

The Service Contract Act

A Trap For Unsuspecting Contractors

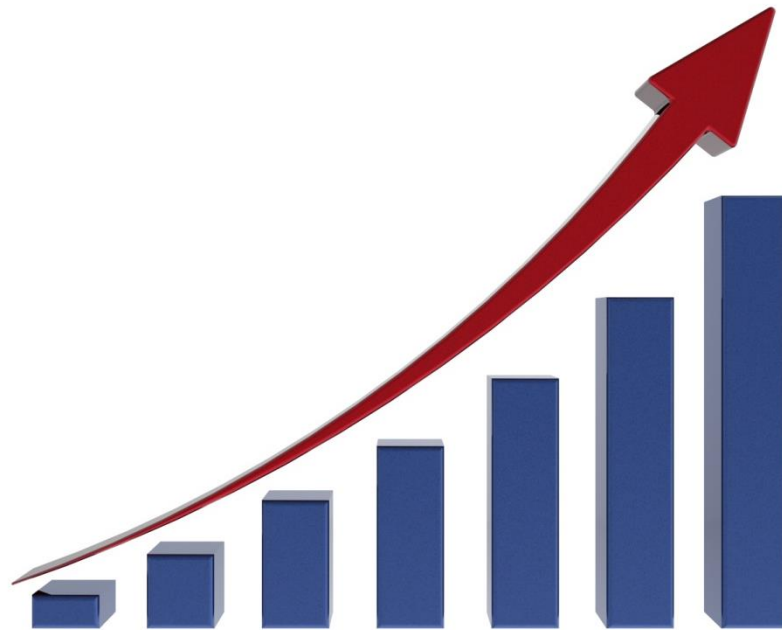
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Outline

- I. The Growing Gov't Market For Services
- II. SCA Fundamentals
- III. The Anatomy Of A WD
- IV. Pre-Award Preparation
- V. Post-Award Execution
- VI. Contracts Extending Beyond One Year
- VII. The Perils Of Ignoring The SCA

I. Growth In Federal Acquisition Of Services



Growth In Spending

“Contracting for services increased by 17% per year between 2000 and 2008.”

Dan Gordon

OFPP Administrator

Federal Computer Week, Feb. 3, 2011

Growth In Spending

“The federal government spends about \$320 billion a year on contract for services.”

New York Times

Sept 12, 2011

Schooner '14 Review

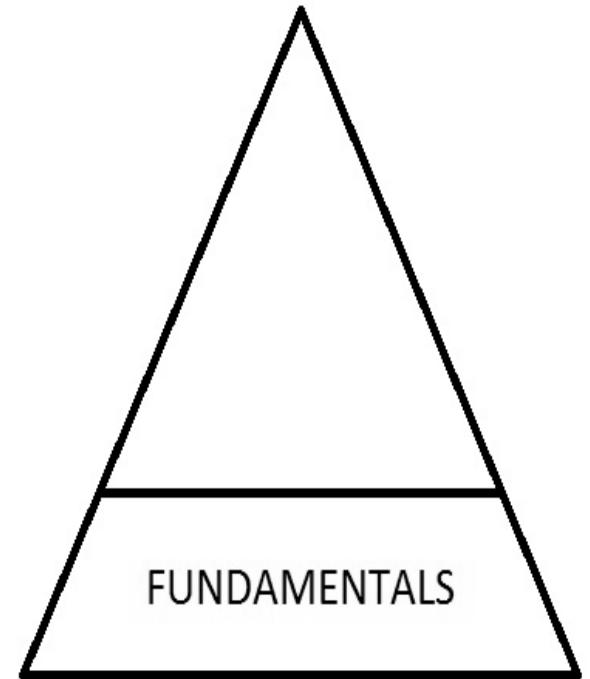
*“We have been aware, for some time, that services dominate the defense procurement landscape, and that has not dramatically changed. *** After peeking in 2008, products declined faster than services.”*

Federal Fiscal Crisis Impact?

“The Postal Service Inspector General (IG) published a report stating the (blatantly) obvious proposition that, in order to achieve savings: ‘the Postal Services should seek an exemption from the Service Contract Act to negotiate contract rates closer to market rates’.”

West Govt Contracts Year In Review 2011 at 10-1

II. The Fundamentals Of The SCA



Chronology

- 1931 Davis Bacon (*construction*)
- 1936 Walsh Healey Public Contracts Act (*manufacturing*)
- 1938 Fair Labor Standards Act (*minimum wage*)
- 1965 McNamara-O'Hara Service Contract Act (*services*)

SCA Fundamental

Applies to every federal contract that exceeds \$2,500 when the **principal purpose** is to furnish services to the Govt through the use of service employees in the US, Puerto Rico, Virgin Islands, and certain South Pacific Islands

SCA Fundamental

The SCA does not apply if the **principle purpose** of the contract is to provide something other than the services of service employees

SCA Fundamental

“Service employee” means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity It includes all such persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

FAR § 52.222-41(a)

SCA Fundamental

Subcontractors as “service employees”

“A person's status as an ‘owner-operator’ or an ‘independent contractor’ is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.”

29 CFR § 4.155

SCA Fundamental

- Contractors must pay their service employees either the prevailing wage rate in the geographic area or at least the wage rate specified under an existing collective bargaining agreement
- Prevailing wages are to be available at the time of solicitation to allow all offerors to compete on a common basis

SCA Fundamental

- DOL, not contracting agency, has responsibility for wage determinations
- SCA prohibits employment under unsafe working conditions
- Must pay employees at least bi-weekly
- Accurate records of hours work and amount paid are imperative

SCA Fundamental

- Service contractors are required to pay their laborers time-and-a-half for all hours in excess of 40 hours per week
- If employee is exempt from SCA, overtime rules do not apply (*e.g.*, IT professionals)

SCA Fundamentals

- The WD issued by DOL must be included in the solicitation and contract
- SCA must “flow down” to subcontractors
- Prime can be held financially responsible for sub’s violations

III. The Anatomy Of A WD



The Anatomy Of A WD

A WD consisting of:

- The minimum wage expressed as an hourly wage rate for each class of service employee
- vacation and holiday benefits prevailing in the locality
- A H&W fringe benefit rate

The Anatomy Of A WD

- Health & Welfare Fringe Benefits are not required (*i.e.* medical insurance, retirement plans, life insurance, sick leave)
- Rates for H&W Fringe Benefits are based on cost to employer per hour
- H&W must be separately accounted for in pay statement

The Anatomy Of A WD

- Only a fringe benefit if the contractor is contractually obligated to provide
 - Discretionary bonuses not included
- Vacations & Holidays separately reported
 - Holidays are usually 10 standard federal holidays
 - Typically 2 weeks vacation accrue after 1 year of continuous employment.

The Anatomy Of A WD

- Contractor must provide fringe benefits (or cash equivalent) separately from the required minimum monetary wages
- Contractor cannot satisfy the minimum wage requirement by furnishing fringe benefits as a portion of the wages
- Temporary and part time employees are entitled to be paid a proportionate share of required fringe benefits

The Anatomy Of A WD

Tri-County Contractors ARB 11-014

- In 2006, Tri-County awarded contract for mobile homes to assist Hurricane Katrina victims.
- SCA WR was \$9.68 for laborers and \$2.56 in benefits
- Tri-County paid \$15.00 an hour flat rate.
- No mention of benefits on pay stub
- Based on 2006 audit, DOL required payment of an additional \$2.56 an hour

IV. Pre-Award Preparation



Pre-Award Preparation

- Most wage determinations are available on line at www.wdol.gov
- A contracting officer can use the DOL e98 to request a wage determination
- DOL insists “the contracting agency remains responsible for the wage determination selected”

FAR § 22.1008-1

Collective Bargaining Agreements

If an activity competes a new contract for substantially the same services and the contract is to be performed in the same locality, the successor contractor must pay wages and fringe benefits at least equal to those contained in the CBA effective under the previous contract.

Collective Bargaining Agreements

- CBAs have priority, even if benefits are less than WD
- Contractor may renegotiate CBA after base year
- Can be successfully challenged if
 - not an “arm’s length transaction”
 - “substantially at variance” with rates prevailing in the locality for similar services.

DOL Late With WD

C.O. need not incorporate a WD into a solicitation if:

- WD arrives after a solicitation has been issued and less than 10 days prior to bid opening
- C.O. finds there is not reasonable time to incorporate WD

No Wage Determination?

If no WD and no CBA,
must pay “the minimum
wage set forth in the Fair
Labor Standards Act.”

FAR § 22.1002-2

DOL WDs ... Reviews

- Any interested party may request a modification of a WD from the Wage & Hour Administrator
- Interested parties include any contractor, employee, labor organization, Federal agency, or other party with a relationship to contract
- If the Administrator denies the request, that party may appeal a WD to the Board of Service Contract Appeals

Exempted Categories

- Executive
- Administrative
- Professional
- Apprentices/student learners
- Handicapped
- “Commercial”
- GSA Schedule?

Executive

- Supervises two or more full-time employees
- Primary duty is the management of the enterprise
- Must be salaried; no deductions for most absences
- Must have role in hiring and firing of subordinates

Administrative

- Primary duty is performing office or nonmanual work directly related to management or general business operations of the company
- Examples include book keepers and IT department personnel

Professional

- Must exercise discretion and independent judgment with area of expertise
- Primary duties require knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual study

Professional

DOL determination that aircraft pilot was not “professional” because employee lacked a college degree reversed as an abuse of discretion

Kitty Hawk Air Cargo v. Secretary of Labor, ND Tex DC. No. 3:01-CV-1356-K, January 26, 2004

IT Professional

- No academic degree; a combination of education, training, and experience is satisfactory
- Expressly excluded are those employees engaged in the operation of computers (key entry occupations) or in the repair or maintenance of "ADP" (automatic data processing) hardware and related equipment

IT Professional

Primary duties must include:

1. the application of systems analysis including consulting with users to determine hardware, software or system functional specifications; or
2. the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; or
3. the design, documentation, testing, creation or modification of computer programs

Commercial Exemption

Contracts principally for the maintenance, calibration, and/or repair of:

- ADPE and office information processing systems
- Scientific equipment and medical apparatus or equipment
- Other office/business machines where such services are performed by the manufacturer or supplier

Commercial Exemption

- (A) Commercial items must be used regularly for other than Government purposes, and are sold or traded by in substantial quantities to the general public;
- (B) The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, and/or repair of commercial items.

Commercial Exemption

- (C) The contractor utilizes the same compensation plan regardless if the employees are performing work for the government or for commercial customers.
- (D) The contractor certifies to (A), (B) & (C).

Commercial Exemption Expanded

In Feb. 2009 the FAR was amended to exempt commercial services performed by employees that individually spend 80% of their time on commercial work.

FAR § 22.1003-4(d)

GSA Schedules?

“The appropriate SCA wage rates are supposed to be included in the order per the GSA ordering instructions.”

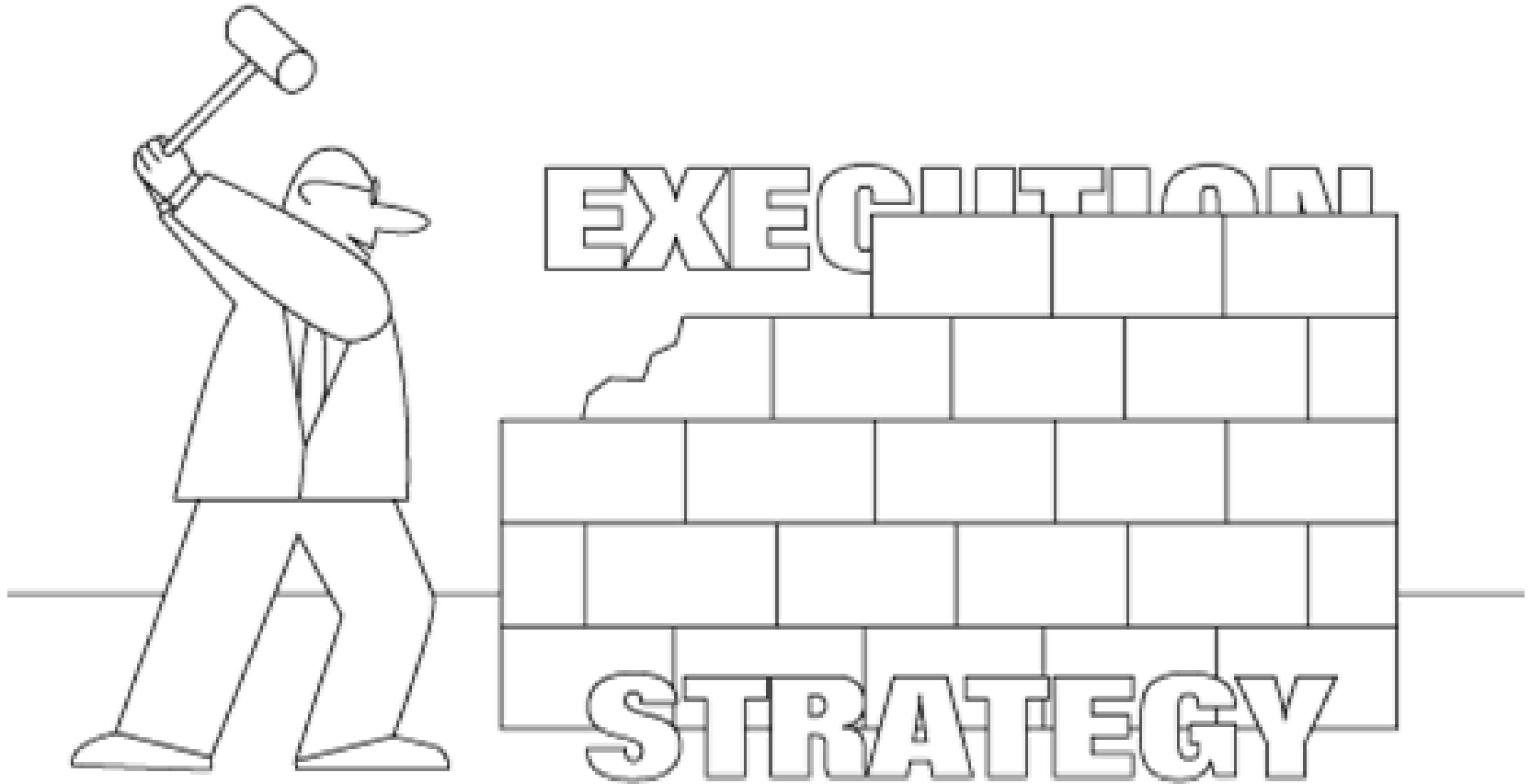
<http://www.wifcon.com/discus/messages/5/390.html?1077596540>

Using SCA To Game Price Proposal

Awardee for linguists services did not escalate its price proposal for the option years in anticipation of increases if SCA wage determinations. Other offerors' proposals included escalating prices for the option years.

SOS Interpreting, LTD, B-293026, Jan. 20, 2004

V. Post-Award Execution



DOL Mistake In WD

DOL may require that its mistake be corrected retroactively. The CO must equitably adjust the contract price to reflect any changes in the costs of performance as a result of incorporating the new WD

Non-Displacement of Qualified Workers Under SCA (E.O. 13495)

- Contractors must offer a predecessor's employees a right of first refusal of continued employment if a follow-on contract will continue the same work at the same location.
- A contractor must make a “good faith” offer to non-managerial and non-supervisory employees whose employment would be terminated as a result of an award of a successor contract for “positions for which they are qualified.”

Non-Displacement of Qualified Workers Under SCA (E.O. 13495)

- The contractor may determine the number of employees needed for efficient performance and may use fewer employees than the predecessor.
- The “good faith” offer must be express and provide a 10-day period for acceptance.

Fed. Reg. Dec. 21, 2012

What Is The Authority That Required Increased Wages?

SCA?

Limits adjustment only to a contractor's actual increase in wage and fringe benefits costs

The Changes Clause?

Contractor entitlement to indirect costs and profit

W.G. Yates & Sons Constr. Co., CBCA 1495, Dec. 21, 2010

“Conformance”

- Where a WD omits a category of service employee, the contractor must classify the employee to derive an appropriate wage rate and fringe benefits using reasonable equivalent analysis
- DOL regulation states “a pay relationship should be maintained between job classifications based on the skill required and the duties performed”

“Conformance”

- Within 30 days of using category, contractor must submit a SF 1444 “Request for Authorization of Additional Classifications and Rates” to C.O.
- C.O. reviews and prepares recommendations to DOL
- DOL either approves, modifies, or disapproves rates within 30 days

“Conformance”

- If DOL increases wage rate or level of benefits, contractor must pay without an equitable adjustment
- Contractor has right to appeal to DOL Administrative Review Board

“Conformance”

Contractor bid on basis of "light truck" driver. In review of conformance, CO agreed with contractor. DOL decided proper classification was "medium truck" driver. No equitable adjustment.

Minuteman Aviation (AGBCA), 00-1 BCA 30,831

Notice To Employees

- Contractors and subs are required to notify each service employee of the compensation and fringe benefits in the WD
- Obligation can be satisfied by:
 - Personal delivery of the notice to the employee
 - Posting the notice in a prominent and accessible place

VI.
Contracts
Extending
Beyond One
Year



Price Adjustments

A new or revised WD is incorporated into the contract when:

- On the annual anniversary date of a multi-year contract subject to annual funds
- Every two years in the case of a multi-year contract not subject to annual funds

Price Adjustments

- Price adjustment includes only increased wages and fringe benefits
 - Includes social security, unemployment taxes, and workers' compensation
 - Excludes increased G&A and O/H
- Price Adjustment clause requires contractor to warrant “that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under the clause”

Price Adjustment

A price adjustment is not available when the contractor voluntarily increases wages for reasons unrelated to a wage determination (*i.e.*, retain quality employees or reward performance)

Price Adjustment Example

- The prior year WD required a minimum wage rate of \$4.00 per hour
- The contractor actually paid \$4.10
- The new WD increased the minimum to \$4.50
- The contractor increases the rate actually paid to \$4.75
- The allowable price adjustment is \$.40 per hour

FAR § 22.1006(c)

Record Keeping Requirements

“The records which a contractor or subcontractor is required to keep ... are required to be maintained for 3 years from the completion of the work, and must be made available for inspection and transcription by authorized representatives of the Administrator.”

29 CFR § 4.185

VII.
**The Perils
Of
Ignoring
The SCA**



Consequences of Violating

Topics of Separate Discussion

- Debarment
- Contract can be cancelled
- Contract payments can be withheld
- Individuals can be held responsible

Potential Debarment

- By statute, debarment for three years is mandatory unless DOL finds that "unusual circumstances" exists
- DOJ states the exception should be "exceptional" because the "legislative history leaves no doubt about the intended rarity of the exception."

www.usdoj.gov/osg/briefs/1990/sg900863.txt

Debarment *(continued)*

Legislative History

According to Congressman O'Hara:

“Restoration * * * [of wages and benefits] is not in and of itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts”

29 CFR § 4.188(b)(2)

DOL's Seven Part Test For Unusual Circumstances

- (1) a history of repeated violations
- (2) the violations were willful
- (3) culpable neglect
- (4) bona fide uncertainty existed
- (5) the contractor demonstrated good faith and cooperation in the resolution of issues
- (6) the contractor promptly paid the back wages or fringe benefits due the employees
- (7) the contractor demonstrated an intention to comply with the Act

Debarment *(continued)*

- “Unusual circumstances” do not include
 - negligence
 - ignorance
 - failure to maintain adequate records
- Before debarring, DOL provides an administrative hearing

Debarment *(continued)*

Also debarred is any firm or person who has a "substantial interest" in the debarred contractor

- Can be ownership of as little as 5% of the firm
- Exists if exercised control over the firm

Debarment *(continued)*

Coast Janitorial Service v. DOL

- In 1995, Coast was awarded a janitorial services contract at Redstone Arsenal for \$19,128,277
- Coast's Project Manager, "to keep overhead low," did not pay employees who worked overtime time and a half

Debarment *(continued)*

Coast Janitorial Service v. DOL

- Instead, Coast credited employee with “comp time” which was paid at regular hourly rates.
- DOL found SCA violation involving two employees and \$6,596.

Debarment *(continued)*

Coast Janitorial Service v. DOL

- Coast responsible for “willful and deliverable” violations of supervisor
- Coast debarred for 3 years
- President, Mr. Grimes, debarred
- VP, Mr. Scott, debarred

Termination For Default

A contractor's failure to comply with the material terms of the SCA can result in a termination of the contract for default. If a default termination occurs, the Government is entitled its additional costs to complete the contract.

Steven Jawitz, ASBCA No. 39973, 86-1 BCA 18,564; 29 C.F.R. § 4.190(a)

CO Withholding Money

- A CO must withhold funds on request from DOL
- Withholding can begin before any adversary hearing by DOL

Individual Liability

“The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty.”

29 CFR § 4.187(e)(2)

Individual Liability

Individual liability has been imposed on:

- Corporate officers who are responsible for the control of the day-to-day operations and management policies of a violator company
- All culpable persons exercising control, supervision, or management over contract performance and employment conditions ...
 - individuals who handle payroll records
 - individuals who act in an official capacity in handling complaints about services and wages

Rights Of Employees

- Employees have no private right of action to enforce the SCA
- Any employee, labor organization, or other interested person may report violations to the DOL Wage and Hour Division
- The DOL treats such complaints as confidential and will protect the identity of the persons making them

Qui Tam Law Suits?

The U.S. Court of Appeals for the Sixth Circuit has affirmed a ruling that a contractor was liable under the FCA for failing to pay the required minimum wage for electrical work on a subcontract.

U.S. ex rel. Bran Wall v. Circle C Construction LLC,
No. 10-5645 (6th Cir. Oct. 1, 2012)

Concluding Thought

“[T]he process has become so complicated that it is sometimes beyond the capability of the average contract specialist to meet the needs of his or her organization....”

OPM Study Of Procurement Work Force

6 N&CR ¶ 54

Executive Order 13658

On October 1, 2014 the DOL implemented EO 13658 raising the minimum wage for workers on federal construction and services contracts to \$10.10.

Executive Order 13673

- Requires offerors to disclose any violation of labor law in the last three years.
- Requires C.O.s to consider labor law violations in making responsibility determinations

Backup

Insight Circa 2004

- ~ 800 Wage Hour Division inspectors
- 654 SCA investigations
(87% result of a complaint)
- 493 SCA violations found
- 17 SCA debarments

SCA Report, GAO-06-07

Priority of \$ Withheld

The money withheld for underpaid employees has priority over:

- IRS levy for unpaid taxes
- Recovery of procurement costs by the contracting agency
- Any claim by the trustee in bankruptcy
- Any claim by an assignee of the contractor