

HOW TO GET PAID FOR WAGE DETERMINATION INCREASES IN OPTIONS AND EXTENSIONS UNDER THE SERVICE CONTRACT ACT

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Contractors know that most contracts for services are subject to the Service Contract Act, 41 U.S.C. § 351(a) (the “SCA”). The SCA was designed to protect wages and fringe benefits of service workers employed on U.S. Government contracts. It directs the Department of Labor (“DOL”) to issue minimum wage orders applicable to fixed-price services contracts, called “Wage Determinations,” which are developed to reflect “prevailing wages.” Through Federal Acquisition Regulation (“FAR”)-mandated contract clauses, contractors are forbidden from paying less than the wages and fringe benefits contained in a Wage Determination. Furthermore, the FAR clauses permit a contractor to recover increases in wages and benefits mandated by future Wage Determinations when they impact on options and extensions. A recent Board case demonstrates the entitlement. *Hallmark-Phoenix 3, LLC*, ASBCA No. 61049, June 23, 2017.

The SCA Price Adjustment Clause

The Service Contract Labor Standards clause, FAR 52.222-41 is mandated for all non-exempt service contracts over \$2,500. Relevant parts of the clause are as follows:

- 1) Each service employee employed in the performance of this contract (both prime and subcontractors --to which the prime must flow this clause down) shall be paid not less than the minimum wages and fringe benefits specified in the Wage Determination attached to the contract.
- 2) If the term of the contract is more than one year, the minimum wages and fringe benefits shall be subject to adjustment after one year and not less often than once every two years under Wage Determinations issued by DOL.

The wage and fringe benefits are adjusted in accordance with FAR 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multiple Year and Option Contracts), a mandatory clause for contracts containing the Service Contract Act Labor Standards clause, and is a multiple year contract or contains options over \$2,500. The clause provides as follows:

- 1) The contractor warrants that the prices in this contract (i.e. in its bid or proposal) do not include any allowance for any contingency to cover increased costs for which adjustment is provided in this clause.
- 2) Current Wage Determinations on the anniversary date of a multiple year contract or the beginning of any renewal option shall apply to the contract.
- 3) The contract price will be adjusted to reflect the Contractor’s actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

- a. The Department of Labor Wage Determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year Wage Determination required a minimum wage rate of \$4.00 per hour. The Contractor chose to pay \$4.10. The new Wage Determination increases the minimum rate to \$4.50 per hour. Even if the Contractor voluntarily increases the rate to \$4.75 per hour, the allowable price adjustment is \$.40 per hour; or
 - b. An increased or decreased Wage Determination otherwise applied to the contract by operation of law;
- 4) Any adjustment will be limited to increases or decreases in wages and fringe benefits and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead, or profit.
 - 5) The contractor must notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new Wage Determination, but must continue performing pending agreement on or determination of any adjustment

See FAR 52.222-43.

In *Hallmark-Phoenix*, the Board noted that in a contract subject to the Service Contract Act (and the price adjustment clause) there are four obligations:

The Three Obligations of Contractors, and the Government's Obligation:

- 1) **The Contractor** must pay its workers the pay and fringe benefits at or above the minimums in the Wage Determination;
- 2) **The Contractor** may not include in its proposal or bid any allowance for any contingency to cover increased costs for which adjustment is provided in FAR 52.222-43
- 3) **The Contractor** must timely notify the Government of any required increase in wages and/or benefits within 30 days of receipt of a new Wage Determination;
- 4) **The Government** must adjust the contract prices as required by FAR 52.222-43.

In *Hallmark-Phoenix*, the contractor paid wages and benefits in accordance with all Wage Determination revisions, and timely notified the Government of these changes. The Board noted that the changes in the applicable Wage Determination, and the appropriate change in contract price, were to be “applied to the contract as a matter of law” (FAR 52.222-43(d)), a requirement that is specifically authorized for contract extensions by FAR 52.217-8 (Option to Extend Services). The latter clause states that the labor rates in an option may be adjusted “only as a result of revisions to prevailing labor rates” in wage determinations. In *Hallmark-Phoenix*, the Contracting Officer did not comply with his obligation to adjust the rates, and accordingly, the Board sustained the full amount of the contractor’s claim for wage/benefit price adjustments.

The takeaway from this and many other SCA wage/benefit price adjustment cases is that contractors must comply with the three obligations noted by the Board above.

As a contractor, you should ensure that you do not include any contingencies in your bid or proposal, that you pay required minimum wages and benefits, and that you timely notify the government of any new Wage Determinations and their impact on prices. By taking these three actions, as a matter of law your contracting officer will be required to adjust your contract prices in connection with the exercise of the option.