




JAN 21 1992

MEMORANDUM NO. 159

TO: All Government Contracting Agencies of the
Federal Government and the District of Columbia


FROM: JOHN R. FRASER
Acting Administrator

SUBJECT: Contingencies for Prospective Wage Rate and Fringe
Benefit Increases Included in Collective
Bargaining Agreements (CBA) Submitted for Wage
Determination Purposes Pursuant to Section 4(c)
of the McNamara-O'Hara Service Contract Act (SCA)

BACKGROUND

Section 4(c) of SCA provides that "no contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract." The provisions of section 4(c) are self-executing and are not contingent or dependent upon the issuance or incorporation in the successor contract of a wage determination based upon the predecessor contractor's CBA.

Since the passage of the 1972 Amendments to SCA, which established the requirements of section 4(c), the Wage and Hour Division (Wage and Hour) has noted an increase in the number of CBA's containing increased wage and fringe benefit provisions contingent upon any number of factors, including approval by Wage and Hour, issuance of a wage determination, incorporation of the wage determination in the contract, adjusting the contract price, etc. Although Wage and Hour has never formally ruled on the effect of such contingency clauses, we have assumed that any such contingency language in CBA's did not have any impact upon a successor contractor's obligations under SCA. Accordingly, whenever such contingency clauses were encountered by Wage and Hour, they were not considered when issuing the applicable wage

determinations, and if for any reason one of the contingency provisions was not fulfilled, Wage and Hour has not treated that occurrence as having any impact on the successor contractor's obligations under SCA. In recent years, however, contracting agencies have contested application of section 4(c) in situations where, for example, a cost reimbursement contingency clause determines whether negotiated prospective wage rate and fringe benefit increases are effective, and have requested Wage and Hour's ruling in this regard.

ANALYSIS OF THE ISSUE

Section 4(c) of SCA and section 4.11(a) of Regulations, 29 CFR Part 4, preclude arrangements by parties to a CBA who, either separately or together, act with an intent to take advantage of the wage determination scheme provided in sections 2(a) and 4(c) of the Act. As already stated, Wage and Hour has not recognized contingency clauses in the past, but has not formally ruled on the arm's-length aspects of such CBA clauses. The increasing prevalence of contingency clauses and the associated complications resulting from these CBA provisions have caused Wage and Hour to thoroughly reexamine its policy in this area.

Prospective wage rate and fringe benefit increases negotiated in CBA's that contain these contingencies essentially attempt to limit a contractor's obligations to comply with the provisions of section 4(c) to those situations where the contractor is reimbursed by the contracting agency. As such, because this constitutes an apparent attempt to take advantage of the wage determination scheme provided in sections 2(a) and 4(c) of the Act, Wage and Hour has concluded that these provisions typically do not reflect arm's-length negotiations.

REVISED POLICY

Contingent CBA provisions that attempt to limit a contractor's obligations by such means as requiring issuance of a wage determination by Wage and Hour, requiring the contracting agency to include the wage determination in the contract, or requiring the contracting agency to adequately reimburse the contractor are the type of arrangements that evidence an intent to take advantage of the wage determination scheme under SCA, and therefore generally reflect a lack of arm's-length negotiations. However, in view of Wage and Hour's past practice relative to contingency clauses in CBA's and in order to give affected parties sufficient time to negotiate new or amended CBA's, we have concluded that any policy change in this area should only have prospective application beginning April 1, 1992.

Therefore, for any invitations for bids issued, negotiated contracts awarded, options exercised, or contract extensions consummated after April 1, 1992, prospective wage rate and fringe benefit provisions that are effective only upon such contingencies will not be recognized by Wage and Hour as resulting from arm's-length negotiations. After April 1, 1992, Wage and Hour will issue section 4(c) wage determinations reflecting the existing CBA wage rate and fringe benefit provisions being paid under the predecessor contract but will not issue prospective wage rate and fringe benefit increases based on the contingencies discussed herein. Upon receipt of any such CBA, Wage and Hour will notify the parties to the CBA and the contracting agency of its determination that there is a lack of arm's-length negotiations. Contractors, employees and their representatives will be able to appeal this finding pursuant to Regulations, 29 CFR 4.11.

With respect to contract actions occurring before April 1, 1992, Wage and Hour will continue to enforce SCA and the self-executing aspects of section 4(c) of SCA in accordance with the policy explained in the background section of this memorandum.

CONTRACTING AGENCY RESPONSIBILITIES

Pursuant to section 4.4(c) of the Regulations, copies of the predecessor contractor's CBA, regardless of any contingencies contained therein, must be submitted with the SF-98 wage determination request. The determination as to whether the CBA has application for section 4(c) purposes must be made pursuant to SCA and the Department of Labor's regulations by Wage and Hour, and not by the contracting agency.