

## **CONSTRUCTION CONTRACTS (BUT NOT SERVICE CONTRACTS) MAY EXCLUDE WAGE ADJUSTMENT CLAUSES**

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Construction contracts that are subject to the Davis-Bacon Act (40 USC §§ 3131-3148), are required to include one of three possible wage adjustment clauses where there is a wage determination increase, one of which is a “no-adjustment” clause. Contracts for services that are subject to the Service Contract Act, 41 USC Chapter 67 are required to include two possible wage adjustment clauses where there is a wage determination increase, but in those contracts, the Federal Acquisition Regulation (“FAR”) does not permit a “no-adjustment” clause. *Gulf Pacific Contracting, LLC*, ASBCA No. 61434, Sept. 26, 2021 provides a good example of a construction contract with a “no-adjustment” clause, and explains how government contractors should deal with it.

The Davis-Bacon Act requires contractors to pay local “prevailing wages” to employees, and may require contractors to increase wages during performance or after the government exercises options. The Department of Labor (“DOL”) issues “wage determinations” that reflect prevailing wages, and the appropriate wage determination must be incorporated in the solicitation and contract. FAR 22.404, 22.404-2. Whenever a construction contract includes option(s) to extend the contract, the government must include the most current wage determination. FAR 22.404-12. The contracting officer is required to include in fixed-price contracts one of three clauses that specifies different methods (determined by the Contracting Officer) to provide an allowance for any increases or decreases in labor costs that result from a new wage determination:

- FAR 52.222-30, Construction Wage Rate Requirements-Price Adjustment (None or Separately Specified Pricing Method) (the “no-adjustment” clause); or
- FAR 52.222-31, Construction Wage Rate Requirements-Price Adjustment (Percentage Method); or
- FAR 52.222-32, Construction Wage Rate Requirements-Price Adjustment (Actual Method)

The title of each clause indicates the type of calculation to be used (none, percentage method or actual method) in increasing wages and incorporating the extra cost of changed wage determinations in the contract.

*Gulf Pacific* concerns a contract to perform construction services at Hurlburt Field in Florida. The contracting officer specified FAR 52.222-30 (“none or separately specified pricing method”) in the contract. The DOL issued new wage determinations coincident with the government’s exercise of the first option year—thereby requiring Gulf to pay some of its employees more during the option period. Gulf demanded additional compensation from the government, and the Contracting Officer refused, pointing to FAR 52.222-30, which is generally called the “no adjustment clause.” Gulf appealed, and the Board denied the appeal, citing the language of the no adjustment clause:

- (a) The wage determination ... that is effective for an option to extend the term of the contract, will apply to that option period.
- (b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of [such wage determination]. FAR 52.222-30

The Board noted that use of the no adjustment clause, chosen by the Contracting Officer, complies with the Davis-Bacon Act framework, and because the clause requires the contractor to increase or decrease wage rates if the wage determination so requires. However, there will be no recomputation of the wage rates (as provided by the other two possible clauses FAR 52.222-31, 32).

The Board noted that the contractor could have provided for *potential* wage rate increases by using one or two methods to protect its pricing and profits:

- (1) If the option years were separately priced, the contractor could have *anticipated* the wage increases, and built those increases into its pricing structure; or
- (2) If the option years were not separately priced, the contractor should have priced its base price to account for such a contingencies (wage increases).

Despite a dissenting opinion from one Board Judge, Gulf's request for a price increase was denied by the full Board.

Note: For Service Contractors subject to the Service Contract Act, the situation is different. Contracts subject to the Service Contract Act are also required to pay wages in accordance with prevailing wage rates set forth in DOL wage determinations. FAR 22.1002-2. However, the FAR requires the Contracting Officer to include two options to ensure that there are no contingencies in an offer, but there is a mechanism for increasing contract pricing as a result of a new wage determination:

- FAR 52.222-43 Fair Labor Standards Act and Service Contract Labor Standards (Price Adjustment) (Multiple Year and Option Contracts) – requires the contractor to warrant that it did not include any allowance for any contingency to cover increased costs due to a wage determination adjustment; but permits a price increase to comply with a wage determination that is applied to the contract in an option period.
- FAR 52.222-44 Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment- also requires the contractor to warrant that it did not include any allowance for any contingency to cover increased costs due to a wage determination adjustment; but permits a price increase to comply with a wage determination applied to the contract by operation of law.

Therefore, while a service contractor will be entitled to price increases in options from new wage determinations, that is not be the case for construction contracts that include FAR 52.222-30 (the no adjustment clause), unless there is a provision for such increase elsewhere in the contract.

Takeaway. It is essential that construction contractors either have a clause that permits increases resulting from new wage determinations, or if the no adjustment clause is used, that contractors build into their pricing structure contingencies for increases in the wage determination (either in the contract option years, or in the price of the contract).

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