A Short History of the Service Contract Act

The McNamara-O'Hara Service Contract Act ("SCA") of 1965, P.L. No. 89-286, 79 Stat. 103, as amended (codified at 41 U.S.C. §§6701-6707), effective January 20, 1966, requires the payment of specified minimum wage rates and fringe benefits to employees working on service contracts and subcontracts with the United States. The reason for enactment of the SCA was explained by the House Education and Labor Committee in its report of September 1, 1965, as follows:

> Many of the employees performing work on Federal service contracts are poorly paid. The work is generally manual work and in addition to craftwork, may be semiskilled or unskilled. Types of service contracts which the bill covers are varied and include laundry and dry cleaning, custodial and janitorial, guard service, packing and crating, food service, and miscellaneous housekeeping services.
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> Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service, blue collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In contract cleaning services, for example, in some areas less than $1.05 an hour was paid. Elevator operators earned low rates, varying from $0.79 to $1.17 an hour. Service contract employees are often not members of unions. They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.
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> The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

H.R. Rep. No. 948, 89th Cong., 1st Sess.; reprinted in 1965 U.S. Code Cong. & Ad. News at 3739.

SCA was amended in 1972, P.L. 92-473, 86 Stat. 789 (1972), to require successor contractors to pay the wages and fringe benefits paid by a predecessor contractor under a collective

bargaining agreement ("CBA") with a union. More amendments were forthcoming in 1976, this time to over-rule cases limiting SCA to "blue collar" employees.

Pursuant to 41 U.S.C. §6707, the Secretary of Labor is authorized to promulgate regulations to implement the SCA. This authority has been delegated to the Department of Labor ("DOL") Wage and Hour Division. The implementing regulations appear in Part 4 of Title 29 of the Code of Federal Regulations.

In 1979, DOL proposed a general updating and substantive clarification of these regulations. On October 27, 1983, after repeated delays and much political and bureaucratic wrangling, DOL issued the final text of the SCA regulations. *See* 48 Fed.Reg. 49,736. However, the final regulations remained the subject of considerable controversy. On December 2, 1983, the AFL-CIO filed an action to enjoin implementation of the regulations set to become effective on December 27, 1983. DOL agreed to postpone the effective date until January 27, 1984, and even after that date was unwilling to take steps to implement the regulations.

On January 30, 1984, the district court issued its opinion upholding the 1983 regulations. *AFL-CIO v. Donovan*, 582 F. Supp. 1015 (D.D.C. 1984). Judge Oliver Gasch concluded that the revised regulations were entirely consistent with Congressional intent. The court upheld the following modifications contained in the 1983 regulations: (1) SCA coverage would be limited to contracts, the entire purpose of which is to provide services, and would exclude coverage of services provided in line items for non-service contracts; (2) maintenance of high technology equipment and ADP equipment would be exempt if certain commerciality criteria are met; (3) the two step procedure used when the locality of performance is unknown would be permitted; (4) modifications in the successorship provision were approved; (5) further restrictions on geographic coverage for contracts performed outside the United States were allowed; (6) timber sale contracts were properly exempted from SCA coverage; and (7) overlapping SCA and Walsh-Healey Public Contracts Act (41 U.S.C. §35; hereinafter, "WHPCA" or "Walsh-Healey") coverage of overhaul contracts was clarified. Most of the above issues will be discussed in detail in the subsequent sections of this manual.

On appeal by the AFL-CIO, the D.C. Circuit Court affirmed the 1983 regulation revisions except for the "significant or substantial standard" adopted to determine whether a contract is performed in the United States. *American Federation of Labor v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985). DOL then put the 1983 regulations fully into effect except for the one provision on geographical coverage just noted.

The Department of Defense ("DOD") implemented the DOL regulations in Defense Acquisition Circular 7649, issued January 27, 1984. The General Services Administration ("GSA") implemented the regulation at 49 Fed.Reg. 6,726.

On January 16, 1981, DOL also issued final revisions to 29 C.F.R. Part 6. Part 6 sets forth the rules of practice for administrative proceedings enforcing labor standards in Federal service contracts. 46 Fed.Reg. 4,398. These regulations were postponed indefinitely and a new set of proposed regulations was issued on August 14, 1981. 46 Fed.Reg. 41,428. On March 21, 1984 DOL finally issued new rules of practice for administrative proceedings enforcing labor standards. *See* 49 Fed.Reg. 10,626. At the same time, DOL established and issued new final rules of practice

before the Board of Service Contract Appeals ("BSCA"). *See* 49 Fed.Reg. 10,636. On July 10, 1992, DOL finally appointed a BSCA, 57 Fed.Reg. 33,414, designating the members of the current Wage Appeals Board (which serves as the administrative appellate tribunal for Davis-Bacon Act matters) to serve as the BSCA. (In the interim, the Deputy Secretary of Labor, or sometimes the Secretary, had acted in the capacity of the BSCA.) Thereafter, on April 17, 1996, the BSCA was merged with the Wage Appeals Board to form the DOL Administrative Review Board ("ARB"). Secretary's Order 2-96. *See* 61 Fed.Reg. 19,982.

The Federal Acquisition Regulation ("FAR") was revised on May 8, 1989, effective June 7, 1989, to incorporate SCA coverage. In particular, subpart 22.10 of the FAR provides guidance on how to apply the SCA to Federal service contracts. The rule elaborates upon the procedural aspects of requesting wage determinations ("WDs") and guides the contracting officer ("CO") in achieving compliance with the SCA under DOL procedures. Note that the regulations were not issued until five years had elapsed from the original April 1984 issuance of the FAR.

On January 18, 2001, DOL issued amended regulations implementing a new, but narrowly defined and heavily conditioned, commercial services exemption from SCA. 66 Fed.Reg. 5,328.

The SCA regulations were again revised on August 26, 2005, to implement an on-line process for submitting a Standard Form 98 to obtain a wage determination. These regulations became effective September 26, 2005. 70 Fed.Reg. 50,888.

On September 18, 2012, a proposed rule was published to change all references to the "Service Contract Act" or "SCA" in the FAR to the "Service Contract Labor Standards statute" or "SCLS statute," respectively. 77 Fed.Reg. 57,950. These changes were finalized and conformed the FAR regulations to Public Law 111-350 (January 4, 2011), which enacted a new codified version of Title 41 of the United States Code. No effort has been made to alter the DOL regulations found in 29 C.F.R. , however. In all likelihood, though, it will take more than an act of Congress to stop experienced contractors and practitioners from using the familiar terms "Service Contract Act" and "SCA."