

DEPARTMENT OF LABOR**Office of the Secretary****Wage and Hour Division****29 CFR Parts 4 and 5****41 CFR Part 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: Final rule.

SUMMARY: This rule revises regulations on Labor Standards for Federal Service Contracts Davis-Bacon and Related Acts Provisions and Procedures, General Regulations Under the Walsh-Healey Public Contracts Act, and the Walsh-Healey Public Contracts Act Interpretations to incorporate changes necessitated by the Federal Acquisition Streamlining Act of 1994, which raised the coverage threshold of the Contract Work Hours and Safety Standards Act (CWHSSA) to \$100,000 and, among other things, eliminated the eligibility requirements of the Walsh-Healey Public Contracts Act (PCA).

DATES: These regulatory changes are effective on September 4, 1996.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Deputy Director, Office of Enforcement Policy, 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 does not contain any new information collection requirements and does not modify any existing requirements contained in 29 CFR parts 4 and 5 and in 41 CFR parts 50-201 and 206. Thus, this rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

II. Background

The Department published a notice of proposed rulemaking in the Federal Register on September 7, 1995 (60 FR 46553), inviting public comments on proposed revisions to 29 CFR parts 4 and 5, and 41 CFR parts 50-201 and 50-206, to correspond to provisions of the Federal Acquisition Streamlining Act of

1994 (FASA) (Pub. L. 103-355, 108 Stat. 3243). Section 4104(c) of FASA amended 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. As a result of this new \$100,000 statutory threshold, conforming revisions were proposed to § 4.181(b) of 29 CFR part 4 and §§ 5.5(b) and 5.15(b) (1) and (2) of 29 CFR part 5.

Section 7201 of FASA amended the PCA to: (1) Repeal section 1(a) of the PCA, which eliminates the requirement that covered contractors must be either a "regular dealer" or "manufacturer,"¹ and to redesignate paragraphs (b), (c), (d) and (e) to (a), (b), (c) and (d), respectively; (2) substitute, in section 10(b) of the PCA, the term "supplier of" for the terms "regular dealer" and "manufacturer"; (3) strike, in section 10(c) of the PCA, the terms "regular dealer" and "manufacturer"; and (4) add new subsections (a) and (b) to section 11 of the PCA to provide for the Secretary's authority to define the terms "regular dealer" and "manufacturer."

Pursuant to these statutory amendments to the PCA, the Department proposed the following modifications to 41 CFR parts 50-201 and 50-206:

1. Renumber § 50-201.1 of 41 CFR part 50-201 relating to contract stipulations as § 50-201.3;
2. Delete the paragraph currently designated as § 50-201.1(a) to remove the "manufacturer of or regular dealer in" requirement, and redesignate subsequent paragraphs of this section;
3. Delete § 50-201.101 relating to definitions of the terms "manufacturer" and "regular dealer";
4. Delete § 50-201.604 relating to partial administrative exemptions from the manufacturer or regular dealer requirement; and
5. Delete the entire part 50-206, which relates primarily to the qualifications of contractors and interpretations of the terms "manufacturer" and "regular dealer," and incorporate §§ 50-206.1 and 50-206.2 into the general regulations at part 50-201 as new §§ 50-201.1 and 50-201.2, respectively.

In addition, section 3023 of FASA repealed 10 U.S.C. 7299 to eliminate the applicability of the PCA to contracts for the construction, alteration, furnishing, or equipping of naval vessels. While this

¹ Under the PCA 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.

amendment required no changes in the regulations, the Department advised contracting agencies and contractors that such contracts would, as a result, 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, because marine vessels have historically been regarded as "public works" for purposes of the Davis-Bacon Act.

In connection with the repeal of the bidder eligibility requirements, section 7201(4) added a new provision to the PCA 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).)

Because only one statute was found which explicitly incorporates PCA's definition of the term "manufacturer" and/or "regular dealer" by reference,² the Department concluded that maintaining special rules defining the terms "manufacturer" or "regular dealer" was not necessary, given FASA's repeal of the eligibility requirements; that the former definitions could be adapted, if necessary, by other Federal agencies; and that the former definitions could be used to resolve questions of PCA eligibility in contracts awarded prior to the change in applicable law. This conclusion was also supported by the fact that a review of the numerous

² 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).)

references to the "manufacturer" or "regular dealer" provisions of the PCA throughout the Code of Federal Regulations (CFR) disclosed that they were only intended to implement these eligibility requirements through the procurement process.

A total of 3 comments were received in response to the notice. Two commenters focused their remarks on the repeal of 10 U.S.C. 7299, which eliminated the applicability of the PCA to contracts for the construction, alteration, furnishing, or equipping of naval vessels. Both the Department of Navy and Shipbuilders Council of America questioned the Department's interpretation that, in the absence of 10 U.S.C. 7299, the Davis-Bacon Act would apply to shipbuilding and ship repair contracts. The Department of Navy also argued that the Congress intended to implement a Department of Defense 800 panel recommendation on acquisition reform which sought repeal of the PCA, including repeal of 10 U.S.C. 7299, and a companion amendment to the Davis-Bacon Act to make clear that it was not applicable to ship repair or construction contracts. This commenter further argued that the failure of FASA to include an amendment to the Davis-Bacon Act does not alter Congressional intent. To clarify the situation, according to this commenter, the Department of Navy expected 10 U.S.C. 7299 to be reinstated in the upcoming FY 1996 appropriation authorization for the Department of Defense. The third commenter, the Honorable Jan Meyer, Chair, Committee on Small Business, U.S. House of Representatives, supported the Department's view that the promulgation of special rules defining the terms "manufacturer" or "regular dealer" was not necessary.

After review of the comments, the Department has concluded that it is appropriate to adopt the revisions proposed in the September 1995 rulemaking as a final rule. With respect to commenter concerns that contracts for naval vessels, previously subject to the requirements of the PCA, would be subject to the DBA in the absence of 10 U.S.C. 7299, the Department lacks authority to provide for an alternative result. Marine vessels have historically been regarded as "public works" for purposes of the DBA.³ The DBA has accordingly been applied to contracts for the construction, alteration, or repair of Federally-owned or operated marine vessels (e.g., of the U.S. Army Corps of Engineers, National Oceanic and

Atmospheric Administration, and Maritime Administration). Pursuant to 10 U.S.C. 7299, however, contracts in excess of \$10,000 calling for construction, alteration, furnishing or equipping of naval vessels (U.S. Navy or U.S. Coast Guard) were heretofore subject to PCA. This statute had the effect of removing Navy and Coast Guard vessels from DBA coverage. The repeal of 10 U.S.C. 7299, however, caused the provisions of DBA to become applicable to Navy and Coast Guard vessels as with all other Federally-owned or operated marine vessels. Although this may have been an unintended consequence of the passage of FASA, the question of DBA coverage is clear. Thus, contracts involving U.S. Navy or U.S. Coast Guard vessels, as for all other U.S. Government marine vessels historically, would also be subject to DBA by statutory language in the absence of 10 U.S.C. 7299. In any case, however, this issue has become moot by the enactment of section 815 of the Fiscal Year 1996 DOD Authorization Act (Pub. L. 104-106; February 10, 1996), which includes a provision reinstating former 10 U.S.C. 7299. As a result, each contract for the construction, alteration, furnishing or equipping of a naval vessel is once again subject to the PCA, unless the President determines that this requirement is not in the interest of national defense.

Executive Order 12866/§ 202 of the Unfunded Mandates Reform Act of 1995

This final 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 revisions adopted in this rule are technical in nature as required by statutory language in 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 may continue to be obligated to pay weekly overtime where the requirements of the Fair Labor Standards Act (29 U.S.C. 201, *et seq.*) apply. 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 final 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. Therefore, 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, Recordkeeping requirements, Reporting requirements, Wages.

³See *Title Guaranty and Trust Co. v. Crane Co.*, 219 U.S. 24 (1910); 38 Op. Atty. Gen. 418; and 17 Comp. Gen. 585.

29 CFR Part 5

Administrative practice and procedures, Government contracts, Investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting 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, CFR Part 50-201, and 41 CFR Part 50-206 are amended as set forth below.

Signed at Washington, DC, on this 30th day of July, 1996.

Maria Echaveste,

Administrator, Wage and Hour Division.

Accordingly, the following Parts of the Code of Federal Regulations are 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 is revised 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; 5 U.S.C. 301; and 108 Stat. 4101(c).

§ 4.181 [Amended]

2. In § 4.181, paragraph (b)(1) is 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 service 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 employees' 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 is revised 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; 108 Stat. 4104(c); and the statutes listed in section 5.1(a) of this part.

4. In § 5.5, paragraph (b) is revised to read as follows:

§ 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 § 5.5(a) or 4.6 of part 4 of this title. As used in this paragraph, the terms *laborers* and *mechanics* include watchmen and guards.

* * * * *

§ 5.15 [Amended]

5. In § 5.15, paragraph (b) is 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 is revised 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; 108 Stat. 7201.

7. Sections 50-201.1 and 50-201.2 are redesignated as §§ 50-201.3 and 50-201.4, respectively, and paragraph (a) of the clause in § 50-201.3, as newly redesignated, is removed, and paragraphs (b) through (j) are redesignated as paragraphs (a) through (i), respectively, and the heading of the clause is revised to read as follows:

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

* * * * *

§ 50-201.101 [Removed]

§ 50-201.102 through 50-201.106 [Redesignated as §§ 50-201.101 through 50-201.105]

8. Section 50-201.101 is removed, and §§ 50-201.102 through 50-201.106 are redesignated as §§ 50-201.101 through 50-201.105, respectively.

§ 50-201.604 [Removed]

9. Section 50-201.604 is removed.

PART 50-206—THE WALSH-HALEY PUBLIC CONTRACTS ACT INTERPRETATIONS

§§ 50-206.1 and 50-206.2 [Redesignated at 50-201.1 and 50-201.2]

§§ 50-206.3 and 50-206.50 through 50-206.56 [Removed]

10. In part 50-206, §§ 50-206.1 and 50-206.2 are redesignated as §§ 59-201.1 and 50-201.2 in part 50-201, respectively, and the remainder of part 50-206 is removed.

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