

Text of AAM No 180

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

NOV 1 1995

MEMORANDUM NO. 180

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

//signed

FROM: Maria Echaveste
Administrator

SUBJECT: Repeal of the Walsh-Healey Public Contracts Act (PCA) Manufacturer and/or Regular Dealer Eligibility Requirements

Section 7201(a) of the Federal Acquisition Streamlining Act (FASA) of 1994, enacted October 13, 1994, eliminated the requirement that covered contractors under PCA must be either "manufacturers" or "regular dealers." This section of FASA became effective as a matter of law on October 1, 1995, and the regulatory amendments reflecting its provisions were published for notice and comment in the Federal Register on September 7, 1995, copy attached.

Accordingly, for any Government supply contracts that are awarded on or after October 1, 1995, contractors are no longer required to be manufacturers of or regular dealers in the item(s) to be supplied in order to be eligible for contract award under PCA.

Attachment

[Federal Register: September 7, 1995 (Volume 60, Number 173)]
[**Proposed Rules**]
[Page 46553-46556]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]

DEPARTMENT OF LABOR

Office of the Secretary
Wage and Hour Division

29 CFR Parts 4 and 5

41 CFR Parts 50-201 and 50-206

RIN 1215-AA96

Amendments to Federal Contract Labor Laws by the Federal Acquisition Streamlining Act of 1994

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of **proposed** rulemaking, request for comments.

SUMMARY: The Federal Acquisition Streamlining Act of 1994 amends the Contract Work Hours and Safety Standards Act (CWHSSA) and the **Walsh-Healey** Public Contracts Act (PCA). This document proposes to conform applicable regulations to the statutory amendments that raise the coverage threshold of CWHSSA and, among other things, eliminate the eligibility requirements of the PCA.

DATES: Comments are due on or before October 10, 1995.

ADDRESSES: Submit written comments to Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3502 200 Constitution Avenue NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped postcard, or to submit them by certified mail, return receipt requested. As a convenience to commenters, comments may be transmitted by facsimile ("FAX") machine to (202) 219-5122 (this is not a toll-free number). If transmitted by facsimile and a hard copy is also submitted by mail, please indicate on the hard copy that it is a duplicate copy of the facsimile transmission.

FOR FURTHER INFORMATION CONTACT:

Richard M. Brennan, Acting Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue NW., Washington, DC 20210, (202) 219-8412. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

II. Background

The Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355, 108 Stat. 3243) was enacted into law on October 13, 1994. Section 4104(c) of this Act amends sections 103 and 107 of the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 327 et seq., to establish a threshold of \$100,000 or more for contracts subject to CWHSSA's overtime provisions. Prior to this

amendment, Federal and Federally assisted construction contracts of \$2,000 or less, and purchases and contracts other than construction contracts of \$2,500 or less, were exempt from CWHSSA's weekly overtime and related provisions pursuant to the variation in Secs. 5.15(b) (1) and (2) of 29 CFR part 5. The new statutory threshold of \$100,000 requires conforming revisions to Secs. 5.5(b) and 5.15(b) (1) and (2) of 29 CFR part 5 and Sec. 4.181(b) of 29 CFR part 4.

Contracting agencies and contractors should be aware that contractors awarded contracts in amounts less than \$100,000 may continue to have obligations to pay certain of their employees weekly overtime, at one and one-half the regular rate for hours worked in excess of forty (40) per week, pursuant to section 7 of the Fair Labor Standards Act, 29 U.S.C. 207.

With respect to amendments affecting the **Walsh-Healey Public Contracts Act (PCA)**, sections 3023 and 7201 of FASA (1) repeal 10 U.S.C. sec. 7299 to eliminate the applicability of the PCA to contracts for the construction, alteration, furnishing, or equipping of naval vessels; (2) repeal section 1(a) of the PCA to eliminate the requirement that covered contractors must be either a "regular dealer" or "manufacturer" and renumbers subsections (b), (c), (d) and (e) to (a), (b), (c) and (d) respectively; (3) amend section 10 (b) of the PCA to substitute the term "supplier of" for the terms "regular dealer" and "manufacturer;" (4) amend section 10(c) of the PCA to strike the terms "regular dealer" and "manufacturer;" and (5) adds subsections (a) and (b) to section 11 of the PCA to retain the Secretary's authority to define the terms "regular dealer" and "manufacturer."

This rule proposes to amend applicable PCA regulations to delete a "regular dealer" or "manufacturer" eligibility requirement for bidders on contracts subject to the Act. Under the Act as amended, an eligible bidder includes, in addition to a manufacturer or regular dealer, any supplier or distributor of the materials, supplies, articles, or equipment to be manufactured or supplied under the contract.

Specifically, Sec. 50-201.1 of 41 CFR part 50-201 relating to contract stipulations is **proposed** to be renumbered as Sec. 50-201.3, the paragraph currently designated as Sec. 50-201.1(a) is **proposed** to be deleted to remove the "manufacturer of or regular dealer in" requirement, and the subsequent paragraphs of this section are **proposed** to be renumbered. In addition, Sec. 50-201.101 relating to definitions of the terms "manufacturer" and "regular dealer" is **proposed** to be deleted in its entirety, as is Sec. 50-201.604 relating to partial administrative exemptions from the manufacturer or regular dealer requirement. Also, the entire Part 50-206, which relates primarily to the qualifications of contractors and interpretations of the terms "manufacturer" and "regular dealer," is **proposed** to be deleted except that Secs. 50-206.1 and .2 are **proposed** to be incorporated into the general regulations at part 50-201 as new Secs. 50-201.1 and .2, respectively.

With respect to the amendment concerning contracts for the construction, alteration, furnishing, or equipping of naval vessels, the repeal of 10 U.S.C. sec. 7299 to eliminate PCA coverage of such contracts requires no changes in the regulations. Contracting agencies and contractors should be aware that such contracts may now be subject to the Davis-Bacon Act, which applies to contracts in excess of \$2,000 for the construction, alteration, and/or repair, including painting and decorating, of a public building or a public work. Marine vessels have historically been regarded as "public works" for purposes of the Davis-Bacon Act.

While section 7201(a) of FASA repealed the bidder eligibility requirements of PCA, section 7201(b) added a new provision which provided that the Secretary of Labor " * * * may (emphasis added) prescribe in regulations the standards for determining whether a contractor is a manufacturer of or a regular dealer in materials, supplies, articles, or equipment to be manufactured or used in the performance of a contract entered into by * * * (the United States)." The new section also provides for judicial review of any legal question regarding the interpretation of manufacturer or regular dealer as promulgated under this new section. According to the legislative history of FASA's section 7201(b), authorizing the Secretary of Labor to define the terms "regular dealer" and "manufacturer" was considered appropriate because the terms have been incorporated by reference into a number of other

statutes. (See H.R. Conf. Rep. No. 712, 103d Cong., 2d Sess. 225 (1994).)

In a review of other statutes, however, the Department only found one statute which explicitly incorporates PCA's definition of the term "manufacturer" and/or "regular dealer" by reference. This statute, 15 U.S.C. 637, concerns contracting authority of the Small Business Administration and the awarding of subcontracts to small businesses owned and controlled by socially and economically disadvantaged individuals. It provides at 15 U.S.C. 637(a)(17) that a responsible business concern may be the actual manufacturer or processor of the product to be supplied under a contract or " * * * be a regular dealer, as defined pursuant to section 35(a) of Title 41 (popularly referred to as the **Walsh-Healey Public Contracts Act**), in the product to be offered the Government * * *." (See 15 U.S.C. 637(a)(17)(B)(iii).) The effect of the **proposed** deletion of the regulatory definitions on this program is unclear.

A review of the Code of Federal Regulations (CFR) disclosed numerous regulations with references to the "manufacturer" or "regular dealer" provisions of the PCA which, in large part, have the purpose of implementing these requirements through the procurement process. The Department, nevertheless, is concerned that there may be other regulations or programs that may require eligible bidders or contractors to be either manufacturers or regular dealers of products sold to the Federal government as defined in accordance with the PCA, for reasons independent of the PCA requirement.

It is the Department's belief that the promulgation of special rules defining these terms is not necessary, and that the former definitions may be adapted, if appropriate, by other Federal agencies. The definitions will also be used to resolve questions of PCA eligibility in contracts awarded prior to the promulgation of this rule. However, the Department, for the reasons discussed above, is particularly interested in obtaining public comment on the appropriateness and feasibility of its proposal not to issue special rules defining the terms "manufacturer" or "regular dealer," and any adverse effect this might have on any other Federal programs, such as those of the Small Business Administration.

This rule does not address the FASA amendments to certain laws that waive the Davis-Bacon Act's (DBA) prevailing wage requirements for certain volunteers on Federally-assisted construction projects. Subtitle C of Title VII of FASA (sections 7301-7306, cited as the "Community Improvement Volunteer Act of 1994) amends the Library Services and Construction Act, the Indian Self-Determination and Education Act, sections 329 and 330 of the Public Health Services Act, the Indian Health Care Improvement Act, and the Housing and Community Development Act of 1974 to provide an exception from DBA prevailing wage requirements for individuals who volunteer services to State and local public entities and to nonprofit entities. The Department expects to publish a notice of **proposed** rulemaking which will address the implementation of these provisions during 1995.

As a point of information, contracting agencies and contractors should also be aware that section 4104(b) of FASA amended the Miller Act to establish a threshold of \$100,000 for construction contracts covered by its bonding requirements. While this law is often associated with the DBA, the Department has no responsibility for its administration.

Executive Order 12866/Section 202 of the Unfunded Mandate Reform Act of 1995

This **proposed** rule is not a "significant regulatory action" within the meaning of Executive Order 12866, nor does it require a section 202 statement under the Unfunded Mandates Reform Act of 1995. The rule merely adopts technical changes in regulations mandated by FASA. While the new statutory threshold of \$100,000 under the Contract Work Hours and Safety Standards Act can be expected to reduce procurement burdens on purchases under \$100,000, contractors awarded such contracts continue to be obligated to pay weekly overtime under the Fair Labor Standards Act. Likewise, the repeal of the "manufacturer" and "regular dealer" requirements under PCA may be expected to increase competition for certain supply contracts; however, the impact on procurement costs resulting from an enlarged pool of eligible bidders is not clearly apparent, and could be minimal. Accordingly, these changes are not

expected to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866 and section 202 of the Unfunded Mandate Reform Act of 1995. Therefore, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

The Department has determined that the **proposed** rule will not have a significant economic impact on a substantial number of small entities. The rule implements statutory changes enacted by FASA, and furthers its streamlining objectives. The repeal of the "manufacturer" and "regular dealer" requirements under PCA will likely increase the number of eligible bidders on supply contracts, many of whom would be small entities, which would have beneficial effects consistent with the purpose of the Regulatory Flexibility Act. The elimination of PCA bidder requirements will also simplify the processing of eligibility protests on bidder eligibility and will otherwise streamline the procurement process. While these and other benefits of the rule would be difficult, if not impossible, to quantify, the rule is not expected to have a "significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act, and the Department has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. A regulatory flexibility analysis is not required.

Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 4

Administrative practice and procedure, Employee benefit plans, Government contracts, Investigations, Labor, Law enforcement, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

29 CFR Part 5

Administrative practice and procedures, Government contracts, Investigations, Labor, Minimum wages, penalties, Reporting and recordkeeping requirements, Wages.

41 CFR Parts 50-201 and 50-206

Administrative practice and procedures, Child labor, Government contracts, Government procurement, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

For the reasons set forth above, 29 CFR part 4, 29 CFR part 5, 41 CFR part 50-201, and 41 CFR part 50-206 are **proposed** to be amended as set forth below.

Signed at Washington, DC., on this 31st day of August, 1995.
Maria Echaveste,
Administrator, Wage and Hour Division.

Accordingly, the following parts of the Code of Federal Regulations are **proposed** to be amended:

- (a) Part 4, Title 29, Code of Federal Regulations (29 CFR part 4);
- (b) Part 5, Subpart A, Title 29, Code of Federal Regulations (29 CFR part 5);
- (c) Part 50-201, Chapter 50 of Title 41, Code of Federal Regulations (41 CFR part 50-201); and
- (d) Part 50-206, Chapter 50 of Title 41, Code of Federal Regulations (41 CFR part 50-206), as set forth below.

Title 29--Labor

SUBTITLE A--OFFICE OF THE SECRETARY

PART 4--LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

1. Authority citation for part 4 continues to read as follows:

Authority: 41 U.S.C. 351, et seq., 79 Stat. 1034, as amended in 86 Stat. 789, 90 Stat. 2358; 41 U.S.C. 38 and 39; and 5 U.S.C. 301.

2. In Sec. 4.181, paragraph (b)(1) is **proposed** to be revised to read as follows:

* * * * *

(b) Contract Work Hours and Safety Standards Act. (1) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332) applies generally to Government contracts, including services contracts in excess of \$100,000, which may require or involve the employment of laborers and mechanics. Guards, watchmen, and many other classes of service employees are laborers or mechanics within the meaning of such Act. However, employees rendering only professional services, seamen, and as a general rule those whose work is only clerical or supervisory or nonmanual in nature, are not deemed laborers or mechanics for purposes of the Act. The wages of every laborer and mechanic for performance of work on such contracts must include compensation at a rate not less than 1½ times the employee's basic rate of pay for all hours worked in any workweek in excess of 40. Exemptions are provided for certain transportation and communications contracts, contracts for the purchase of supplies ordinarily available in the open market, and work, required to be done in accordance with the provisions of the Walsh-Healey Act.

*** * * * * PART 5--LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)**

Subpart A--Davis-Bacon and Related Acts Provisions and Procedures

3. The authority citation for part 5 continues to read as follows:

Authority: 40 U.S.C. 276a-176a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in section 5.1(a) of this part.

4. In Sec. 5.5, paragraph (b) is **proposed** to be revised to read as follows:

Sec. 5.5 Contract provisions and related matters.

* * * * *

(b) Contract Work Hours and Safety Standards Act. The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by Sec. 5.5(a) or Sec. 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

* * * * *

Sec. 5.15 [Amended]

5. In Sec. 5.15, paragraph (b) is **proposed** to be amended by removing paragraphs (b)(1) and (2), and by redesignating paragraphs (b)(3), (4), and (5) as paragraphs (b)(1), (2), and (3), respectively.

Title 41--Public Contracting and Property Management

CHAPTER 50--PUBLIC CONTRACTS, DEPARTMENT OF LABOR

PART 50-201--GENERAL REGULATIONS

6. The authority citation for part 50-201 continues to read as follows:

Authority: Sec. 4, 49 Stat. 2038; 41 U.S.C. 38. Interpret or apply sec. 6, 49 Stat. 2038, as amended; 41 U.S.C. 40.

7. Sections 50-201.1 and 50-201.2 are **proposed** to be redesignated as Secs. 50.201.3 and 50-201.4, respectively, and paragraph (a) of the clause in Sec. 50-201.3, as newly redesignated, is **proposed** to be removed, and paragraphs (b) through (j) are **proposed** to be redesignated as paragraphs (a) through (i), respectively, and the title of the clause is **proposed** to be amended to read as follows:

REPRESENTATIONS AND STIPULATIONS PURSUANT TO PUBLIC LAW 846, 74TH CONGRESS, AS AMENDED

Sec. 50-201.101 [Removed]

Sec. 50-201.102 through 50-201.106 [Redesignated as Secs. 50-201.101 through 50-201.105]

8. Section 50-201.101 is **proposed** to be removed, and Secs. 50-201.102 through 50-201.106 are **proposed** to be redesignated as Secs. 50-201.101 through 50-201.105, respectively.

Sec. 50-201.604 [Removed]

9. Section 50-201.604 is **proposed** to be removed.

PART 50-206--THE WALSH-HEALEY PUBLIC CONTRACTS ACT INTERPRETATIONS

10. The authority citation for part 50-206 continues to read as follows:

Authority: Sec. 4, 49 Stat. 2038, 41 U.S.C. 38, Secretary of Labor's Order No. 16-75, 40 FR 55913, and Employment Standards Order 2-76, 41 FR 9016.

Secs. 50-206.1 and 50-206.2 [Redesignated as 50-201.1 and 50-201.2]<Secs. 50-206.3 and 50-206.50 through 50-206.56 [Removed]

11. In part 50-206, Secs. 50-206.1 and 50-206.2 are **proposed** to be redesignated as Secs. 50-201.1 and 50.201.2 in part 50-201, respectively, and the remainder of part 50-206 is **proposed** to be removed.

[FR Doc. 95-22139 Filed 9-6-95; 8:45 am]

BILLING CODE 4510-27-M

Return to All Agency Memo Page