

SCA Collective Bargaining Strategy and Timing

So-called section 4(c) of the Service Contract Act (“SCA”) provides some special rules for unionized contracts. In those kinds of SCA covered contracts, the union collective bargaining agreement (“CBA”) can become the wage determination for the SCA covered contract. In that event, the negotiation of a CBA should be done keeping in mind the impact on any future price adjustments under the SCA/Fair Labor Standards Act (“FLSA”) price adjustment clause.

Let's start with the basics. Let's assume we are only discussing fixed rate contracts, and not cost reimbursable contracts. In that event, neither the incumbent contractor nor any other offeror is ordinarily entitled to an adjustment in price for wages and fringe benefits payable in the base year of the contract. On the re-procurement, all offerors are supposed to factor the anticipated wages and fringe benefits, **as well as the escalation thereon** which must be paid during the base year, into their proposed price. These rules apply to both prevailing wage determinations and section 4(c) wage determinations based on CBAs. Accordingly, if a CBA is negotiated and put into the solicitation as a section 4(c) wage determination (WD"), it should be added to the solicitation, and all the offerors must then price those wages and benefits into their proposed contract price for the base year. If the CBA raises the wages or benefits sometime later but during the base year performance period, those labor costs too must be priced into the bid. Since these fixed costs on a fixed price contract are supposed to have been included in the bid, they are not ordinarily subject to a price adjustment.

Changes in labor costs which arise during the option years (or after two years of performance on multi-year funded contracts) can be a limited exception to the normal fixed price contract bidding rules. Under the SCA/FLSA price adjustment clause set forth in FAR 52.222-43, the contractor is entitled to what I call an **inequitable** adjustment, i.e., just extra out of pocket costs (and not overhead, G&A or profit) on increases in wages or fringe benefits in the option years. Thus, contractors ordinarily do not price increased wages or fringe benefits for SCA covered workers which occur in the option years into their bid price. They leave the option year or extended term costs out and wait for the SCA/FLSA price adjustment clause to pick them up later. This includes negotiated increased in wages and fringe benefits pre-scheduled in a CBA under the predecessor contractor which only become effective during an option year portion of an SCA covered contract.

These basic rules owe their origin to the language used in the FAR SCA/FLSA Price Adjustment clause. FAR § 52.222-43 provides as follows:

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 [now 6701], *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)

Under section 4(c) of the SCA, the CBA can become the SCA wage determination (“WD”). But, when there is a CBA in the picture, in order for it to be effective, it must be timely provided to the Contracting Officer. The FAR provides some specific rules for the timing and notice necessary to administer the section 4(c) requirements in negotiated procurements. The principal rule is found at FAR 22.1012-3(b) and (c) which state:

(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.

This FAR provision thus sets forth at least three possible results. First, assuming the agency failed to give the proper notice of the option year rights to the union and contractor, then there is no timeliness rules for negotiating the CBA. Second, assuming the agency does its job and gives the requisite notice, then ordinarily the contractor and union need to get the CBA in the agency's hands at least 30 days before the award of the new contract. Third, even if the contractor misses the 30- day window, the new CBA may still become effective under section 4(c) of the SCA if the contract performance doesn't commence within 30 days of award of the contract and the parties give the agency notice of the new CBA at least 10 days prior to commencement of the new contract work.

Thus it is important to negotiate the CBA and time the increases so that you get a price adjustment. You can't get an adjustment for increases granted in the base year of the contract, for example. Those costs are supposed to have been included in your bid. So any COLA or lump sum signing bonus, new benefit, or extra compensation needs to be timed to come in the option years.

Then there is a question of what constitutes wages and fringe benefits. The contractor only gets a price adjustment if the cost increase relates to wages or fringes. The SCA regulations say that "seniority, grievance procedures, work rules, overtime, etc." are NOT wages or fringes and thus the contractor gets no price adjustment for those items. 29 CFR 4.163(a). The "etc." provision might also included expense reimbursements, arctic coats or gloves or other articles of clothing, protective gear and equipment, funds for employee morale such as birthday parties, gifts, and the like. So, for example, do not negotiate a premium double time overtime provision in your CBA. Nor should you negotiate a daily overtime provision for work in excess of 8 hours a day. You won't get any price adjustment for such CBA overtime. However, the Boards of Contract Appeals have made it clear that severance pay is subject to a price adjustment.
