



# Getting to Yes: Understanding and Applying SCA and DBA Price Adjustments

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# Presented by

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# About PilieroMazza

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Our primary practice areas are:

- Government Contracting
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# Learning Objectives

- Overview of the Prevailing Wage Laws and Wage Determinations
- Discuss the categories of recoverable costs under a price adjustment and how to calculate them
- Provide real life situations where these situations arise
- Learn what supporting documentation should be provided to support the requests
- Review the various methods of calculating increased costs

# Service Contract Act Overview

- McNamara O'Hara Service Contract Act of 1965
- Requires general contractors and subcontractors providing services on prime contracts (United States and D.C.) in excess of \$2,500 to pay service employees in various wage classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by DOL, or the rates contained in the predecessor's collective bargaining agreement
- Applies to contracts "...the principal purpose of which is to provide services...in the US...through the use of service employees..."
  - "Principal purpose": simple majority of contract requirements
  - Greater than 50% of contract effort
  - US is defined as 50 states, District of Columbia, and US territories

# Service Contract Act Overview

- Purpose to remove wages as a bidding factor in the competition for Federal service contracts
- Who is a “service employee”?
  - Any person engaged in the performance of the contract
  - Exception for employees who qualify for exemption as bona fide executive, administrative or professional employees under the FLSA (29 C.F.R. Part 541)
  - Regardless of contractual relationship (independent contractors)

# Davis Bacon Act Overview

- The Davis Bacon Act of 1931
- Contracts in excess of \$2,000, to which the Federal Government or the District of Columbia is a party
- For construction, alteration, or repair, including painting and decorating of public buildings and public works
- Requires or involves the employment of “mechanics” or “laborers”

# Davis Bacon Act Overview

- Covered Work Includes:
  - New construction
  - Alterations, remodeling, installation, painting and decorating
  - If performed at the site of and in connection with the work, covered work may also include the manufacture or furnishing of materials, articles, supplies and equipment
- Who is a “laborer” or “mechanic”?
  - At least those workers whose duties are manual or physical in nature (Workers whose duties are primarily administrative, executive or managerial or clerical are not covered)
  - Apprentices, trainees, and helpers are included, but may only be categorized and paid as such under the Act if they meet certain requirements
  - The employee must be engaged in construction work as distinguished from manufacturing, the furnishing of materials, or service and maintenance work
- Davis Bacon Related Acts (DBRAs) extend coverage to similar, federally assisted contracts



# Wage Determinations

- The U.S. Department of Labor (DOL) issues SCA and DBA wage determinations (WDs) which establish the minimum wages and fringe benefits a contractor must pay its employees performing work on covered contracts.
- DOL revises these WDs from time to time to reflect the current prevailing wage and benefit rates for each locality or area.
- The most current WD will be incorporated into an existing contract at the issuance of each modification to exercise an option, to extend a contract, or to change the scope of work.
- This is where price adjustments come into play.

# Wage Determinations

- **Prevailing Wage WDs:** Issued by DOL for specific geographic localities by occupational groups. They are based on surveys of wages and benefits paid in the specified locality.
- **WDs based on Collective Bargaining Agreements (CBAs):** Successor contractors must pay wages and fringe benefits at least equal to those contained in a CBA entered into under the predecessor's covered SCA or DBA contract.
  - The WD applicable to the successor contract period will reflect the CBA between the predecessor contractor and the collective bargaining representative of the employees.

# Wage Determinations

- Contracts subject to the DBA and/or SCA are required to include standard “Price Adjustment” clauses, which provide for a price adjustment when a new DOL wage determination is incorporated into the contract.
- When the contract is modified to incorporate new rates, these clauses provide that the contractor is entitled to a change in contract price.

# SCA FAR Price Adjustment Clauses

- FAR 52.222-43 -- Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment (Multiple Year and Option Contracts)
- FAR 52.222-44 -- Fair Labor Standards Act and Service Contract Act—Price Adjustment
  - not multiple year or option contracts

# DBA FAR Price Adjustment Clauses

- **FAR 52.222-30 -- None or Separately Specified Method**
  - No adjustment in contract price, since the offeror will price each option separately to include an amount to cover possible increases in labor cost; or
  - Price adjustment is based on a separately specified pricing method, agreed to at time of award for use of pricing data contained in an annually published unit pricing book, that is incorporated at option exercise.
- **FAR 52.222-31 -- Percentage Method**
  - Adjustment based on a published economic indicator identified by the CO in the contract clause such as the Employment Cost Index or Consumer Price Index published by the Bureau of Labor Statistics.
  - This methodology also requires the CO to indicate which percentage of the total contract price is considered labor and will therefore be subject to adjustment.
- **FAR 52.222-32 -- Actual Method**
  - **Similar to the SCA Price Adjustment Clause.**
  - **This is the complicated clause.**

# Price Adjustments

- No price adjustment under cost-reimbursable subcontracts
- Under fixed-price contracts, a contract price adjustment can be changed only under the **changes clause** or the applicable **price adjustment clause**.
- If the government agency didn't include the applicable Prevailing Wage law or Wage Determination, DOL can insist on backpay for employees. DOL can make the agency add the SCA or DBA.

# How to Calculate Recoverable Costs

- **Calculating adjustments:** difference between current hourly rate of pay for employees and newly issued rate that results in an increase in hourly pay. **The Delta!**
- A price adjustment is based on what the contractor *actually* paid its employees, not on the previous wage determination rates. In other words, if a contractor was paying workers \$.10 more per hour than required by a previous wage determination, and a new determination increased wages by \$.50/hr, then the contractor will only be entitled to a \$.40/hr price adjustment.

# Requesting a Price Adjustment

- It is the contractor's responsibility to request a price adjustment!
- Submit your request within **30 days** of a new wage determination being incorporated into the contract
  - Remember that CBAs are incorporated upon effective date
- Submit calculations and documents to support amounts requested in adjustment
  - All payroll data showing the previous amounts paid to employees and the amounts paid as of the date the new WD applied to the contract.
  - Documentation of contract work hours
  - Documents supporting accompanying costs (i.e. payroll taxes and workers comp)
  - Fringe benefit cost support
- The more detail you provide, the easier (and faster) it will be for the agency to approve your request)



# How to Calculate Recoverable Costs

- **Adjustments may include:**

- Associated labor costs as a result of changes in social security and unemployment taxes, and workers' compensation insurance in some states
- Increased costs due to increased fringe benefits, such as vacation, holidays, sick days

- **Adjustments do not include:**

- General administrative costs, overhead and/or profit
- Costs which reimburse employees, such as for travel expenses, uniform allowances, or per diem rates
- Costs associated with exempt employees (e.g. administrative, executive or professional employees)
- Any costs where there is an escalation of option period pricing

# Sick Leave

Requires employers to provide up to seven days of paid sick leave annually (1 hour for 30 hours worked)

Covered Employees:

- Any person engaged in performing work on or in connection with a covered contract whose wages are governed by the SCA, DBA, or FLSA
- If CBA provides employee less than 7 days of sick leave, contractor must provide covered employees with the difference

# SCA Health And Welfare

- New WDs have sick leave EO on the WD
- ONLY APPLIES if FAR 52.222-62 in Contract
- Rates (once incorporated on or after Aug 1):

No Sick Leave	Sick Leave	Hawaii
\$4.41	\$4.13	\$1.91/ \$1.63
Odd: per hour paid	per hour worked	Must provide Hawaii health care

# Additional Considerations with Unionized Contractor

- Incorporating the CBA
- Timely (signed, ratified, delivered)
- Not effective if received after award and performance starts within 30 days
- If performance starts more than 30 days after award, CBA effective if received 10 days prior to start of performance
- Arms-Length, Substantial Variance, Contingency Clauses
- Reimbursable vs. non-reimbursable costs

# Price Adjustments Example

ABC Contracting is awarded a contract with the Navy. The predecessor CBA includes a provision that requires severance pay be paid to workers not hired by a future successor contractor. At the end of ABC's option, the Navy determines to set aside the work for blind and disabled workers, triggering the CBA's severance clause for most workers.

Is ABC entitled to a price adjustment for the cost of employees' severance?

- A. Yes
- B. No
- C. Not Sure

# Price Adjustments Example

Contractor classifies a bookkeeper as exempt. DOL conducts an audit and determines that the employee should have been classified as non-exempt. DOL requires contractor to pay thousands of dollars in backpay and fringe benefits.

DOL contacts contractor about their failure to pay SCA wage rates. The contract makes no mention of SCA or a WD. Contractor increases employee wages to the correct wage determination without waiting for the government to incorporate the WD into the contract.

- A. Yes
- B. No
- C. Not Sure

# Price Adjustments Example

Same example, but in this case the contracting officer incorporated the correct WD and then the contractor asks for a price adjustment. What costs will the contractor be eligible to recover?

- A. The difference in wages and fringe only.
- B. The difference in wages and fringe plus taxes.
- C. The difference in wages and fringe, taxes, G&A, overhead, and profit.
- D. None of the above.

# Common Questions and/or Pitfalls

- What if I'm issued the wrong WD?
- What if the WD isn't included at all in the contract?
- The CBA doesn't have an effective date prior to the start of a new option
- A contractor pays the new WD prior to a contract modification
- Including an escalation clause in the contract
- Classifying employees (FLSA exemptions, directory of occupations, conformances)
- Overtime



# Best Practices

- Read the solicitation CAREFULLY
- Pick the correct labor classification from the WD in the contract
- Pay the prevailing wage for the correct locality
- Never adjust wages before the WD has been incorporated into the contract
- Important to include flowdown provisions in subcontracts
- Draft a request as clearly and concisely as possible

# Thank You.

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