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Service Contract Act Training Session III

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Sarah serves as Chair of PilieroMazza’s Labor & Employment Group, one of the few legal practices in the U.S. with a multi-jurisdictional labor and employment practice dedicated to advising government contractors on their compliance obligations. She advises government contractors and commercial businesses on a wide variety of labor and employment issues, including the Fair Labor Standards Act, the National Labor Relations Act, Office of Federal Contract Compliance Programs regulations, and anti-discrimination law.

Sarah’s practice also includes counseling employers on terminations, labor relations matters, employment agreements, wage and hour issues, and employment practices and policies. She regularly advises clients on compliance specific to government contracting, including offering counsel on prevailing wage laws, such as the Service Contract Act, codes of ethics, and equal employment opportunity requirements.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital

Session 3 Overview

- Record Keeping
- Wage determination changes
- Price Adjustments (including CBA considerations)
- SCA/DBA Cross over
- Subcontracts
- DOL Enforcement

Record Keeping

- Defend your case
- H&W Records
 - Segregate cash H&W from wages
 - Sick and vacation
- Pay Frequency
 - Pay 2x per month
- Notice
 - Obligation to provide Service Employees with prevailing wages, H&W, and other benefits
 - Post onsite
 - Notice in offer letters

Wage Determination Changes

- DOL periodically issues new wage determinations and each summed DOL issues updated H&W rates
- If a wage determination is issued resulting in increases, the contracting officer is supposed to incorporate the new WD into the contract at the option
- A contractor is not obligated to increase wages or fringe before the new WD is incorporated into the contract
- If a contractor decides to increase ahead of incorporation, they may forego the right to a price adjustment because there would be no difference in wages and fringe benefits at the time of incorporation

Wage Determination Changes

- Distinguished from Minimum Wage increases which (assuming the applicable FAR clause has been incorporated) go into effect January 1 of each year without modification.
- Reminder that not all wage determinations satisfy the minimum wage requirements (currently \$17.20)

Wage Determination Changes

- Unique considerations for:
 - Conformed rates;
 - Place of performance unknown; and
 - GSA Schedule.
- Newly organized bargaining units?

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**
 - 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)

Price Adjustments

- 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.

Price Adjustments

- It is the contractor's responsibility to request a price adjustment!
- Submit your request within **30 days** of a new WD being incorporated into the contract
- 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

Price Adjustments: 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

Price Adjustments: 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

Example

A new SCA WD is issued by DOL in July. The contractor's first option starts December 1. The Contractor increases employee H&W to meet the DOL requirements in July and requests a price adjustment when the contract is modified to include the wage determination in December. Will the contractor be entitled to a price adjustment?

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

Examples

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. Would the contractor be entitled to an adjustment?

A contractor classifies a foreman as exempt, salaried. DOL conducts an audit and determines that the employee should have been classified as non-exempt. DOL requires the contractor to pay thousands of dollars in back pay and fringe benefits. Would the contractor be eligible for a price adjustment?

SCA Crossover with the Davis-Bacon Act

- “Construction” under the DBA includes “construction, alteration, and repair, including painting and decorating”
- SCA does not apply to any contract principally for construction subject to the DBA
- DBA-covered when activity part of construction contract
 - Performed prior to acceptance by owner
 - Examples of activities:
 - Cleanup
 - Landscaping
 - Carpet laying
 - Drapery installation

SCA Maintenance vs. DBA Repair

- SCA Maintenance – Work is typically
 - Scheduled, regular and recurring maintenance activities
 - Routine to keep something in state of continuous utilization
 - Examples: custodial service, routine HVAC filter changes, snow removal
- DBA Repair -- Typically covers activities such as restoration of facility
 - One time fix to something not functioning
 - Restoration, alteration or replacement of fixed components
 - Examples: building structural repair, renovation, roof shingling, paving repairs

DBA vs. SCA—DFARS Rule

DFARS § 222.402-70 Installation support contracts.

Repairs versus maintenance. Some contract work may be characterized as either Construction Wage Rate Requirements painting/repairs or Service Contract Labor Standards maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the Construction Wage Rate Requirements or the Service Contract Labor Standards. In those instances where a contract service call or order requires construction trade skills (i.e., carpenter, plumber, painter, etc.), but it is unclear whether the work required is Service Contract Labor Standards maintenance or Construction Wage Rate Requirements painting/repairs, apply the following rules:

- (1) Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the Construction Wage Rate Requirements.
- (2) Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be maintenance subject to the Service Contract Labor Standards.
- (3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the Construction Wage Rate Requirements statute regardless of the total work-hours required.

Subcontracting Considerations

- Subcontractors are subject to the SCA just like the prime contractor is responsible for lower tier violations
- Prime contractor must flow down the applicable SCA clauses & WDs into subcontractor and independent contractor agreements
- Make sure the subcontract protects you!
 - The clauses
 - Indemnification
 - Inspection rights

Department of Labor (DOL) Enforcement

- DOL has sole enforcement authority
- No private right of action
- Contracting Officers make initial determination subject to DOL review
- Retroactive application
- Withholding, suspension, debarment

Questions?



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