoid Them

Breakout Session #E14

Leslie Stout-Tabackman
Shareholder, Jackson Lewis

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This presentation is to provide general information and updates regarding Service Contract Act and related prevailing wage requirements for federal contractors and recipients of ARRA funds.

These materials are not intended to provide legal advice on specific compliance issues. Attendees should consult either with in-house counsel or, as directed, with an outside counsel for legal advice about whether, based on specific facts and circumstances, the company complies with the applicable prevailing wage requirements.
SCA Basics

• FAR Clause 52.222-41.
• The McNamara-O’Hara Service Contract Act of 1965, as amended, covers most federal service contracts in excess of $2,500 (41 USC § 351 et seq. and 29 CFR Part 4).
• Provides minimum labor standards protection to service employees.
• Wage Determinations issued by DOL that set wage rates and benefits for classes of employees used in service contracts.
• Purpose is to remove wages as a bid factor in competition for federal service contracts.
What is Covered?

• Contracts entered into by federal and District of Columbia agencies in which the **principal purpose** of the contract is to furnish services in the U.S. through the use of “service employees.”
  – Includes contracts with federal agencies and instrumentalities (DOD, DHS, Coast Guard, USPS).
• Above $2,500 threshold – for IDIQ and task order contracts must aggregate $ amounts of purchase orders and task orders under umbrella contracting vehicle on annual basis.
• SCA provisions apply to subcontractors under SCA-covered prime contracts.
Basic Requirements

- Wages and fringe benefits minimum rates are separately specified and must be paid/provided separately to workers (unlike DBA).
  - Determined by the DOL in WDs.
  - Includes holidays, vacation, and bona fide health and welfare fringe benefits or cash equivalent.
- Posting requirements—notice and WD rates and benefits.
- Recordkeeping requirements.
Penalties

• Back wages and benefits.
• A “hold” on contract payments by agency.
• Contract cancellation and reprocurement costs.
• Personal liability for corporate officials and others who exercise control, supervision or management of contract performance.
• Debarment for three-year term from all government contracts unless showing of “unusual circumstances.”
• Debarment applies to contractor in its capacity as both a prime contractor and a subcontractor.
Enforcement

• DOL is the enforcement agency, and relies on audits.
  – DOL audits may be triggered by complaints or DOL’s selection.
• Often, an initial DOL complaint or audit focuses on alleged FLSA or Family and Medical Leave Act (“FMLA”) compliance.
• Once DOL is “in the door” DOL can then audit for SCA compliance.
• DOL can and will expand audit to multiple contractors and/or multiple locations where initial audit shows violations that may be systemic or are found to be willful.
• No private cause of action, although an employee or union may file a qui tam action under the Civil False Claims Act.
#1 – Where’s My Wage Determination?

- Contracting agency is responsible for selecting appropriate WD(s) and incorporating WD(s) into contract.
- Contractor should not independently select the WD(s)—risk following the wrong WD and risk losing price adjustment.
- A new wage determination is applicable on the anniversary date of contract in multi-year contract (non-appropriated funds contracts require new WDs every two years rather than annually).
- Extension of contract (but not if contractor just granted extra time to fulfill original commitment) or exercise of option.
- Major modification or amendment of contract affecting labor requirements.
#2 - What? A Collective Bargaining Agreement?

• Successor contractor rule under Section 4 (c) of the SCA requires that a successor contractor providing substantially the same services in the same location must pay the wage rates and fringe benefits of the predecessor contractor’s CBA for the base year of the contract.

• Successor obligation is self-executing (with limited exceptions).

• Critical to get incumbent contractor’s collective bargaining agreement from CO during bid and solicitation process.

• Contractor with own CBA is its own successor in multiyear contracts.
Collective Bargaining Agreement (cont.)

- Successor contractor is not required to recognize union or follow CBA provisions relating to:
  - Seniority.
  - Grievance procedures.
  - Work rules.
  - Overtime.
#3- Hmmm- Who is an SCA Worker?

- Employees (both FT and PT), temps, independent contractors.
- Work necessary to contract but not in direct performance?
- Exempt/non-exempt? Check both duties test and salary basis test.
- Try to get confirmation from CO regarding which employees are considered “service employees.”
- Back pay and CWHSSA penalties for misclassification of SCA workers – good luck obtaining adjustment from agency.
#4- Classification of Workers- high stakes!

- Try to get confirmation from CO regarding proper classification of employees.
- If job is not on the WD, must conform it by filing SF 1444.
Classification of Workers (cont.)

• Conformance may not be used to:
  – Subdivide an existing job class;
  – Combine two or more classes to create a new class;
  – Establish a job level lower than that for a particular job class grouping (e.g., for Accounting Clerks, there is no conformance allowed below level I); or
  – Create a helper or trainee class.
Classification of Workers (cont.)

- Employers must propose rate based on “reasonable relationship” to rates in the WD.
- No single formula used.
- Often GS rates from OPM or WG, WS, WL rates from DoD can be used to help determine and support proposed rate.
- Must furnish job description, federal wage grade equivalent and proposed rate rationale.
Classification of Workers (cont.)

- Employer prepares SF 1444 form and submits to CO no later than 30 days after affected employees begin work.
- CO reviews, makes recommendation and submits to DOL.
- Employer should pay affected employees at proposed rate until approval or disapproval from DOL.
- If DOL disapproves rate, employer must provide back pay.
Classification of Workers (cont.)

- Beware of “job creep” – periodically check actual job duties being performed and change classification if necessary (discuss with CO and modify contract to match change).

- In addition to back pay for improper classification, CHWSSA penalties for improper OT pay based on misclassification – good luck again getting adjustment from the agency.
#5- I Have to Segregate What?

• Hours worked subject to SCA wages (and benefits) are hours worked on covered contract.

• Employer must keep segregate time and keep records of time spent on SCA-covered and non-SCA covered work each workweek or else all work may need to be paid at SCA rate.

• Employer must track and keep proof of SCA-covered work performed by employees who perform work in different classifications or else all work may need to be paid at the highest SCA rate.
#6 - Vacation and Holiday Benefits - Pitfalls

- Amount of vacation due employees is listed on the WD.
- “Continuous service” determines employee’s eligibility for vacation benefits and is determined by the length of time:
  - Worked for the contractor in any capacity (includes non-SCA work); and/or
  - Worked for the predecessor contractor in performance of same or similar contract at same facility.
- Prior to beginning contract work, ensure predecessor contractor has provided required data regarding length of service of any predecessor service employees hired by Company for purpose of determining vacation benefits.
Vacation and Holiday Benefits (cont.)

- Vacation becomes vested upon employee’s anniversary date.
- Where there is predecessor/successor contractor situation, contractor that employs employee as of anniversary date must pay the vested unpaid vacation benefit.
- Vacation becomes vested and due on anniversary date, but need not be used or paid out until the **earliest** of:
  - The employee’s next anniversary date;
  - The date of contract completion; or
  - The employee terminates employment.
Vacation and Holiday Benefits (cont.)

• Many employers’ vacation policies may be in conflict with or fail to fully meet the SCA’s vacation requirements.
  – The SCA doesn’t provide for carryover of vacation even though many employers allow it.
  – Vacation is determined based on anniversary date of employee, not calendar year or employer’s fiscal year.
  – Part-time employees are entitled to pro-rata vacation; temps and independent contractors must also receive vacation or cash equivalent.

• For employers that hire employees who worked for predecessor contractor performing similar contract work at a federal facility, the contractor with whom the employee works at the time vacation vests must provide the full vacation benefit.
Vacation and Holiday Benefits (cont.)

- Named holidays are listed on WD.
- Employee entitled to holiday pay if he/she performs any work during the holiday workweek.
- Employee is also entitled to holiday pay if he/she is on paid vacation or sick leave during holiday workweek.
- Holiday benefits must be provided regardless of the length of time the employee has worked for the employer at the time a holiday occurs and regardless of whether she works the day before or after the holiday (as some employers require).
Vacation and Holiday Benefits (cont.)

• Okay to provide or trade named holidays for another day off if policy is communicated in writing to employees.

• Can pay holiday pay (in addition to regular pay) if employee must work on holiday and is not provided alternative holiday.

• Remember, part-time employees are entitled to pro-rata vacation; temps and independent contractors must also receive holidays or cash equivalent.
#7- Health & Welfare Benefits- Traps for the Unwary

• Unless otherwise specified on the applicable WD, health and welfare payments are due for all hours worked/paid, including paid vacation, sick leave and holiday hours; up to a maximum of 40 hours per week and 2,080 hours per year on each contract.

• Employer may provide H&W rate through bona fide fringe benefits or in cash payments.
H&W Benefits (cont.)

- Life Insurance.
- Health Insurance.
- Disability Insurance.
- Pension/401(k).
- Sick leave.
- Vacation, holidays, PTO provided in excess of WD requirements.
H&W Benefits (cont.)

• Contractors may take credit (without prior approval from DOL) for bona fide fringe benefit fund contributions made to third-party trustees or insurers that:
  – Are irrevocably paid; and
  – Are made regularly, not less often than quarterly.

• Credit is for payments made for individual workers eligible to participate in the plan, program, or fund.

• If plan is self-funded (e.g. self-insured medical insurance) and meets requirements for approval, plan to seek approval letter from DOL.
H&W Benefits (cont.)

• Cash payments in lieu of fringe benefits must be paid on the regular pay date.

• Fringe benefit cash payments must be separately listed on payroll or DOL will not give credit.

• Higher wage payments (above the SCA rate) may not be used to offset fringe benefit payments due to employees.

• Payments into bona fide fringe benefit plans must be made no less often than quarterly.
H&W Benefits (cont.)

- If participation in the FB plan requires a contribution from the employee’s wages, the employee’s consent is necessary.
- The cost of providing fringe benefits may not be credited towards meeting the SCA wage or benefit requirements under the contract.
- Employer cannot count any benefits mandated by law toward the H&W benefit required (e.g., social security taxes, unemployment compensation, worker’s compensation).
  - State mandated sick leave is an “unofficial” exception.
#8-SCA or Davis-Bacon Work?

- Federal agencies responsible for designating application of DBA and SCA requirements to different work under a single contract. But DOL makes the final call.
- Work may be DBA covered when activity is part of a construction contract or on site undergoing construction.
- Individual task or work orders on contract are not to be split to avoid DBA coverage.
- SCA and DBA may both apply to contracts “principally” for service that
  - contain specific requirements for “substantial” (type and quantity –not just dollar value) amounts of construction, alteration, repair.
  - physically or functionally separate from other work in contract.
SCA maintenance or DBA repair?

- **SCA work** is typically:
  - scheduled regularly occurring maintenance activities.
  - routine to keep something in use.
  - examples – custodial service, HVAC filter changes, snow removal.

- **DBA work** is typically:
  - one time fix to something not functioning.
  - restoration, alteration or replacement of fixed components.
  - examples – building or extensive mending of fence, structural repair of building, paving repairs, roof shingling.
#9 – Subcontractors – What Me Worry?

- Joint and several liability for prime contractors and subcontractors.
- Contractor responsible for SCA flow-down provisions including wage determination.
- Contractors should ensure subcontractors understand SCA requirements.
- Consider certification requirements and include specific indemnification provisions.
#10- Who is in Charge Here?

- Often contractors take in SCA contracts but don’t create and/or follow robust SCA compliance plans.
- Create SCA working group of all stakeholders.
- Create SCA compliance checklist and internal flow chart with responsible persons for each task.
- Train responsible persons.
- Include SCA compliance in performance metrics.
- Perform internal periodic reviews and promptly remediate problem areas.
And … Are Posting, Notice, and Recordkeeping Requirements a Big Deal?

• Yes. When DOL comes calling during an audit it will look to see if company has complied with posting and notice requirements.

• Investigators make initial assessments of employer as a “good” contractor or a “bad” contractor.

• Failure to keep adequate records is more than just a recordkeeping violation – if your records are not in good order and do not show clearly job classifications, hours worked, wages paid, benefits provided, etc., the audit process will be slower and more underlying records will be sought.
Posting and Notice Requirements

• Employer performing work covered by the SCA is required to:
  – Provide each employee working on the contract notice of the SCA payment and fringe benefit requirements for the different classes of service employees, and
  – Post the “Employee Rights on Government Contracts” notice (including any applicable WD) at the site of the work in a prominent and accessible place where it may be easily seen by employees.

• If the contractor employs workers with disabilities under special minimum wage certificates, the “Notice to Workers with Disabilities/Special Minimum Wage” (PDF) poster must also be posted.
Recordkeeping

• Some of the records required under the SCA are also required under the Fair Labor Standards Act (see Wage and Hour Division Fact Sheet #21: Recordkeeping).

• Contractors and subcontractors are required to maintain certain records for each employee performing work on the covered contract. Basic records, such as name, address, and Social Security number of each employee must be maintained for three years from completion of the work.
Recordkeeping (cont.)

• In addition, records on the following must be maintained for three years:
  – The correct work classification(s), wage rate(s), and fringe benefits provided (or cash equivalent payments provided in lieu of fringe benefits);
  – The total daily and weekly compensation of each employee;
  – The number of daily and weekly hours worked by each employee;
  – Any deductions, rebates, or refunds from each employee’s compensation;
  – Any list of a predecessor contractor’s employees which had been furnished showing employee’s length of service information;
  – A list of wages and fringe benefits for those classes of workers conformed to the WD attached to the contract; and
  – The contractor shall also make available a copy of the contract upon request from the Wage and Hour Division.
Executive Order 13495 - Nondisplacement of Qualified Workers under Service Contracts

• President Obama signed E.O. 13495 as one of three pro-labor Executive Orders as soon as he took office in January 2009.

• Stated purpose is to provide greater productivity and efficiencies when a government service contract expires and a follow-on contract is awarded.

• Applies to certain contracts and subcontracts entered into under the McNamara-O’Hara Service Contract Act of 1965 (SCA).

• Federal contractors awarded a follow-on contract for the “same or similar services at the same location” must offer the predecessor contractor’s employees (other than managers and supervisors) the “right of first refusal” for positions in which they are qualified.
Executive Order 13495

- August 29, 2011 the Department of Labor’s Wage and Hour Division (WHD) published its final rule implementing the E.O. but not effective until the FAR Council published its rule.
- FAR Council published its final rule on December 21, 2012 and issued FAR Clause 52.222-17 to implement the E.O.
- Rules became effective January 18, 2013.
- Rules are applicable to solicitations issued on or after January 18.
- But, FAR rule states that COs are expected to work with their existing service contractors and bilaterally modify their contracts to include the new FAR clause and COs shall document their files to describe steps taken to do so.
Same or Similar Service at Same Location

• “Same or Similar Service”:
  – Broad interpretation to encompass more contracts.
  – Contracting agency determines if the follow-on contract is for the same or similar services.
  – “Either identical to or has characteristics that are alike in substance to a service performed at the same location on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract.”

• “Same location”:
  – Depends on geographic area in which performance has occurred and will occur.
  – May be determined by reference to contract SOW or other contract provision.
Workforce Notification

- **Workforce Notification:**
  - Responsibility of the predecessor contractor to provide to the contracting officer.
  - A seniority list of the workforce that performed work under the service contract (contract and subcontracts) as of the date the list is submitted.
    - At least 30 days before the expiration of the predecessor’s contract.
    - And if changes in the workforce, a revised list 10 days prior to contract completion.

- Responsibility of the contracting officer to provide to the successor contractor (immediately but not before contract award) and to employees or their representatives upon request.
  - The seniority list provided to the agency by the predecessor contractor.
Workforce Notification

- Workforce Notification:
  - Responsibility of the predecessor contractor to provide to predecessor contractor’s employees.
  - Written notice of their possible right to an offer of employment.
    - In a conspicuous place at the worksite or delivered to employees individually.
    - Contracting officer may advise whether to post notice, or provide paper notices, or send by email.
    - Must be provided in both English and in other language(s) where a significant portion of employees are not fluent in English.
Workforce Notification

- Workforce Notification:
  - What if the successor contractor does not receive a seniority list at all or the list does not comprise the entire pool of workers eligible for the right of first refusal?
  - Contractor still has the obligation to offer employment to the predecessor’s workforce.
  - Evidence of worker’s eligibility could be established through:
    - Pay stubs.
    - Verification from the predecessor employer.
    - Verification by the contracting agency.
    - Verification by “another person who worked at the facility.”
Bona Fide Offer of Employment

- Bona Fide Offer of Employment:
  - Successor contractor must make a bona-fide offer of employment to each qualified employee:
    - Best practice is to make all offers in writing.
    - Offer must remain open for a minimum of ten days.
    - Good faith offer of employment can be for lower wages and benefits.
    - Offer may be for a different position other than job the employee held with predecessor contractor.
Bona Fide Offer of Employment

• Bona Fide Offer of Employment:
  – A contractor may determine the size of the workforce necessary to fulfill the service contract and only has to offer employment to the number of employees it deems necessary to fulfill the contract.
  – Obligation to offer employment to the predecessor’s employees continues for 90 days.
  – Must exhaust the list of qualified employees until all positions are filled and for any additional openings that occur within the first 90 days of a contract.
  – Contractor may determine the order in which employees are offered employment.
Exceptions

- Exceptions:
  - Managerial and Supervisory Positions:
    - “A person engaged in the performance of services under the contract who is employed in a bona fide executive, administrative, or professional capacity” – but successor must presume all workers are service employees absent “a reasonable belief” based on “credible information” provided by a “knowledgeable source” (predecessor contractor, contracting agency, or the employee).
Qualified Worker

- Who is a “Qualified Worker”?
  - Primarily based on experience on predecessor contract.
  - Workers generally presumed qualified for any position they held under the predecessor contract unless the successor employer “reasonably believes” based on “written credible information” from a “reliable source” that an employee has failed to perform “suitably” on the job.
  - May rely on information from:
    - written disciplinary charges.
    - past supervisors.
    - the employee.
    - contracting agency.
Qualified Worker

- Who is a “Qualified Worker”?
  - May apply own hiring standards (B.A. degree, minimum years experience, etc.) and employment screening (drug tests, background checks, security clearance checks, etc.) but only if such standards/screening are:
    - Provided for by the contracting agency.
    - A condition of the service contract.
    - “Are consistent with the Executive Order.”
  - Any standards or screening the employer may wish to use should be discussed with the contracting agency as early as possible in the bid and award process.
Recordkeeping

- Recordkeeping
  - Must retain the following records for 3 years from the date created:
    - Written offers of employment.
    - Written record of oral offers of employment (date, location, attendance roster, summary of meeting, copy of any written notice, name of employee(s)).
    - Record of any exclusion or exemption from the Order.
    - Seniority or employee list received from the predecessor contractor or contracting agency.
Enforcement

• DOL’s WHD:
  – Employees of the predecessor (or their union) may file a complaint with the WHD within 120 days from the effective date of the contract.
  – WHD may try to conciliate with contractor.
  – WHD may initiate an investigation including review of documents and witness interviews.
Enforcement

• Remedies and Sanctions:
  – WHD has authority to:
    • Order the contractor to offer employment to the predecessor’s employees;
    • Order the contractor to pay lost wages and restore terms, conditions and privileges of employment;
    • Withhold payments on any of the contractor’s government contracts; and
    • Debar the contractor from future contracts for a period of up to three years for failure to comply with order or for willful or aggravated violations
  – 20 days to appeal and request a hearing for an adverse determination.
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