THE SERVICE CONTRACT ACT OF 1965
AND GOVERNMENT PROCUREMENT

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of the Service Contract Act with respect to the Act's legislative history, including the interests motivating its enactment, its current interpretation by the U. S. Department of Labor and with particular emphasis on the problems encountered by Government contracting officers.

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CHAPTER I

LEGISLATIVE HISTORY

The Service Contract Act of 1965[1] was signed into law on 22 October 1965[2] and took effect on 20 January 1966[3] after years of effort by numerous members of Congress. Thus after three decades, the final hole was plugged in the dike of labor legislation begun in the Great Depression of the nineteen thirties.

To place the Service Contract Act in its proper perspective and to relate the act to its legislative brethren, it is necessary to review briefly the American political and social scene during the Great Depression years of the thirties. This is necessary since the Service Contract Act is a direct descendant - an offshoot in the sixties - of the labor legislation characteristic of that Depression era.

On 24 October 1929, the stock market's "Black Thursday", the market prices came crashing down.[4] The Great Depression had begun. There followed a spiraling

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1. 41 U.S.C. secs. 351-357 (Supp. III, 1964).
2. 111 Cong. Rec. 28555(1965).
3. 41 U.S.C. sec. 357 (Supp. III, 1964).
4. Data concerning the Great Depression, see generally Morison, The Oxford History of the American People, Chap. LV (1965) and Faulkner, American Political and Social History, Chap. XL (6th ed. 1952).

downward of prices, production, employment, and foreign trade which did not fully reverse itself until the Nation began production toward rearmament in 1939. The Depression reached its rock bottom low in mid-1932 when twelve million people, about 25% of the normal labor force, were unemployed. In the cities there were soup kitchens and bread lines. Factory payrolls dropped to less than half those of early 1929.[5]

The Nation was in the grips of financial, business, and industrial collapse which permeated every aspect of its existence. For the Nation to survive, it was felt that money had to be pumped back into the economy, methods found to reduce the great number of unemployed, and assurance of a living wage for the working man.

One of the first efforts in this direction was made during the Hoover administration with the Davis-Bacon Act[6] of 3 March 1931. The thrust of the Davis-Bacon Act was to insure that federal money spent on contracts for public works would not depress wages of certain workers even lower than the Depression had brought them. Davis-Bacon required that all contracts for more than $2000 for the construction, alteration, or repair of public buildings or works in the United States had

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5. Morison, supra, note 4 at 944.
6. 40 U.S.C. 276a(1964).

to contain a stipulation whereby the contractor agreed to pay laborers and mechanics employed on the contract work at least a minimum wage to be set by the Secretary of Labor.

By creating a wage floor, Congress intended to halt and stabilize the wages of laborers and mechanics working on federal construction projects. With this legislation a first tentative step had been made to relieve labor's plight. The Davis-Bacon Act is still the law today, and by amendment[7] in 1964 Congress added fringe benefits to the compensation which government contractors must furnish to their laborers and mechanics. Government contracting officers must insure that an appropriate clause[8] required by the Davis-Bacon Act is inserted in construction contracts covered by the Act.

On 30 June 1936, five years and four months after Davis-Bacon, Congress enacted the Walsh-Healey Public Contracts Act.[9] Similarly to Davis-Bacon in construction contracts, Walsh-Healey, inter alia, extended the wage floor to employees of contractors manufacturing or furnishing materials, supplies, articles, and equipment

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7. 40 U.S.C. sec. 276b(1964).
8. Armed Services Procurement Reg. para. 18.703-1 (1 January 1968)(hereinafter cited as ASPR).
9. 41 U.S.C. secs. 35-45(1964) as amended.

to the United States.

The purpose of Walsh-Healey (and Davis-Bacon) was "to impose obligations upon those favored with Government business and to obviate the possibility that any part of the tremendous national expenditures would go to forces tending to depress the wages and purchasing power and offending fair social standards of employment."[10]

Thus with the Davis-Bacon Act and Walsh-Healey Public Contracts Act, Congress had established a wage floor below which the downhill snowball of wages could not descend, at least in contracts with the United States for construction and for production or supply respectively.[11]

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10. Perkins v. Lukens Steel Co., 310 U.S. 113,128(1940).

11. There was other labor legislation whose genesis harks back to the Great Depression of the thirties, the detailed discussion of which is beyond the scope of this study. For example: the Copeland (Anti-kickback) Act of 1934 [18 U,S.C. 874(1964)], which supplemented the Davis-Bacon Act by applying criminal sanctions to government contractors in the construction field who forced employees to "kickback" or make rebates of their wages; the Contract Work Hours Standards Act [40 U.S.C. secs. 327-332(1964)] also supplemented Davis-Bacon by prohibiting laborers and mechanics from being required to work more than 8 hours a day or more than 40 hours a week without overtime pay at one and one-half times the regular rate in public work contracts or contracts financed with government funds; the Fair Labor Standards Act of 1938 [29 U.S.C. secs. 201-219(1964) as amended], which required payment of a minimum wage to all employees engaged in interstate or foreign commerce, the production of goods for such commerce, or any closely related process or occupation essential to such production. Being thus based on the interstate commerce concept, the Fair Labor Standards Act was broader in concept and reached more employees than did Davis-Bacon or Walsh-Healey whose effect was restricted to government contracting power. The National Industrial Recovery Act of 1933 (NIRA) was a part of the Roosevelt administration's New Deal labor policy designed to improve the security of

Legislation giving minimum wage protection to the service employee[12] was not forthcoming until 1965. It is easy to ask why Congress allowed this gap in its comprehensive labor legislation to exist for almost thirty years after Walsh-Healey and thirty-four years after Davis-Bacon.

The answer, if an answer there is, probably lies in the peculiar circumstances characteristic of service employees, or the service industry considered collectively, particularly in the late nineteen thirties and early nineteen forties. First, in the thirties, service employees were few in number compared to workers in the construction and manufacturing fields. For example, the 1940 census indicated that there were only 409,000 people in

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the wage earner. Section 7a of NIRA provided that employees were to have the right to organize and bargain collectively through representatives of their own choosing free from interference or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization. The labor provisions of NIRA also created a National Labor Relations Board to carry into effect the act's provisions. Sec. 7a of the NIRA was re-enacted in 1935 as the National Labor Relations Act.

12. In the public hearings which led to the enactment of the Service Contract Act, witnesses who appeared before the House Special Subcommittee on Labor considered service employees to be persons working in janitorial, custodial, maintenance, guard, cleaning, and other low paid positions. See, e.g., Hearings on H.R. 1678 and 6088 before the Special Subcommittee on Labor of the House Committee of Education and Labor, 88th Cong., 2d Sess. at 8(1964) (cited hereinafter as 1964 Hearings).

the United States working as janitors, sextons, charwomen, and cleaners.[13] By 1960 the number of people in these occupations had increased to 773,000 people - an increase of almost 89 per cent.[14] Another example is the increase in disinfecting and exterminating service contractors from 1,373 in 1948 to 4,231 in 1958.[15] Presumably the number of such contractors was even lower in the Depression era than in 1948.

During the nineteen thirties and early nineteen forties, these service employees did not possess the strength in numbers to force their employers, through economic coercion, to raise wages or provide fringe benefits.[16] Where, for example, an industrial plant employed 500 men and women, a dozen janitors would have a comparatively small voice.

Second, service employees often work in semi-isolation and during odd and irregular hours. Typically, janitors clean after other employees have gone home; the maintenance employee makes his repairs after normal office hours and on weekends; the guard generally mans his post and makes his patrols at night or on weekends. Even if his tour is during normal weekday working hours, there is a degree of

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13. Id. at 48.
14. Id.
15. Id.
16. Id. at 8.

segregation from the regular work force by virtue of the very nature of guard duty. All these factors make it difficult for service employees to communicate with each other or band together for their mutual aid and protection. Because of their peculiar employment conditions, service employees for a number of years were almost helpless to assert their collective economic strength to better their working conditions.[17]

The third reason is really a combination of the first two. That is, the lack of numbers and peculiar working conditions were not conducive to the efforts of major labor unions to organize service employees. For example, the International Union, United Plant Guard Workers of America was not organized until February 1948,[18] whereas twenty-eight years before the American Federation of Labor had already been organized and numbered more than 4,000,000.[19]

Involved as it is in the social history of the United States in the last thirty years, the fourth reason for the long delay before minimum wage protection was afforded service employees is perhaps more subtle than the first three reasons.[20]

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17. Id.
18. Id. at 7.
19. Faulkner, supra note 4, at 946.
20. This study is not intended and should not be interpreted as a comment on the direction and progress of the

The occupations which have been generically described as those filled by "service employees" (janitors, custodians, maintenance men, charwomen, for example,) drew into their ranks the ill-educated and underprivileged -- those people who were inherently at the bottom of the Nation's labor market. A great number of those working in service occupations were Negroes and members of minority groups, who until more recent times, did not have the political voice to be heard in the halls of Congress.

For the aforementioned reasons, at least, service employees did not benefit from legislated minimum wage provisions for thirty-four years after the enactment of the first such law - the Davis-Bacon Act of 1931.

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social advancement in the United States in the recent past. Nevertheless it would be less than a realistic, objective appraisal of this topic not to recognize and point out the bearing which the advancement of Negro civil rights had in the history of the Service Contract Act of 1965. The hearings before Congress on the Service Contract Act of 1965 and predecessor bills are replete with such references. For example, Mrs. Ester Peterson, Assistant Secretary of Labor, in her testimony described service employees as "among the most unskilled, the weakest, and the poorest of our citizens." (1964 Hearings, supra note 12, at 69) Thereafter she quoted President Johnson in his 1964 State of the Union Message as referring to the same workers as "living on the outskirts of hope." (1964 Hearings, supra note 12, at 68)

The history of agitation in Congress which ultimately resulted in enactment of the Service Contract Act in 1965 began with several bills introduced in Congress at least six years earlier in 1959.[21] It is apparent that by 1959 unions had been able to organize at least two groups of service employees[22] and, by collective bargaining, raise the wages of these groups and to some extent the wages of unorganized service employees as well.[23]

Doubtless the inadequacy of the wages paid most unorganized service workers was magnified by comparison when the wages of unionized service workers began to rise. Even with this disparity, however, it is entirely possible that the plight of service workers would have gone unnoticed longer but for a policy decision of the federal Government. In the decade prior to 1963, the Government increased the number of its contracts for the maintenance of buildings which contracts required cleaning and janitorial services.[24] Apparently this increase in contracting-out work was for the purpose of stimulating business activities[25] during the minor recession of

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21. 1964 Hearings, supra note 12, at 41.
22. Building service employees engaged in the cleaning and maintenance of buildings, institutions, and hotels. (1964 Hearings, supra note 12, at 46) and plant guards (1964 Hearings, supra note 12, at 7).
23. Id. at 7.
24. 1964 Hearings, supra note 12, at 62.
25. Id.

1957-58.[26] This increase in Government contracting-out brought into direct conflict two diametrically opposed interests: the federal Government procurement policy (low-bidder) and labor union endeavor to obtain maximum benefits for members. This conflict is probably the strongest single reason for the subsequent enactment of the Service Contract Act.

The federal Government is committed by law to a policy which prefers the procurement of all property and services by formal advertising.[27] Formal advertising procedure---the competitive bidding system---envisions and requires the acceptance by the Government of the lowest bid submitted by a responsive, responsible bidder, or cancellation of the procurement.[28] By virtue of the required competitive bidding system of awarding government contracts, when applied to a contract for services,

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26. Morison, supra note 4, at 1101.
27. See 10 U.S.C. sec. 2304(a)(1964) a part of the Armed Forces Procurement Act of 1949 [10 U.S.C. secs. 2301-2314(1964) as amended], which requires formal advertising by the armed forces with certain subsequently prescribed exceptions. 41 U.S.C. sec. 5(1964), as amended applies to procurement and sales transactions of other Government agencies except those whose procurement is covered by Title III of the Federal Property and Administrative Service Act of 1949, as amended [41 U.S.C. secs. 251-260(1964) as amended]. The latter act applies to the General Services Administration and agencies to which GSA has delegated authority [41 U.S.C. sec. 252(a)(1964)].
28. See, e.g., ASPR, supra note 8, sec. 2.101.

the responsive, responsible contractor whose bids were lowest would automatically receive the award without regard to wages paid the contractor's employees. In short, the Government's formal advertising procedures made no provisions for taking into account the wage scales paid by contractors furnishing services. The Government's prime concern was obtaining the lowest price for the product or services to be obtained.

Diametrically opposed to the concept of Government formal advertising procedures was the primary goal of labor unions to obtain the highest possible wages and other benefits for their members. The sparks generated over a period of time by these opposing forces was the most potent single force which ultimately brought the service employee's problem to the attention of members of the Congress. After attention had been galvanized, the personal efforts of individual members of Congress, the collective endeavor of the Department of Labor, and the personal cognizance of two Presidents brought the Service Contract Act to fruition. This then was generally the situation when the first attempts were begun to secure corrective legislation.

Bills designed to assist service workers had been introduced as early as 1959.[29] Representative Pelly

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29. 1964 Hearings, supra note 12, at 46.

from Washington was apparently the first member of Congress to become interested in the problem.[30] Mr. Pelly introduced a bill, H.R. 6731, in the first session of the 87th Congress (in 1961). This bill would have extended the provisions of the Davis-Bacon Act to contracts let by the United States for cleaning Government buildings.[31] It is important to note that President Kennedy, and later President Johnson, was aware of the problem and recommended legislative correction[32] (expanding Fair Labor Standards Act to include service employees) as an adequate solution.[33] Congressman Pelly's interest stemmed from personal conversations with contractors and labor union representatives[34] in Washington State, primarily in the Seattle area.[35] Mr. Pelly's bills, however, expired without enactment.[36]

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30. Id. at 73.
31. Id. at 74.
32. H.R. Rep. No. 1495, 82d Cong., 2d Sess. 12(1964) [cited hereinafter as H. Rep. 1495].
33. In June, 1964, eleven of the thirty-one members of the House Committee on Education and Labor felt that expanding the Fair Labor Standards Act to cover service employees was preferable to enacting new legislation. Their feelings were expressed in minority views accompaning a favorable report on H.R. 11522, a bill similar to the bill which later became the Service Contract Act of 1965. Id.
34. 1964 Hearings, supra note 12, at 74.
35. In the hearings on Congressman O'Hara's service contract bills in 1964, Mr. Pelly appeared as a witness and read letters from a Seattle cleaning contractor's association, a building maintenance company apparently in Seattle, and a Seattle local of the Building Service Employee's International Union. Id. at 75.
36. Id. at 79.

During the same period of time in which Congressman Pelly was working on service contract legislation but unknown to him,[37] Congressman O'Hara from Michigan had become aware of the lack of minimum wage coverage for service employees.[38] Mr. O'Hara's attention had been drawn to the lack of minimum wage requirements for service employees by a threatened strike in his district.[39] A Government contractor with a contract to haul mail between Detroit and Port Huron was paying his non-union drivers seventy-five or eighty cents an hour, a rate which was considerably below the Teamster's Union minimum wage rate in the area;[40] a strike was narrowly averted. Additionally, in Mr. O'Hara's district, problems arose when unionized contractors providing guard services for Nike-Ajax sites near Detroit were underbid by non-union contractors from out-of-state.[41] This problem was brought to Mr. O'Hara's attention by a neighbor,[42] Mr. James C. McGahey, international president of the United Plant Guard

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37. Id. at 65.
38. Hearings on H.R. 10238 before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess., at 11 (1965) [hereinafter cited as 1965 Hearings].
39. Id.
40. Id.
41. 1964 Hearings, supra note 12, at 9.
42. Id. at 7.

Workers of America.[43] To remedy these and similar problems, Congressman O'Hara obtained the help of the Department of Labor in drafting corrective legislation as early as 1959 or 1960.[44] One bill was completed apparently as early as 1962.[45] Another bill, also designed to provide minimum wage to service employees, was drafted apparently in 1963.[46] Both bills were introduced by Congressman O'Hara in January, 1964.[47]

Mr. O'Hara conducted public hearings on these two bills on 27, 29, and 30 January, and on 16 March 1964 in the House Special Subcommittee on Labor. The total amount of time alloted to the public hearings was brief.[48] Of the twelve witnesses who appeared, four, affiliated with various labor unions,[49] gave the vast majority of the testimony heard.[50] Congressman Pelly and a

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43. Id.
44. Id. at 9.
45. The short title of the bill, H.R. 1678, indicates that it was meant to be cited as the "Service Contract of 1962". 1964 Hearings, supra note 12, at 1.
46. The short title of this bill, H.R. 6088, indicates it was meant to be cited as the "Service Contract Act of 1963". Id. at 4.
47. Id. at 79.
48. Four hours and thirty-six minutes. See 1964 Hearings, supra note 12.
49. John A. McCart, operations director, Government Employee's Council of the AFL-CIO; James C. McGahey, international president, United Plant Guards of America; Kenneth A. Meiklejohn, legislative representative, AFL-CIO; and David Sullivan, president, Building Service Employees International Union, AFL-CIO. 1964 Hearings, supra note 12, at 111.
50. Two hours and fifty minutes of the four hours and thirty-six of hearings was consumed by Messrs McCart,

representative of the Department of Labor[51] completed the array of witnesses originally scheduled to appear before the Subcommittee. Six witnesses from the Department of Defense were called to testify only after the hearings were well underway.[52] The Defense Department spokesmen were called solely to "explain and justify"[53] certain practices at the Detroit Nike-Ajax sites alleged by a union witness earlier in the hearing to be violative of national security.[54]

Both of Mr. O'Hara's bills were designed to provide minimum wage protection to service employees working on Government service contracts[55] but by different procedures. It is important to set out the provisions of the two bills,

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McGahey, Meiklejohn, and Sullivan. See 1964 Hearings, supra note 12.

51. Honorable Ester Peterson, Assistant Secretary of Labor, Id. at 66.

52. Id. at 21.

53. Id.

54. Mr. McGahey of the United Plant Guards of America had asserted that a Government contract for guard and police dog services at a Nike site had been awarded to an out-of-state contractor who placed an unarmed farmer at the site with a house dog. (1964 Hearings supra note 12, at 9). Subsequent testimony elicited from Defense Department Representatives showed the allegations to be unfounded. The Nike site was not operational; it had been dismantled and was in the process of being disposed of. The contract did not require the guards to be armed nor did it require a dog of any kind. The guard services required were in a capacity of watchmen for Government real estate. (1964 Hearings, supra note 12, at 82 et seq).

55. 1964 Hearings, supra note 12, at 6.

since, as will appear subsequently, the essence of one of these bills with rather minor modifications was ultimately enacted as the Service Contract Act of 1965. A cursory glance at the legislative history of the Service Contract Act of 1965 supplies little feel for the problems intended to be solved and the reasons for the legislation. It is necessary to jump the gap and study the first bills dealing with the problem of service contracts if the full legislative history is to be recreated.

The first of Mr. O'Hara's bills in the 88th Congress was H.R. 6088.[56] This bill would have required each contracting agency to establish comparability in wages on the basis of the rates the agency paid its own employees. Wage boards were to establish these rates under the long-established procedure designed to provide federal "blue-collar" workers with a wage rate comparable to that of their counterparts in private industry.[57] In addition to comparable wages, the contractor on federal service contract work would have been required to provide health, life, and accident insurance, and vacation and retirement benefits equivalent in value to those provided by the

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56. H. Rep. 1495, supra note 32 at 1.
57. Id.

contracting federal agency to its employees; in lieu of providing the benefits in kind, the contractor was required to pay his employees an amount equal to the cost to the federal agency of furnishing such insurance and benefits.[58] Additional provisions of H.R. 6088 prohibited the contractor from permitting his employees to work in hazardous or unsanitary surroundings.[59] The contracting officer was authorized to withhold funds where, after investigation, he found that the contractor had paid his employees less than the amount required by the contract.[60] The head of the Government contracting agency or his authorized representative was required to consider reports and findings submitted by the contracting officer and made a decision thereon after allowing the contractor to present any additional evidence or arguments desired under procedures set up by the agency head. Decisions of the agency head would have been conclusive on all federal agencies and, if supported by substantial evidence, upon courts of the United States.[61] Where the head of the contracting agency found that the contractor was in violation of the wage provisions and other contract clauses,

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58. 1964 Hearings, supra note 12, at 4.
59. Id.
60. Id.
61. Id.

the contracting officer could terminate the contract, procure the work elsewhere, and charge the defaulted contractor for any excess costs incurred.[62] The Comptroller General was authorized to pay funds withheld directly to any underpaid employees; where funds withheld were insufficient to pay all sums due underpaid employees, the United States was authorized to bring suit to recover the amounts of underpayment.[63]

The Secretary of Labor was directed to prescribe appropriate standards, regulations, and procedures to be observed by the contracting federal agencies in order to assure coordination of administration and consistency in enforcing the act.[64]

Thus, under H.R. 6088 the contracting agency itself was responsible for the determination of comparable wages under so-called wage board procedures as well as the internal administration of the act. The standard imposed upon contractors required that they pay their employees the wage board rates prevailing in that agency.

H.R. 6088 was redrafted and with only minor variations[65] was reported from the Committee but with a strong

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62. Id.
63. Id. at 5.
64. Id.
65. The principle change in the redrafted version was that the contractor could under no circumstances pay less

dissent by eleven of the thirty-one Committee members.[66] This dissent pointed out primarily the basic inadequacies of the Special Subcommittee hearings relating to both of the bills considered and was not aimed specifically at either bill. The dissent indicated the hearings were not sufficiently comprehensive. Specifically indicted were the Subcommittee's failures to seek the views either of important federal agencies directly affected by the proposal, or employers engaged in contract services.[67] The only two federal agencies to communicate with the Subcommittee expressed sympathy for some form of wage standards but did not endorse the proposed legislation.[68] The dissenting members further pointed out several unresolved questions they felt required further study pending enactment of any legislation.[69]

Brought under fire was the failure to determine the additional costs to the federal Government of the proposal,

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than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, as amended. This change was suggested by the Department of Labor (1964 Hearings, supra note 12, at 96).

66. H. Rep. 1495, supra note 32 at 12.

67. Id.

68. Bureau of the Budget and the General Services Administration. Id.

69. Id.

the impact of the proposal upon private enterprises affected, the vexing personnel and operational problems upon contractors, and the effect of the proposal upon the Government's overall contracting-out policy.[70]

The dissenters pointed out that both former Presidents Kennedy and Johnson had recommended action by way of amendment to the Fair Labor Standards Act.[71] Their conclusion was that amendment of the Fair Labor Standards Act was a sound first step which course would have afforded the Committee and Congress time for a more thorough and detailed consideration of the broader questions.[72]

None of the questions posed appears to have been investigated further prior to enactment of the Service Contract Act of 1965.[73]

The second service contracts bill, introduced by Mr. O'Hara in January, 1964, and considered in hearings on the two bills, was H.R. 1678.[74] The purpose of this

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70. Id.
71. Id.
72. Id.
73. See generally 1965 Hearings, supra note 38; H.R. Rep. No. 948, 89th Cong., 1st Sess.(1965); Hearing on H.R. 10238 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st Sess. 11 (1965) (cited hereinafter as 1965 Senate Hearing); S. Rep. No. 798, 89th Cong., 1st Sess. (1965).
74. 1964 Hearings, supra note 12, at 1.

bill, like H.R. 6088, was to provide minimum wage standards for employees of employers engaged in service contracts for the federal Government.[75]

H.R. 1678, however, was patterned generally after the Davis-Bacon type determination by the Labor Department of prevailing wages in the locality where the work was to be done.[76] It was in fact the provisions of this bill, with some very minor modifications, which ultimately became the Service Contract Act of 1965.

Under H.R. 1678, the Labor Department, not the contracting agency, would have made the wage determinations. The determinations would have been based, not on wages paid by the agency to its own employees, rather wages prevailing in the city, town, village, or other civil subdivision of the state or territory where the work was to have been performed.[77] Federal service contractors would have had to agree to pay their service employees this minimum wage as a condition of contract award. Further, H.R. 1678 made provisions for determination by the Labor Department of fringe benefits to be provided by the contractor.[78] Overtime provisions were included as well as the requirement that employees be provided safe and sanitary working conditions.

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75. Id. at 6.
76. Id.
77. 1964 Hearings, supra note 12, at 2.
78. Id.

Enforcement provisions included authorization for the contracting officer to withhold payments accrued on the contract work and on other federal contracts held by the same contractor for payment to underpaid employees.[79] Where the Labor Department found underpayment of employees to have occured, the contract could be terminated by the contracting officer who could then effect reprocurement and charge the contractor with any excess costs incurred.[80] The Secretary of Labor was authorized to bring suit against the contractor, subcontractor, or sureties where withholding of payments accrued under the contract was insufficient to make up underpayments to employees of the contractor.[81] Administration of the procedures was placed in the hands of the Secretary of Labor who was given authority to make investigations and findings, as well as to make rules and regulations of implementation and interpretation.[82]

After the completion of the hearings on this bill and H.R. 6088, a third bill, H.R. 11522, was drafted which generally followed the wage board comparability theory of H.R. 6088.[83] H.R. 11522 incorporated changes

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79. Id.
80. Id. at 3.
81. Id.
82. Id.
83. H. Rep. 1495, supra note 32 at 2.

suggested during the hearings,[84] primary of which was the recommendation that the minimum wage provisions of the Fair Labor Standards Act be incorporated into all service contracts regardless of the contract amount. H.R. 11522 was favorably reported out of Committee[85] but died in the Rules Committee when the 88th Congress adjourned.[86]

The death of his bill in the 88th Congress did not dampen Congressman O'Hara's fervor. In the 89th Congress early in 1965, Mr. O'Hara introduced another bill.[87] This bill apparently got nowhere, for on 3 August 1965 he introduced still another bill, H.R. 10238.[88] This bill appears to have been drafted <u>in toto</u> by the Labor Department[89] with the full support and assistance of the Administration.[90]

A single hearing on H.R. 10238 was held on 5 August 1965 which lasted only thirty minutes.[91] Two witnesses were called: Mr. Donahue, Solicitor of Labor, and Congressman Karth from Minnesota.[92] Mr. Donahue justified the need for the legislation with the same reasons which had been presented by the Labor Department repre-

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84. <u>Id.</u>
85. H. Rep. 1495, <u>supra</u> note 32.
86. 1965 Hearings, <u>supra</u> note 38, at 3.
87. <u>Id.</u> at 6.
88. <u>Id.</u>
89. <u>Id.</u> at 13.
90. <u>Id.</u> at 6.
91. <u>Id.</u> at 1.
92. <u>Id.</u> at 111.

sentative in the hearings on H.R. 6088 and H.R. 1678 a year and a half earlier.[93]

H.R. 10238 was essentially a rewritten version of H.R. 1678, the bill which had been considered in the 1964 hearings together with H.R. 6088. The only material difference between H.R. 1678 and H.R. 10238 was the addition in the latter bill of the requirement that the minimum wage required by section 6(a)(1) of the Fair Labor Standards Act apply to all service contracts regardless of the amount of the contract. The concept of H.R. 10238 was almost exactly like that of the Davis-Bacon Act, that is, wage determinations made by Labor Department. Indeed Mr. Donahue later advised the Senate Subcommittee on Labor that in principle, without mentioning it in the bill, the Labor Department had followed the Davis-Bacon Act.[94]

H.R. 10238 was reported out of the House Committee on Education and Labor on 1 September 1965.[95] Being a "comparatively noncontroversial measure" with "considerable

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93. Compare the statement and testimony of Mrs. Ester Peterson, Assistant Secretary of Labor, in the 1964 hearings (1964 Hearings, supra note 12, at 69) with the statement and testimony of Mr. Donahue in the 1965 hearings (1965 Hearings, supra note 38, at 4).

94. 1965 Senate Hearing, supra note 73.

95. H.R. Rep. No. 948, 89th Cong., 1st Sess. 1(1965) (cited hereinafter as H. Rep. 948).

endorsement and with little or no opposition",[96] the bill was passed in the House under suspension of the rules on 20 September 1965.[97]

A thirty-five minute hearing on the bill was held 23 September 1965 before the Senate Subcommittee on Labor.[98] Mr. Donahue, Solicitor of Labor, appeared as the sole witness.[99] The prime concern of the Subcommittee members, particularly Senator McNamara of Michigan and Senator Javits of New York,[100] was why new legislation was needed at all. Senator Javits wanted to know why a "very brief amendment to the Davis-Bacon Act" wasn't sufficient.[101] Solicitor Donahue pointed out that the "building trades unions [had] very properly considered themselves as having a strong interest in [the Davis-Bacon Act] and would have been adverse to any amendment or change in it which brought it beyond the scope of the construction field."[102]

The bill was reported out of the Senate on 30 September 1965[103] and signed by President Johnson on 22 October 1965[104] as Public Law 89-286. The Act became effective ninety days after enactment[105] on 20 January 1966.

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96. 1965 Senate Hearing, supra note 73, at 10.
97. 111 Cong. Rec. 24386 (1965).
98. 1965 Senate Hearing, supra note 73.
99. Id. at 10.
100. Id. at 1.
101. Id. at 12.
102. Id. at 11.
103. S. Rep. No. 798, 89th Cong., 1st Sess. 1(1965).
104. 111 Cong. Rec. 28555 (1965).
105. 41 U.S.C. sec. 357 (Supp. III 1964).

CHAPTER II

PROVISIONS OF THE ACT

The Service Contract Act of 1965[106] is brief, containing only nine sections. Superficially it appears to be a rather uncomplicated piece of legislation. Its brevity and seeming simplicity are deceiving. As interpreted by the Wage and Hour and Public Contracts Division of the Department of Labor (hereinafter WHPC) the Act has had a tremendous impact on Government contracting officers and on individuals contracting with the United States.

The Act applies to any contract (and any bid specification therefor) entered into by the United States or the District of Columbia the principal purpose of which is to furnish services in the United States through the use of service employees.[107] The Act applies whether the contract is negotiated or advertised.[108] Certain categories or types of contracts are exempted from the Act's coverage.[109]

Contracts within the definition above which are in excess of $2500 must contain certain stipulations regarding minimum wages, fringe benefits, and other matters.[110]

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106. 41 U.S.C. secs. 351-357(Supp. III 1964).
107. 41 U.S.C. sec. 351(Supp. III 1964).
108. Id.
109. 41 U.S.C. sec. 356(Supp. III 1964).
110. 41 U.S.C. sec. 351(a)(Supp. III 1964).

The first stipulation or clause required is a provision which specifies the minimum monetary wages to be paid the various classes of service employees who will be employed in the performance of the contract. The Secretary of Labor or his authorized representative determines the minimum wage in accordance with prevailing rates in the locality where the contract will be performed. The minimum wage set by the Secretary can in no case be lower than the minimum wage set by the Fair Labor Standards Act.[111] This clause applies to contractors as well as subcontractors at all tiers.

The second clause[112] required in contracts for more than $2500 specifies certain "fringe benefits" which the contractor must furnish various classes of service employees who will work on the contract. These fringe benefits, like the minimum wage, are set by the Secretary of Labor or his representative based on the fringe benefits determined to be prevailing in the locality where the contract will be performed. The fringe benefits required include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity. The contractor can either furnish the aforementioned benefits or may purchase

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111. 41 U.S.C. sec. 351(a)(1)(Supp. III 1964).
112. 41 U.S.C. sec. 351(a)(2)(Supp. III 1964).

insurance to provide them. Also included as fringe benefits are unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs, and other bona fide fringe benefits which are not otherwise required by federal, state, or local law to be provided by the contractor or subcontractor. The fringe benefit obligations can be discharged by providing any equivalent fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary of Labor.

The third required clause or stipulation is a provision[113] that no part of the services covered by the Act will be performed in buildings or surroundings or under working conditions which are unsanitary, hazardous, or dangerous to the health or safety of service employees engaged to furnish the services. The provision applies to buildings, surroundings, or working conditions which are either provided by or under the control of the contractor.

The fourth clause required[114] is a provision whereby the contractor agrees to furnish notice of the applicable wage and fringe benefit requirements to each service

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113. 41 U.S.C. sec. 2(a)(3)(Supp. III 1964).
114. 41 U.S.C. sec. 2(a)(4)(Supp. III 1964).

employee on the day the employee commences work on the contract. The contractor may use a form provided by the federal agency, or post a notice in a prominent place at the worksite.

Thus, the four clauses required in any service contract for more than $2500 provide for the service employee minimum monetary wage, fringe benefits, safe and sanitary working conditions, and notice of the required monetary wage and fringe benefits.

An additional protection is provided the service employee when working on a service contract for the federal Government. Any contractor who enters a service contract with the federal Government or any subcontractor regardless of contract amount is required[115] to pay the employees engaged in performing work on the contract at least the minimum wage specified under the Fair Labor Standards Act.[116] This requirement emanates directly from authority of the Act; its applicability to the contractor is not dependent on a clause or stipulation in the contract. Nevertheless, the Secretary of Labor requires the insertion of a clause in service contracts wherein the contractor agrees to pay the minimum wage set by the Fair Labor Standards Act.

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115. Id. sec. 351(b)(1).
116. 29 U.S.C. sec. 201-219(1964).

The Service Contract Act is enforced by a threefold procedure. Where the contractor fails to provide the prevailing minimum wage or fringe benefits determined by the Secretary of Labor or fails to pay the minimum wage required by the Fair Labor Standards Act, he becomes liable to pay a sum equal to the amount of underpayment. Accrued payments due on the particular contract or any other contract between the same contractor and the Government may be withheld for payment to the underpaid employees.[117] If accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees who have been underpaid, the United States may bring suit to recover any remaining underpayments.[118]

For violation of any provision contained in the clauses inserted in a service contract, the contract may be cancelled by the contracting agency upon written notice to the contractor. When the contract is so cancelled, the United States may enter into other contracts or arrangements for the completion of the original contract and charge any additional costs to the original contractor.[119]

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117. 41 U.S.C. sec. 352(a)(Supp. III 1964).
118. Id. sec. 354(b).
119. Id. sec. 352(c).

Finally, for violation of the Act the contractor may be prohibited from contracting with the United States for up to three years. The Secretary of Labor, however, has discretion to recommend removal of the contractor from the "blacklist" before three years have elapsed.[120]

The Service Contract Act excludes[121] a number of contracts from its coverage or application. First, any contracts of the United States or the District of Columbia for construction, alteration and/or repair of public buildings or public works in exempt.[122] The term "construction, alteration or repair" includes painting or decorating. This exclusion describes contracts which are subject to the Davis-Bacon Act.

Secondly, the Act does not apply to any work required to be done according to the provisions of the Walsh-Healey Public Contracts Act.[123]

Third, the Act is not applicable to any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where publishedtariff rates are in effect.[124]

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120. Id. sec. 352(a).
121. Id. sec. 356.
122. Id. sec. 356(1).
123. Id. sec. 356(2).
124. Id. sec. 356(3).

Fourth, the Act does not apply to any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934.[125]

Fifth, the Act is inapplicable to any contract for public utility services, including electric light and power, water, steam, and gas.[126]

Sixth, the Act has no force in any employment contract providing for direct services to a federal agency by an individual or individuals.[127]

Finally, the Act is inapplicable to any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.[128]

The Act goes on to give definitions[129] for certain terms used therein. "Service employee" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semi-skilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement. "Service

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125. Id. sec. 356(4).
126. Id. sec. 356(5).
127. Id. sec. 356(6).
128. Id. sec. 356(7).
129. Id. sec. 357.

employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.[130]

The term "United States" is defined only in a geographical sense as any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, but does not include any other territory under the jurisdiction of the United States or any other United States base or possession within a foreign country.[131]

The Act places primary responsibility for its enforcement in the Secretary of Labor.[132] The Secretary in turn has delegated his authority to the Wage and Hour and Public Contracts Division of the Department of Labor.[133] Pursuant to the authority granted him,[134] the Secretary of Labor has issued rules and regulations governing the Act which may be found in the Code of Federal Regulations.[135] The Department of Defense has

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130. Id. sec. 357(b).
131. Id. sec. 357(d).
132. Id. sec. 353.
133. Order of Secretary of Labor No. 36-65, 30 Fed. Reg. 15, 305.
134. 41 U.S.C. 353 (Supp. III 1964).
135. 29 C.F.R., Part 4(1968).

also issued instructions[136] which implement its responsibilities under the Act.

In any discussion of the interpretation of the Act by the Secretary of Labor, it is well to keep in mind this principle: The Secretary broadly construes the Act in all its particulars except those provisions of the Act itself which restrict its coverage in which case a very narrow construction[137] is applied. This is because of the ..."remedial purpose of the /Act/ is to protect prevailing labor standards...."[138]

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136. The latest instructions from the Department of Defense may be found in Defense Procurement Circular No. 64, 28 October 1968. (cited hereinafter as D.P.C. No. 64.)

137. See 29 C.F.R. sec. 4.123(b)(1968).

138. Id.

CHAPTER III

EXTENT OF THE ACT'S COVERAGE

In a study of the Act the first consideration should be to determine the extent of its coverage. The Act is not so far reaching as other legislation based on the power of Congress to regulate interstate commerce. In the latter category, for example, is the Fair Labor Standards Act[139] which requires the payment of certain prescribed minimum wages by any employer or contractor who is engaged in interstate commerce. The Service Contract Act, however, affects only employers who contract with the "United States",[140] or with the "federal Government."[141] In other words, the extent of the Act's coverage is co-extensive with the definition of "United States" or "federal Government".

The Service Contract Act of 1965 defines neither "United States" nor "federal Government". In the absence of a statutory definition, reference must be made to interpretations of the Secretary of Labor since in the final analysis the terms mean exactly what the Secretary says they mean. Thus, the Secretary has

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139. 29 U.S.C. secs. 201-219(1964).
140. 40 U.S.C. sec. 351(a)(Supp. III 1964). Contracts with the "District of Columbia" are also covered by the Act.
141. Id. sec. 351(b).

stated that

> ...contracts entered into by the United States and contracts with the federal Government include generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party pursuant to authority derived from the Con-142 stitution and laws of the United States.

No distinction is permissible, says the Secretary, between agencies and instrumentalities based on their inclusion in or independence from the legislative, judicial, or executive branches of government. That the agency may be corporate in form or may use non-appropriated funds[143] in payment for the contract services does not change its nature as an agency within the meaning of the Service Contract Act.[144] Under this interpretation, nonappropriated fund instrumentalities of the Armed Services such as Post Exchanges, Officer's Open Messes, Noncommissioned Officer's Open Messes, and Ships Stores are subject to the Act's provisions. The same is true of wholly owned Government corporations such as the Federal Deposit Insurance Corporation. The method of procurement is not the controlling factor in the Secretary's view. So long as the contract

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142. 29 C.F.R. sec. 4.107(a)(1968).
143. As contradistinguished from funds appropriated by Congress.
144. 29 C.F.R. sec. 4.107(a)(1968).

is to obtain services for the Government or for Government personnel,[145] it is considered subject to the Act. Under this theory a contract let by a private organization is subject to the Act if the services are obtained on behalf of the United States.

Many private organizations operate Government-owned plants and facilities for the federal Government; these are so-called "GOCO" (i.e., government-owned-contractor-operated) facilities. Contracts for services let by a contractor operating such a GOCO facility are subject to the Act according to the Secretary. This conclusion is apparently based on an agency theory upon which the Labor Department has heretofore applied the Walsh-Healey Act to GOCO contracts.[146]

The application of the Service Contract Act to GOCO facilities flies directly in the face of the Congressional intent expressed in the House Hearings on the bill and in the House report of the bill.

In the hearing before the House Special Subcommittee on Labor[147] the Solicitor of Labor specifically referred to the Atomic Energy Commission as one

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145. Id. sec. 4.107(b).
146. 1965 Hearings, supra note 38, at 10.
147. Id.

agency which had operating contracts with private companies for operation of government-owned plants; that under these "GOCO" contracts a great deal of maintenance and other related services are performed. The Solicitor stated that "technically this bill does not cover those (GOCO) type of contracts." (Emphasis added) He then recommended that the subcommittee consider placing service contracts of a "GOCO" contractor in an equal position with contracts let by the Government itself for the same purpose. Congressman O'Hara, sponsor of the Act, agreed that in the situations mentioned by Solicitor Donahue, the Walsh-Healey Act ought to apply to every worker in the establishment and then went on to say..."[b]ut this bill wouldn't cover it in any way."[148] (Emphasis supplied)

That Congressman O'Hara and the House Labor Committee did not intend GOCO service contracts of the Atomic Energy Commission to fall within the Service Contract Act is buttressed by the following statement in the Committee Report of the bill: "Similarly, contracts entered into by the Atomic Energy Commission for the management and operation of Government-owned plants would not be service contracts within the meaning of the bill."[149] (Emphasis supplied)

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148. Id.
149. H. Rep. 948, supra note 95, at 3.

These quotations amply express the intent of Congress with regard to GOCO contracts of the Atomic Energy Commission at least. It is suggested that the intent of Congress, thus expressed, effectively negates the agency theory[150] upon which the Labor Department purports to apply the Service Contract Act to all GOCO contracts of the federal Government. The Department of Defense has announced a policy which precludes the appointment of defense contractors as purchasing agents of the United States.[151] This policy was promulgated following the decision of the United States Supreme Court in Kern-Limerick v. Scurlock[152] which held that a defense contractor is immune from state taxation where the contractor had been constituted the purchasing agent of the United States.

Congress intended to limit the application of the Service Contract Act to its proper sphere. Congress suggested that if workers employed by contractors operating GOCO facilities are to receive minimum wage protection, it should properly be by expansion of the

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150. 1965 Hearings, supra note 38, at 10.
151. Letter dated 28 January 1955 from the Deputy Assistant Secretary of Defense (Supply and Logistics) to the Director of the Bureau of the Budget.
152. 347 U.S. 110(1954).

Walsh-Healey Act, not by overextension of the Service Contract Act into an area beyond its scope.

Under its current interpretation, the Labor Department has said the contract of a GOCO contractor for operation of an on-site cafeteria is a service contract under the following conditions:[153] The Army Materiel Command issued a contract to a private company whereby the company would operate a government-owned ammunition production facility - a typical GOCO contract. The operating company in turn let a contract to a second private concern under which the latter would operate a cafeteria located on the site at the government-owned facility.

A correct analysis of these facts is that the principal purpose of the operating contract between the Army Materiel Command and the contractor is for the production or fabrication of supplies, in this case ammunition. The Walsh-Healey Act, if at all, applies to this contract under the Labor Department's theory of agency, that is, the operating contractor is the agent of the United States in operating the government-owned facility for purposes of applying Walsh-Healey minimum wage standards applicable to employees engaged in work on the contract. Only a strained construction of the

153. The illustration is taken from correspondence on file at the Department of the Army.

on the contract. Only a strained construction of the intendment of the Service Contract Act can bring within its scope employees of a contractor whose only connection with the United States is by contract, not with the Government or an agency thereof, but solely with a contractor who himself is under contract with a Government agency. Congressman O'Hara's words during the hearings on the Service Contract Act illustrate the extreme strain created by such an interpretation:

> "I think it should be made clear, and... I would like to emphasize that this bill applies to federal contracts, the principal purpose of which is to furnish services through the use of service employees."
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> "This act does not intend to apply to services incidental to another purpose."[154]

Under Congressman O'Hara's interpretation of the bill he introduced, the fact that service employees were used in the performance thereof would not automatically bring the Service Contract Act into play if the principal purpose of a contract was, for example, to supply ammunition. It is more doubtful yet that he would apply the Service Contract Act to a subcontract, first, when the prime contract was not executed by a Government

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154. 1965 Hearings, supra note 38, at 10.

agency and, second, where the principal purpose of which was not to provide services rather to procure supplies.

As indicated earlier the Labor Department has interpreted the terms "United States" and "federal Government" as used in the Act to include so-called "instrumentalities" of the Government.[155] The Department considers Post Exchanges, Officers' Messes, Non-commissioned Officers' Messes, and recreational activities for the benefit of the Armed Forces as such instrumentalities;[156] the Department, therefore, holds that contracts for services let by these instrumentalities are subject to the Service Contract Act. This view attaches no consequence to the fact that these instrumentalities are not operated with funds appropriated by Congress nor to the fact that whatever benefits emanate from these instrumentalities flow directly to personnel employed by the Government and thus only indirectly to the Government. More important than any theory of relative benefit to the Government is that status

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155. 29 C.F.R. sec. 4.107(1968).
156. See the remarks of Solicitor of Labor Donahue in the hearings before the Senate Subcommittee on Labor as well as the memorandum supplied by the Labor Department to the Subcommittee. 1965 Senate Hearing, supra note 73, at 15, 16.

which federal courts[157] have given to Post Exchanges, officers' and non-commissioned clubs and similar facilities.

Indeed the word "instrumentality" used in reference to such facilities was coined by federal courts faced with making a determination of the legal status to be conferred on them. The very fact that courts selected a term such as instrumentality shows an implicit recognition that such facilities are to be differentiated from agencies of the Government and are in some quasi-status of lesser stature than a Government agency.

In the leading case[158] in this area the United States Supreme Court decided that the contractual obligations of a post exchange are not obligations of the United States. In a more recent case[159] the United States Supreme Court implicitly reemphasized the difference existing between the United States, vis-a-vis an agency thereof, and nonappropriated fund activities (post exchanges, open messes, and similar facilities).

In considering the application of a California minimum wholesale milk pricing regulations with respect to sales on certain military reservations in the state, the Supreme Court permitted application of the California

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157. See for example Standard Oil Co. v. Johnson, 316 U.S. 481(1942).
158. Id.
159. Paul v. United States, 371 U.S. 245(1963).

milk pricing regulations to nonappropriated fund activities which were not situated on land under the "exclusive jurisdiction" of the United States and the State's regulatory scheme was not in effect when such jurisdiction was acquired. Thus whatever federal immunity from California legislative power the Supreme Court was willing to permit was based solely on the immunity emanating from exclusive federal jurisdiction of land, not on the status of the nonappropriated fund.

For those nonappropriated funds which did not enjoy federal immunity vicariously from their geographical location, the Supreme Court was perfectly willing to allow State law to apply. The point is that if the Supreme Court had felt the nonappropriated funds were agencies of the United States or otherwise enjoyed federal immunity[160] from State legislative power the application of the California regulations would not have been permitted. Thus the Supreme Court of the United States views nonappropriated funds of the Armed Services as entities enjoying lesser stature than the United States and its entities.

In the hearings on the Service Contract Act before the Senate Subcommittee on Labor, the Solicitor of Labor

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160. Cf. M'Cullough v. Maryland, 17 U.S. (4 Wheat.) 316(1819).

recognized that the Act did not apply to direct employees of nonappropriated fund instrumentalities of the United States. In response to a question asking if there were any groups not covered by the legislation, the Solicitor replied: "There is one group that would not be covered. . . and that is part of the employees who are paid by non-appropriated funds who are in effect employees of the federal Government - such as employees in PX's, for example."

The Solicitor then opined that labor standards for direct employees of nonappropriated fund activities could be effected by administrative action within the Department of Defense. The Senate Subcommittee on Labor having heard the Solicitor's comments urged such administrative action[161] but did not alter the bill in any manner to apply labor standards by legislative means.[162]

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161. The Senate's sole amendment to the bill was a slight expansion of the bill's geographic application by adding to the definition of "United States" Eniwetok Atoll, Kwajalein Atoll, and Johnston Island. S. Rep. No. 798, 89th Cong., 1st Sess. 1(1965)(cited hereinafter as 1965 S.Rep).

162. In fact a year and a half earlier the Department of Defense had administratively required all nonappropriated funds to pay their direct employees the minimum wage then required by the Fair Labor Standards Act /Department of Defense Directive No. 1416.6(27 March 1964)/. Part of the 1966 amendment of the Fair Labor Standards Act /29 U.S.C. sec. 206(Supp. III 1964)/ included employees of non-appropriated fund instrumentalities in the group to which new minimum wage rates applied ($1.60 effective 1 February 1968).

Initially the Departments of the Army and Air Force resisted efforts by the Labor Department, rendering opinions based on sound legal reasoning which included the legislative history of the Service Contract Act,[163] all of which concluded that the Act was inapplicable to nonappropriated fund instrumentalities. These efforts were totally ineffective.

In February, 1968, the Army and Air Force Exchange Service issued a bulletin[164] which brought Army and Air Force exchanges within the coverage of the Service Contract Act.

The Secretary of the Army followed suit in March, 1968, by letter[165] providing that service contracts of all nonappropriated funds of the Army are subject to the provisions of the Service Contract Act. Accompanying the letter were sample clauses for insertion in such contracts; these clauses are essentially like those contained in the 1968 revision[166] of Sections VII and XII, Part 10 of the Armed Services Procurement Regulations.

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163. Correspondence, memoranda, and legal briefs from Army-Air Force Exchange Service and the Department of the Army are on file at the Department of the Army. Similar correspondence was filed by the Department of the Air Force.

164. Army and Air Force Exchange Service Bulletin No. 30, (28 February 1968).

165. Letter from Headquarters, Department of the Army, dated 14 March 1968, to all major commands of the Army.

166. The revision is found in Defense Procurement Circular No. 64 (28 October 1968).

From this discussion it is apparent that "United States" and "federal Government" as used in sections 351(a) and (b) of the Service Contract Act are interpreted to mean almost all contracts for services which could conceivably be entered into by the legislative, judicial, or executive branches of the Government, including agencies, wholly-owned Government corporations, and nonappropriated fund instrumentalities. There are one or two exceptions to this rule.

First, the fact that a state or municipal government used federal funds in securing services under a contract does not bring the contract within the purview of the Service Contract Act.[167] Thus a state or municipal housing authority may use funds obtained from a grant or loan from the federal Government to pay for service contract work under an urban renewal project. The use of federal funds in this situation does not bring the contract within the coverage of the Act.

Secondly, a state or local government or its agencies within the United States is still free to enter into service contracts on its own behalf without incurring Service Contract Act obligations.[168]

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167. 29 C.F.R. sec. 4.107(b)(1968).
168. 29 C.F.R. sec. 4.107(b)(1968).

It is abundantly plain that contracts "with the federal Government" and contracts entered into "by the United States" within the meaning of the Act have been interpreted by the Labor Department to include service contracts with every entity of the federal Government which has power to contract under the Constitution and laws of the United States. It is just as plain, however, that Congress had no intention to extend the Act so far.

CHAPTER IV

GEOGRAPHICAL APPLICATION

The next determination which a Government contracting agency or officer might face is whether the Act applies from a geographical standpoint. The Act applies only where services are to be furnished in the United States.[169] "United States" in its geographical sense is defined[170] in the Act as "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll..." Expressly excluded from the definition is "any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country." Thus, for example, service contracts to be performed in Panama would not be covered by the Act.[171] A contract for services at an Army installation in Germany or an Air Force base in Spain or any other foreign country would not be subject to the Act.

Few problems will be encountered with service contracts which are to be performed completely, either

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169. 41 U.S.C. sec. 351(a)(Supp. III 1964).
170. Id. at sec. 357(d).
171. 29 C.F.R. sec. 4.112(a)(1968).

within or outside the "United States" within the meaning of the Act. There are situations where a contract for services could in a particular case be performed partly within and partly outside the United States. For instance, an American vessel could operate partly inside and partly outside the territorial waters of the United States. In this situation the Labor Department has ruled that the contract for services must include the appropriate clauses required by the Act[172] and that the services performed within the United States would be subject to labor standards but those performed outside the United States would not be.[173]

Other interesting questions come to mind such as the application of the Act to a service contract let by the Maritime Commission to an American-owned vessel of Panamanian registry, manned partly by American crewmen, which will be performed partly in and partly outside the territorial waters of the United States.

Another and more realistic problem is posed by that part of the definition pertaining to Outer Continental Shelf Lands. The land areas are defined in the Outer Continental Shelf Lands Act of 1953.[174] Generally

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172. 41 U.S.C. sec. 351(a)(Supp. III 1964).
173. 29 C.F.R. sec. 4.112(b)(1968).
174. 43 U.S.C. secs. 1331-1343(1964).

speaking, these lands are an extension of the land mass of the United States which lie beneath the ocean surface and extend beyond the historical three-mile jurisdiction to that place where the land drops off into the ocean deep. Under this definition a federal contract for services to be performed sixty miles at sea would be subject to the Service Contract Act assuming that that place were upon, or on the ocean surface above Outer Continental Shelf land. The so-called "Texas Towers" of the petroleum industry immediately come to mind as one such example. As the presently expanding efforts of science to explore and exploit American undersea resources increases further, more examples may present themselves.

CHAPTER V

WHAT IS A "SERVICE CONTRACT"?

Having discussed the agencies of the federal Government whose contracts the Act effects and the geographical application of the Act, the next determination which an agency or a contracting officer would have to make is whether the particular contract being considered is one to which the Service Contract Act applies; in other words, whether the contract is a "service contract" within the meaning of the Act. If it is such a service contract, there are a number of ramifications which follow, almost all of which can or may affect the contracting officer in particular and the entire procurement in general.

The contracting officer must decide in advance whether the Act applies to any given procurement prior to the issuance of an Invitation for Bids (IFB) or a Request for Proposals. This decision is necessitated by the requirement that the IFB and any specifications therein contain any existing wage or fringe benefit determinations[175] as well as appropriate contract clauses.[176]

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175. 41 U.S.C. sec. 351(a)(1) and (2)(Supp. III 1964); 29 C.F.R. sec. 4.5(1968); ASPR secs. 12-1005.3, 12-1005.4(1968).

176. 41 U.S.C. sec. 351(a)(1) and (2)(Supp. III 1964); 29 C.F.R. secs. 4.6, 4.7(1968); ASPR secs. 12-1004(a) and (b)(1968).

A look at the practical difficulties the Air Force has experienced in determining the type of situation where the Act applies and an extremely helpful discussion are contained in an article[177] by Mr. Edward G. Carter which appeared in the Air Force publication, Judge Advocate General's Law Review.

Not all contracts are covered by the Act, only service contracts. A service contract within the meaning of the Act is a contract "...the principal purpose of which is to furnish services in the United States[178] through the use of service employees."[179]

Having established that a particular contract falls within this definition, the Act applies unless it comes within one of the seven exclusions set forth in the Act[180] or within an exemption which the Act authorizes the Secretary of Labor to make.[181] Such statutory exclusions and Secretarial exemptions will be separately discussed subsequently.

The "Principal Purpose" Test

The definition is best analyzed by breaking it down

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177. Judge Advocate General's Law Review, Jan-Feb 67, at 17.
178. The impact on the performance of the contract within or outside the United States has been discussed earlier.
179. 41 U.S.C. sec. 351(Supp. III 1964).
180. Id. sec. 356.
181. Id. sec. 353(b).

into its component parts and discussing each separately.

The first criteria is that the contract must be one "the principal purpose of which is to furnish services."[182] The legislative history[183] of the Act and the wording of the Act itself,[184] make painfully plain that the Act was not intended to apply to services incidental to a contract for another purpose. The Labor Department interpretations[185] of the Act, in language at least, follow the same rule, thus:

> If the principal purpose is to provide something other than services of the character contemplated by the Act and any such services which may be performed are only incidental to the performance of a contract for another purpose, the Act does not apply.[186]

On this point what the Labor Department says and what it does in actual practice differ greatly. The rule followed in actual practice appears to be that if services comprise even a slight part of the overall performance of a contract the contract is deemed a service contract subject to the Act.[187] This is consistent

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182. Id. sec. 351.
183. See for example 1965 Hearing, supra note 38, at 10.
184. 41 U.S.C. sec. 351(Supp. III 1964).
185. 29 C.F.R. sec. 4.111(1968).
186. Id.
187. It should be noted that a determination that the Service Contract Act applies does not automatically exclude application either the Davis-Bacon or the Walsh-Healey Acts. A contract may be subject both to Davis-Bacon or Walsh-Healey and the Service Contract Act.

with the Department's announced policy to give the Act the broadest application possible. Two illustrations point up this rule of practice.

A contract required lodging for students; under the specifications a room fully furnished including full size bed, desk and chair, dresser, telephone and air conditioning was required for each student. Also required were bed linens, towels, and maid service. No meals or other subsistence were required. The contract also required bus transportation from the school to the hotel on a stipulated schedule in the morning and afternoon. Taking the "principal purpose" doctrine at face value it would appear that the principal purpose here was to provide a room, bed, and desk for a student and that maid and bus service were only incidental thereto. The Labor Department ruled it to be a service contract.[188]

It is noted in passing that the House Committee on Education and Labor mentioned hotel rooms in the Committee Report[189] which accompanied H.R. 11522,[190] a bill predating the Service Contract Act but having the same purpose.

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188. Blackhawk Hotels Co., ASBCA No. 13333 (30 September 1968). See also 29 C.F.R. sec. 4.130(q)(1968).
189. H. Rep. 1495, supra note 32, at 5.
190. 88th Cong., 2d Sess., (1964).

> The language of [H.R. 11522] is designed to make it clear that application of the act is to contracts which have as their main purpose the furnishing of services...Thus it would not be applicable to...the contracting of a block of hotel rooms for a conference, where the principal purpose is to supply space...Service employees... of hotels deserve and should have higher labor standards but the determination of what portions of an employee's time would be devoted to the Government contracts presents difficult and complicated administrative problems. Improvement of the labor standards for such employees must await a broader application of the Fair Labor Standards Act.[191]

Another illustration: A contract for the rental of parking space under which the Government agency is simply given a lease or license to use the contractor's real property is not a service contract. However, a contract "for the live storage of vehicles which are delivered into the custody of the contractor, who will provide the required services including the parking or retrieval of the vehicles" is a service contract.[192] The principal purpose of both contracts is the same ---to provide a place of relative safety for vehicles. The use of a service employee to "park and retrieve" the vehicle has been interpreted to alter the contract's principal purpose and make it a service contract. Variations of

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191. H. Rep. 1495, supra note 32, at 5.
192. 29 C.F.R. sec. 4.134(b)(1968).

the same basic problems may be posed: A contract service employee merely takes a ticket from the Government driver of a Government vehicle and the Government driver moves the vehicle on into the contractor's parking area. Or, a contract service employee merely pushes a button which raises an elevator into which the Government employee has driven the Government vehicle; after depressing the button, the vehicle is moved, parked, and stored by automated equipment without further human intervention. A common sense application of the "principal purpose" test would show the principal purpose of such an arrangement to be vehicular parking or storage, respectively. In either case, however, the addition of some modicum of involvement by a service employee could make the difference by only a moderate extension of Labor Department rationale.

A contracting officer should be extremely cautious in making a final decision as to the principal purpose of a given contract. If any reasonable man could disagree, the matter should be referred to the Wage and Hour and Public Contracts Division, Department of Labor, for resolution.

The "Services" Criteria

Having discussed "principal purpose" as those words are used in the definition "the principal purpose

of which is to furnish services", consideration should be given to the meaning "services" generally.

The Act does not provide any direct definition of the "services" involved in the contracts to which the Act applies. The Act does, however, define in broad terms the persons who may provide these "services" by defining the term "service employee."[193]

The House Report of the Act[194] indicated that the types of service contracts to which the Act would apply were varied but specifically included contracts for laundry, dry cleaning, custodial, janitorial, guard service, packing and crating, food service, and miscellaneous housekeeping services. A contracting officer could feel fairly safe in categorizing a particular contract as a service contract merely by contract types set out above. Additional types of contracts considered by the Labor Department to be service contracts are set forth in official interpretations.[195] The same categorization is repeated in ASPR.[196]

Also covered by the Act are contracts which could be performed by the various service employees defined

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193. 41 U.S.C. 357(b)(Supp. III 1964).
194. H. Rep. 1495, supra note 32, at 2.
195. 29 C.F.R. sec. 4.130(1968).
196. ASPR sec. 12-1002.3(b)(1968).

in the Act[197] which will be discussed subsequently.

In approaching the problem from the contract type which may be considered a service contract, it is well to keep in mind the Act's legislative intent, as interpreted by the Labor Department:

> In determining questions of contract coverage, due regard must be given to the apparent legislative intent to include generally as contracts for 'services' those contracts which have as their principal purpose the procurement of something other than the construction activity described in the Davis-Bacon Act or the materials, supplies, articles, and equipment described in the Walsh-Healey Act."[198] (emphasis supplied)

The preceding quoted statement indicates the Labor Department views any contract involving services not specifically coming within the purview of Davis-Bacon or Walsh-Healey as a service contract. To reiterate, in addition to specific types of contracts previously mentioned, the Act also covers contracts which may be performed through the use of "service employees" as defined in the Act.

What are "Service Employees"

> The term 'service employee' means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semi-skilled or skilled manual labor occupations;

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197. 41 U.S.C. sec. 357(b)(Supp. III 1964).
198. 29 C.F.R. sec. 4.111(b)(1968).

> and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons."[199]

Thus the classes or categories covered are:

1. /Specifically/ guards, watchmen

2. Any person engaged in

   a. A recognized trade or craft, or other skilled mechanical craft

   b. Unskilled, semi-skilled, or skilled manual labor occupations

3. Any other employee, including a foreman or supervisor, in a position having trade, craft, or laboring experience as the paramount requirement.

4. All such persons regardless of any contractual relationship between a contractor or subcontractor and such persons.

The specific inclusion of guards and watchmen is doubtless in response to Congressman O'Hara who sponsored the service contract bills in the House. His attention was drawn to the service employees' plight by problems involving guards on Nike sites in the Detroit area.[200]

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199. 41 U.S.C. sec. 357(b)(Supp. III 1964).
200. See generally 1964 Hearings, supra note 12, at 6 et seq.

The final provision in the definition regarding contractual relationships is designed to preclude a contractor from evading the provision of labor standards to service employees by subcontracting out the work. The 1964 hearings are replete with evidence of "fly-by-night" contractors having successfully bid on a Government contract then subcontracting out, after taking their "cut" of the profits "off the top". It was said that this process was often repeated by subcontractors down through lower tiers, each subcontractor taking his "cut", all of which resulted in extremely depressed wages for the service employee who actually performed the contract work.[201]

The statutory definition expressly includes foremen and supervisory personnel whose position has as the paramount requirement trade, craft, or laboring experience.

Excluded from the definition by Labor Department interpretations are "bona fide executive, administrative, or professional" employees.[202]

Much of the language in the definition with the exceptions already noted was taken directly from the 1954 amendments[203] to the Classification Act of 1949.[204]

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201. See generally 1964 Hearings, supra note 12, at 16, 17.
202. 29 C.F.R. sec. 4.113(b)(1968).
203. 5 U.S.C. 1082(1964).
204. 5 U.S.C. secs. 1071-1174(1964).

The Classification Act defines so-called "wage board" or "blue collar" workers employed directly by the Federal Government.

The legislative history of the Act shows that definition of "service employee" in terms of the Classification Act was recommended by the General Services Administration[205] as a change to H.R. 6088.[206] It will be recalled that the theory of H.R. 6088 envisioned that each federal agency would establish comparability between its own direct employees and contractor employees. Use of the Classification Act criteria was suggested as a means to establish comparable "levels of work and pay" and to emphasize the fact that the "level of work" was to be taken into consideration when determining prevailing wages.[207] The language Classification Act was carried over into the Service Contract Act of 1965 apparently as a convenient method of defining the term "service employee". Thus the Labor Department is able to define "service employee" by reference to a Civil Service Commission publication, the Bluebook of Blue Collar Occupational Families and Series.

To summarize, some contracts are defined to be

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205. H. Rep. 1495, supra note 12, at 7.
206. 88th Cong., 1st Sess.(1964).
207. H. Rep. 1495, supra note 12, at 7.

service contract solely by contract type (custodial, janitorial, etc.). Other contracts are service contracts because of the use of "service employees" performing the contract work. The term "service employee" is defined in the Act and is interpreted by the Labor Department as meaning any contract employee who would be a "blue collar" or "wage board" employee if employed directly by the federal Government. By Labor Department interpretation "bona fide executive, administrative, or professional" employees are not deemed to be service employees. By statute a person who would otherwise be deemed a service employee is not removed from this category by reason of being a foreman or supervisor. The contracting officer should keep in mind the Labor Department's interpretation of the Act's intent:

> In determining questions of contract coverage, due regard must be given to the apparent legislative intent to include generally as contracts for 'services' those contracts which have as their principal purpose the procurement of something other than the construction activity described in the Davis-Bacon Act or the materials, supplies, articles, and equipment described in the Walsh-Healey Act."[208] (emphasis supplied)

The "Use" of Service Employees

Having at least a rough definition of "service employees" the next order of business should be to

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208. Note 198, supra.

fit it into the remainder of the phrase "to furnish services...through the use of service employees" in performing the contract.

Thus the Labor Department holds that if the principal purpose of the contract is to obtain services through the use of service employees it is a service contract "if any of the services which it is the principal purpose of the contract to obtain will be furnished through the use of any service employee or employees."[209]

Therefore, even if it is contemplated that a contract for services will be performed individually by the contractor himself [and therefore excluded from the Act as a contract for direct services][210] the contracting officer can treat it as outside the Act's coverage only if he is absolutely sure that no other service employee will be used. The use of even one service employee in addition to the individual contractor removes the contract from the statutory exclusion. The contracting officer can omit the required clauses[211] from such a contract only if he is absolutely certain that no one other than the individual contractor will

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209. 29 C.F.R. sec. 4.113(a)(1968).
210. "This Act shall not apply to...(6) any employment contract providing for direct services to a federal agency by an individual or individuals...." 41 U.S.C. sec. 356(6)(Supp. III 1964).
211. ASPR sec. 12-1004(a) and (b)(1968).

perform on the contract.[212]

The source from which service employees will be drawn is immaterial. Thus the fact that employees of a municipal, county, or state government will be used to perform the services required by a federal contract does not remove it from the service contract category.[213] This rule would apply, for example, where a military installation's contracts with a nearby municipality for the removal of garbage from the installation; that the contract service employees are employed by the municipality is immaterial.

Exclusion of "executive, administrative and professional" employees

Although a contract for services to be performed to a very substantial degree by "bona fide executive, administrative, or professional" personnel is deemed not to be a service contract within the meaning of the Act,[214] the use of such personnel in supervisory roles is not sufficient to exempt the contract from the Act. Thus, where service employees are to be used, including "supervisory personnel", the fact that the manner in which these services are performed is subject to the

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212. 29 C.F.R. sec. 4.113(a)(1968).
213. 29 C.F.R. sec. 4.113(a)(1)(1968).
214. Id. sec. 4.113(b).

"continuing overall supervision" of professional personnel is immaterial; the contract remains a service contract.[215]

A contract for services to be performed entirely by professional personnel is deemed exempt from the Act's coverage; a contract for medical services is an example. Contracts for professional services which services are to be performed "essentially" by professional employees where the use of service employees will constitute only a minor factor in performance are exempt from the Act.[216]

One aspect of the use of professional employees should be emphasized. The Labor Department classifies employees as professional, administrative, or executive, not necessarily in accordance with a layman's definition, but in accordance with lengthy and complicated definitions set out in the Code of Federal Regulations.[217] If a particular employee fails to qualify under this definition, he will not be considered as exempt from coverage under the Act, regardless of the fact he may be very highly paid.[218] Thus the Labor Department treats laboratory technicians, draftsmen, air ambulance

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215. Id. sec. 4.113(a)(1).
216. Id. sec. 4.113(a)(2).
217. 29 C.F.R. Part 541(1968).
218. 29 C.F.R. sec. 2.156(1968).

pilots and others as service employees on the same level with federal "blue collar" employees.

From these examples it is clear that although an exemption exists for professional personnel, it is narrowly construed by the Labor Department. Unless it is patent that the principal purpose of a contract is services to be rendered by professional employees within the Labor Department definition, a contracting officer would be ill advised to assume it was not a service contract.

Contracts for Services Involving Supplies

Thus far only procurements involving services have been considered in the discussion of the problems which may face a contracting officer in determining whether a particular procurement will be a service contract. There are a number of situations where both labor or services and some form of supply may be required. For example, for Government convenience, a single procurement may include both services and the supply of tangible items. For example, in a single contract document a number of new typewriters may be purchased together with an agreement to repair typewriters already in Government use. In this situation the Labor Department deems the contract to be severable. So much of the procurement as pertained to the repair of typewriters is considered a service contract, accordingly appropriate service contract clauses

would have to be included. On the other hand that portion of the contract calling for the supply of new typewriters would not be a service contract. The Walsh-Healey Act would apply to the latter if the contract amount was more than $10,000.[219] Another similar example, is a contract for the repair and maintenance of vehicles. The fact that some supply parts are furnished does not alter the principal purpose of the contract - to service and repair machinery through the use of service employees. Such contracts would be subject to the Act,[220] even though the furnishing of non-labor items is an important element of the contract.[221]

Assuming service employees will be used in performing the contract the Act will be applied regardless of the proportion of labor cost to the total cost of furnishing the services.[222] For example, a contractor who rents the Government a bulldozer with operator may be paid on the basis of $40 per hour; the fact that the operator is paid only $7.50 an hour does not alter the Act's application.

The form in which a contract is drafted is not determinative of the Act's application assuming ser-

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219. 29 C.F.R. sec. 4.132(1968).
220. 29 C.F.R. sec. 4.131(1968).
221. Id. sec. 4.131(a).
222. Id.

vice employees will actually be used in performing the work.[223] A contract for rental of a crane could be artfully drafted to make it appear that the crane was being furnished as a supply item. If in fact the work to be done reasonably contemplated the use of a service employee of the contractor to operate the crane the contract doubtlessly would be considered a service contract.

The Labor Department gives other examples to illustrate the same principles:[224] The recurrent supply to a Government agency of freshly laundered items on a rental basis. Here the services of employees are involved in laundering the items, delivering them to the place desired by the agency, and picking up soiled items for return to the contractor's premises. Contracts for plowing and reseeding where equipment and driver are furnished by the contractor, contracts for aerial spraying or aerial reconnaissance where the contractor furnishes the aircraft and pilot, and contracts for furnishing the Government vehicles or equipment with drivers or operators are all considered service contracts.

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223. Id.
224. 29 C.F.R. sec. 4.131(c)(1968).

The fact that a contract is not reduced to writing - an oral contract - does not remove it from the Act's coverage assuming it qualifies as a service contract.

Summary:

In summarizing the efforts to determine what a service contract is it should be recalled that the Service Contract Act applies to "every contract (and bid specification therefor) entered into by the United States or the District of Columbia...the principal purpose of which is to furnish services in the United States through the use of service employees...."[225]

It has been shown that the Wage and Hour and Public Contracts Division, Department of Labor, interprets this definition as broadly as possible to carry out the intent which it attributes to Congress. This intent is interpreted to mean that labor standards in the form of minimum wages and fringe benefits are to be provided for every employee who can possibly be brought within the purview of the Act.

To carry out its interpretation of the Act's coverage the WHPC Division interprets the words "United States" very broadly to mean every agency, instrumentality, and corporation of the United States Government,

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225. 41 U.S.C. sec. 351(Supp. III 1964).

including in some cases private companies who are deemed to be "agents" of the United States.

The Act as written defines service contracts as those whose "principal purpose" is to obtain services. The words "principal purpose" are very narrowly construed to the degree that it seems that if any purpose of the contract involves the use of service employees it is deemed to come within the Act's coverage.

"Services" to which the Act applies are apparently interpreted to mean every modicum of labor not specifically included as construction under the Davis-Bacon Act or supply of the Walsh-Healey Act.

"Service employees" are broadly defined to include any person determined to be a "blue collar" worker by the Civil Service Commission.

Although "professional, executive, and administrative" employees are deemed not to be service employees, the criteria by which these categories are established is restrictive. High wages alone do not establish a person as a "professional" employee.

The "use" to which a service employee is put on a contract may be very minor indeed and yet qualify the contract as a service contract. This is a logical result of the Labor Department's restrictive view of the "principal purpose" test.

CHAPTER VI

CONTRACTS EXCLUDED FROM THE ACT'S COVERAGE

The Service Contract Act itself excludes from its coverage seven types of contracts.[226] It should be kept in mind that any such exclusion necessarily reduces the number of employees who may be said to be within the Act's coverage. Thus in accordance with its policy of extending the Act's coverage to the maximum extent possible, the Labor Department very narrowly construes the seven excluded contracts.

Davis-Bacon Contracts

First, the Act does not apply to "any contract of the United States or the District of Columbia for construction, alteration and/or repair, including painting and decorating, of public buildings or public works."[227] (emphasis supplied)

Though not specifically stated in the Act, the legislative history[228] shows that this definition refers to contracts falling within the coverage of the Davis-Bacon Act.[229]

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226. 41 U.S.C. sec. 356(Supp. III 1964).
227. Id. sec. 356(1).
228. See H. Rep. 948, supra note 95, at 5.
229. 40 U.S.C., sec. 276a(1964).

A contracting agency or contracting officer would in all probability, taking the definition at face value, conclude that any service contract which calls for construction, alteration, or repair of a public building or public work was excluded from coverage under the Service Contract Act. Unfortunately, so logical a conclusion would be erroneous.

The WHPC Division interprets the exclusion to mean only that contracts are not to be covered by both the Davis-Bacon and the Service Contract Acts. The intent of Congress, according to the WHPC Division, was only to avoid overlapping coverage of the two Acts.[230] Thus since the Davis-Bacon Act applies only to constuction contracts involving more than $2000, the Service Contrace Act applies to construction contracts involving the use of service employees if the contract amount is $2000 or less.[231]

From the geographical viewpoint there are areas where the Davis-Bacon and Service Contract Acts do not overlap. The geographical definition of the "United States" in the Service Contract Act is broader than that in the Davis-Bacon Act. "United States" under Davis-Bacon means the boundaries of the fifty states

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230. See 29 C.F.R. sec. 4.115(b)(2)(1968).
231. Id. sec. 4.116(b)(3).

and the District of Columbia. "United States" under the Service Contract Act includes the fifty states, the District of Columbia and nine other areas as well: Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, and Johnston Island. Thus on these islands and areas Davis-Bacon has no application regardless of contract amount; consequently the Service Contract Act does apply to construction contracts involving service employees.[232]

Often construction activity under Davis-Bacon necessarily involves the clearing of land, and/or the demolition or dismantling of structures as a prerequisite to actually beginning work on a public work or building. Assuming the contract involved more than $2000 and was to be performed in one of the fifty states or the District of Columbia, the Davis-Bacon Act would apply to the exclusion of the Service Contract Act to all work at the scene, including clearing the land.

If a location is to be cleared, but no construction activity is to follow, the Davis-Bacon Act is not applicable; the Service Contract Act would apply as a contrace for clearing, dismantling, or demolition work.[233]

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232. Id.
233. Id. sec. 4.116(b)(1).

There may be instances where a contracting officer includes in a single contract document construction work some of which is subject to Davis-Bacon coverage and some of which is not. The WHPC Division views the contract as severable; the Service Contract Act would apply to that part of the contract not covered by Davis-Bacon and appropriate clauses would be required.[234]

Walsh-Healey Contracts

Section 7(2)[235] of the Act excludes from its coverage "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act...." (emphasis supplied) Note that this exclusion applies to work required to be done in accordance with Walsh-Healey, whereas under Section 7(1)[236] the exclusion applied to contracts covered by Davis-Bacon. The WHPC Division held that the purpose of the exclusion was to prevent the overlapping of differing wage standards under the two Acts.[237]

The Walsh-Healey Act[238] applies to contracts for more than $10,000 for the manufacture, or furnishing, of materials, supplies, articles, or equipment. For contracts of $10,000 or less there is no overlapping of coverage

234. Id. sec. 4.116(c).
235. 41 U.S.C. sec. 356(2)(Supp. III 1964).
236. 41 U.S.C. sec. 356(1)(Supp. III 1964).
237. 29 C.F.R. sec. 4.122(1968).
238. 41 U.S.C. sec. 35-45(1964).

between Walsh-Healey and the Service Contract Act. Nor is there any overlapping of coverage if the principal purpose of a contract is the manufacture or furnishing of materials since the Service Contract Act covers the furnishing of services. The exclusion under Section 7(2)[239] is not pertinent in these two instances.

The exclusion becomes pertinent where both the Walsh-Healey and the Service Contract Act apply to a single contract. Walsh-Healey would apply to a contract for more than $10,000 if the furnishing of materials, supplies, articles, or equipment "in a substantial amount" is required, or amounts to "a significant or independent purpose" of the contract.[240]

The Service Contract Act would apply to the same contract if it had as its principal purpose the furnishing of services through the use of service employees.[241] Under a contract subject to this dual coverage, the "work required to be done in accordance with..." Walsh-Healey which is excluded by Section 7(2) is interpreted[242] to be only the work of those employees who are "engaged in or connected with the manufacture, fabrication,

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239. Id. sec. 356(2).
240. 29 C.F.R. sec. 4.122(1968).
241. Id.
242. Id.

assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract."[243]

Service employees thus "engaged in or connected with the manufacture, fabrication, assembling, handling, supervision or shipment" and these employees only, are excluded from Service Contract Act coverage and subject only to Walsh-Healey. Other service employees under the same contract, such as guards, watchmen, and clerks, are not subject to Walsh-Healey nor to the exclusion and are subject to the Service Contract Act.[244]

Such is the interpretation which the WHPC Division has attached to the exclusion of Section 356(2). Such interpretation is not justified by the legislative history of the Act. In the analysis of the bill contained in the House report[245] it is said "[section 356] exempts from the application of the act...(2) Contracts covered by the Walsh-Healey Public Contracts Act." (emphasis supplied)

The Senate report of the bill reads exactly the same.[246] In the debate on the bill on the floor of the

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243. 41 C.F.R. 50-201.102.
244. 29 C.F.R. sec. 4.122(1968).
245. H. Rep. 948, supra note 95, at 5.
246. S. Rep. 798, supra note 161, at 5.

House,[247] Congressman O'Hara, sponsor of the bill, indicated his belief that the exclusion applied to "contracts" covered by Walsh-Healey.

In his testimony before the House Subcommittee on Labor, the Solicitor of Labor, Mr. Charles Donahue, spoke of exemptions:

> Specifically exempt, I wish to underline, are any contracts for the construction, alteration, and repair, including painting and decorating of public works of the United States. This insures that those who may be subject to the Davis-Bacon Act will not be subject to this particular statute. Second, the same end is accomplished, so far as the Walsh-Healey Act is concerned. Any workers or any contracts which are subject to the Walsh-Healey Act would not be subject to this particular statute.[248] (emphasis supplied)

At this same hearing, Mr. Donahue pointed out changes which the 1965 version of the Service Contract Act had made in predecessor bills. There was no mention of any changed provisions regarding statutory exclusions.[249]

The three bills[250] which can be considered direct predecessors of the 1965 Act all excluded contracts

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247. 111 Cong. Rec. 24387(1965).
248. 1965 Hearings, supra note 38, at 9.
249. See generally 1965 Hearings, supra note 38, at 7 et seq.
250. H.R. 1678 and H.R. 6088, 88th Cong., 2d Sess. (1964), each of which is set out in its entirety in the 1964 Hearings, supra note 12, at 1 and 5, respectively; H.R. 11522, 88th Cong., 2d Sess. (1964).

covered by the Walsh-Healey Act.

During the 1965 Hearings, Congressman O'Hara evidenced his belief that the Service Contract Act would not apply to contracts covered by the Walsh-Healey Act in a colloqy with Mr. Donahue. Having said that the Act would not apply to GOCO contracts, Congressman O'Hara went on to say:

> Incidentally, speaking of the Walsh-Healey Act, one of the things I have been considering is the extension of the coverage of Walsh-Healey to other employees of the contractor who provides the supplies called for in a supply contract.
>
> It is my understanding, under Walsh-Healey that if, for example, Chrysler Corp. has a contract to build trucks for the Army, the Walsh-Healey prevailing wage determinations apply only to those employees who are directly involved in the production of those trucks.
>
> It wouldn't apply to the fellow who is sweeping up around the area in which the production takes place. It wouldn't apply to the fellow who is the timekeeper on the job. It wouldn't apply to the guard standing at the gate of the plant. It seems to me that it ought to be broadened so that it does apply to them. Perhaps it would apply in a Government-owned plant. I believe, that is the position you are taking, where the plant itself was operated under contract. But in a privately-owned facility, such as the Dodge plant in my district producing trucks for the Army, it wouldn't apply to those categories of employees.
>
> I had not thought of taking up that question at this time. It will have

to wait its turn.[251]

That Mr. Donahue understood Mr. O'Hara to have been referring to broadening the scope of the Walsh-Healey Act and not to broadening the scope of the Service Contract Act is evidenced by Donahue's immediate reply:

> "I think the Department would be sympathetic to any constructive proposal to try to sensibly broaden the reach of the Walsh-Healey Act."[252] (emphasis supplied)

It seems clear that the understanding of the Congressman who sponsored the Service Contract Act as well as the Solicitor of the Department of Labor was that where a contract was subject to the Walsh-Healey Act, the Service Contract Act would not apply. The wording of the Act in Section 356(2)[253] was changed indicating only work covered by Walsh-Healey would be excluded from coverage under Service Contract Act only in the final draft of the Act prepared by the Labor Department. Although it was no doubt the intention of the Labor Department to change the effect of the exclusion, it is clear the Congress was not made aware of the change and that neither the Congress nor the Solicitor of Labor intended the change.

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251. 1965 Hearings, supra note 38, at 11.
252. Id.
253. "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts...." (emphasis supplied)

The erroneous interpretation of the WHPC Division effecting dual coverage by both Walsh-Healey and the Service Contract Act causes undue complication in administration by contractors who have employees covered by both acts.

Public Transportation Contracts

The third exclusion[254] provided by the Act is "any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariffs are in effect." This exclusion is construed strictly and applies only to common carriers in the terms used. Since taxicabs are not specifically mentioned, the exclusion does not apply to this means of conveyance,[255] despite the fact that in many localities regulation of taxicabs is very strict. Also if a particular mode of carriage is not in fact regulated by published tariff rates under authority of state or federal law a contract using that mode of transportation would not come within the exclusion.[256]

Communications Contracts

Section 356(4) of the Act excludes from its coverage "any contract for the furnishing of services by radio,

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254. 41 U.S.C. 356(3)(Supp. III 1964).
255. 29 C.F.R. sec. 4.117(1968).
256. Id.

telephone, telegraph, or cable companies, subject to the Communications Act of 1934...." This exclusion is strictly construed. "It does not exempt from the Act any contracts with such companies to furnish any other kinds of services through the use of service employees."[257] Presumably a contract with such a company to remove obsolete poles and wire from a military installation would not be considered as furnishing "services by radio", etc. and would not come with the exclusion.

Public Utility Contracts

Contracts for "...public utility services, including electric light and power, water, steam, and gas" are excluded from the Act's coverage.[258] This exclusion applies only where such utilities are regulated by federal, state, or local law. Examples of contracts coming within the exemption are those between federal electric power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities, and state agencies engaged in the transmission and sale of electric power and energy.[259]

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257. 29 C.F.R. sec. 4.118(1968).
258. 41 U.S.C. sec. 356(5).
259. 29 C.F.R. sec. 4.119(1968).

Contracts for Individual Services

Employment contracts "providing for direct services to a federal agency by an individual or individuals...." are excluded from the Act's coverage.[260] This section makes it clear that the Act applies only to contracts for services with independent contractors.[261] A contract for services to be performed by an individual which in effect makes him an employee of an agency is not covered by the Act.[262] A contract for services of a kind to be performed by service employees entered into with an independent contractor whose individual services will be used in performing the contract is not within the exclusion.[263] Nevertheless, such a contract does not come within the Act's general coverage so long as only the individual contractor's services were used. If the individual contractor used even one other service employee, the contract would come within the Act's coverage and the exclusion would not affect it in any way.[264]

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260. 41 U.S.C. sec. 356(6)(Supp. III 1964).
261. 29 C.F.R. sec. 4.121(1968).
262. Id.
263. Id.
264. Id.

Operation of Postal Contract Stations

The final statutory exclusion[265] pertains to "any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations." As originally written this exclusion included the "transportation, handling, or delivery" of mail as well as the operation of postal contract stations. "Transportation, handling, or delivery" was deleted by the House Subcommittee on Labor, no doubt at Congressman O'Hara's insistence.[266] It was the hauling of mail by non-union drivers in Michigan under Government contract which first brought Congressman O'Hara's attention to the service contract problem.[267] Thus it is clear that a contract the principal purpose of which is the "transportation, handling, or hauling" of mail is a service contract.

The Secretary of Labor has granted an exemption, however, which excludes from the Act's coverage contracts with common carriers for the carriage by rail, air (except air star routes), bus, and ocean vessel. This exemption applies only if the carriage is performed on regularly scheduled runs and over regularly

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265. 41 U.S.C. sec. 356(7)(Supp. III 1964).
266. See 1965 Hearing, supra note 38, at 11.
267. Id.

scheduled routes and accounts for only an insubstantial portion of the revenue earned by these carriers.[268]

It should be clear from this discussion that the seven statutory exclusions are very narrowly construed by the WHPC Division in order to obtain maximum coverage under the Act's general provisions.

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268. 29 C.F.R. sec. 4.6(m)(9)(1968).

CHAPTER VII

DETERMINING THE AMOUNT OF THE CONTRACT

Having determined that a contemplated procurement will in fact be a service contract the contracting agency or officer must determine what the monetary amount of the contract will be. Depending on the determination of contract amount, the procurement may be relatively uncomplicated, or may involve quite a number of factors tending to make the procurement more complex.

If the contract amount is $2,500 or less the contracting officer is required to insert a clause[269] wherein the contractor agrees to pay his employees at least the minimum wage specified by the Fair Labor Standards Act,[270] as amended, and proceed with the procurement.

If, on the other hand, the contract amount exceeds $2,500, the contracting officer must furnish the WHPC Division with notice of intention to make a service contract,[271] possibly insert minimum wage determination

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269. ASPR sec. 12-1004(b)(1968)/Currently found in Defense Procurement Circular No. 64(28 October 1968)7.
270. 29 U.S.C. secs. 201-219(1964).
271. 29 C.F.R. sec. 4.4(1968); ASPR sec. 12-1005.2 (1968).

in the Invitation for Bids or Request for Proposals[272] and insert appropriate clauses,[273] as well as other things.

The WHPC Division, by interpretation of the Act, holds that the contract amount is determined by the legal consideration agreed to be paid whether in money or other valuable consideration.[274] The inquiry, therefore, is not merely how much the contract costs in terms of dollars and cents, rather what the value of the contract is under all the circumstances of the particular procurement. Thus, under a contract to raze a building, under circumstances not within the Davis-Bacon Act, not only may the contractor not be paid by the Government for his work, but may actually make payments to the Government for the right to raze the structure and use the property and materials obtained. The value of the contract would be the value of the material and/or property the contractor obtained, less any amount of money he paid to the Government, in excess of such amount.[275]

All bids from the same person on a single Invitation for Bids are considered to be a single offer;

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272. 29 C.F.R. sec. 4.5(1968); ASPR sec. 12-1005.3(1968).
273. 29 C.F.R. sec. 4.6(1968); ASPR sec. 12-1004(a)(1968).
274. 29 C.F.R. sec. 4.141(1968).
275. Id.

the total award to such person determines the contract amount for purposes of the Act's coverage.[276] Thus bids from a company quoting prices for cleaning of five buildings, each at $2,400, covered by one Invitation for Bids, would amount of $12,000 and the Act would require the contractor to pay the minimum wage and provide fringe benefits established by determinations of the Labor Department.

If negotiation is used instead of formal advertising, the contract amount is nevertheless determined under formal advertising principles. Therefore, all property and services which would properly be grouped together in a single procurement and would be included in a single Invitation for Bids if it were a formally advertised procurement must be included to establish the aggregate contract amount.

On the other hand, a procurement may involve more than $2,500 where bidders are allowed to bid on separate portions or increments of the services required, none of which amount to $2,500. In this case the contract amount is measured by the portion of total contract and separately awarded to individual and unrelated bidders.[277]

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276. Id. sec. 4.14(b).
277. Id.

Presumably, even in this situation if several apparently individual bidders were in fact connected with a single controlling parent company the division would not be allowed and the contract amount would be the aggregate of the amount of all the contracts awarded to the parent contractor.

Deductions from the contract amount for contracts for more than $2,500 which may contingently be deducted from the amount which will actually be paid by the Government are not considered for purposes of establishing the contract amount. Thus, deductions for prompt payment, or penalty deductions for late delivery, and the like, are not considered for purposes of determining the contract amount.[278]

Where the contract amount is indefinite the presumption is that the contract will exceed $2,500 and the labor standards clauses must be included "unless the contracting officer has definite knowledge in advance that the contract will not exceed $2,500 in any event."[279] This rule finds its widest application in negotiated contracts which provide for delivery of services in response to individual purchase orders or calls, during

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278. Id. sec. 4.141(c).
279. 29 C.F.R. sec. 4.142(1968).

the life of the contract.[280] The fact that under the contract the Government is not obligated to purchase any services does not change its character as a service contract. Lacking definite knowledge that under no event will the contract exceed $2,500, the contracting officer must insert the required labor standards clauses.

280. See generally ASPR sec. 3.409(1968).

CHAPTER VIII

REQUIREMENTS FOR SERVICE CONTRACTS

Based on the considerations discussed previously, the contracting officer will establish the amount involved in the service contract.

Contracts Less Than $2,500

If the contract amount is $2,500 or less, the contracting officer must insert in the Invitation for Bids or Request for Proposals the contract clause found at Section 12-1004(b),[281] assuming, of course, that the service contract is not to be performed outside the United States, is not within one of the statutory exclusions, nor within one of the exemptions promulgated by the Secretary of Labor.

The aforementioned clause is essentially a contractual stipulation whereby the contractor agrees that he and any subcontractor will pay all his employees performing work on the contract not less than the minimum wage specified under Section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. (As of January, 1969, the specified wage is $1.60 per hour.) The clause makes an exception to the 6(a)(1) minimum wage where

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281. As of January, 1969, the revised sections of ASPR dealing with the Service Contract Act may be found in Defense Procurement Circular No. 64(28 October 1968).

the contract is to provide linen supply services to the Government and less than 50% of the contractor's gross annual dollar volume of sales or business done is derived from such linen supply contracts. In such a situation the contractor may pay employees not directly engaged in providing services under service contract a lesser wage.[282] If more than 50% of the linen supply contractor's gross annual dollar volume or business done is attributable to linen supply contracts with the Government he is required to pay all his employees not less than the wage specified by Section 6(2)(1) of the Fair Labor Standards Act[283] ($1.60 per hour as of January, 1969).

It should be noted that payment of the minimum wage required by the Fair Labor Standards Act is required for all service contracts regardless of the contract amount.[284] This requirement stems directly from the Service Contract Act[285] and is binding on a service contractor by force of law whether or not a contractual clause appears

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282. $1.30 beginning 1 February 1969; $1.45 beginning 1 February 1970; and $1.60 beginning 1 February 1971. /See 29 C.F.R. sec. 4.160(1968)/ ASPR requires the insertion of a specific clause for linen supply contracts. /See ASPR secs. 7-104.26 and 12-1004(d)(1)/.

283. See generally 29 C.F.R. sec. 4.160(1968).

284. 40 U.S.C. sec. 351(b)(1)(Supp. III 1964).

285. Id.

in the contract.[286] Nevertheless the regulations of the Secretary of Labor[287] and the implementing regulations of the Department of Defense[288] require insertion of an appropriate clause.

Increased costs to service contractors will emanate from future increases in the minimum wage which may be required by amendment of the Fair Labor Standards Act since the Service Contract Act incorporates that wage by reference. In such situations the Department of Defense has recently provided for appropriate increase in the contract price in multi-year service contracts and service contracts with options to renew.[289]

Contracts Exceeding $2,500

If a contemplated service contract is for more than $2,500, the contracting officer must do a number of things required by the Act, some prior to the issuance of an Invitation for Bids or Request for Proposals, and others immediately after contract award. Other responsibilities of the contracting officer with regard to the Act - residual responsibilities - exist throughout the life of the contract and extensions thereof. It is

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286. 29 C.F.R. sec. 4.159(1968).
287. 29 C.F.R. sec. 4.7(1968).
288. ASPR sec. 12-1004(b)(1968).
289. ASPR sec. 7-107(d)(1968).

the purpose of the remainder of this paper to set out those duties and responsibilities in the sequence mentioned above.

Notice of Intent

Not less than thirty days prior to the issuance of an Invitation for Bids or the commencement of negotiations, the contracting officer must fill out and file a so-called Notice of Intention to Make a Service Contract and Response to Notice.[290] This Notice is Standard Form 98 which has directions for its use on the reverse side. Despite directions found there, only the original and three copies are to be forwarded. Whenever the detailed information called for on the Notice is not reasonably available the contracting officer should provide as much general information as is available. The most important information contained in the Notice is the classes and numbers of service employees who will be employed under the contract. The Notice will be forwarded directly to the Administrator of the Wage and Hour and Public Contracts Division, U.S. Department of Labor, Washington, D.C. (Supplies of Standard Form 98 are available in General Services Administration supply depots, listed under federal stock

290. See generally 29 C.F.R. secs. 4.3-4.5(1968) and ASPR sec. 12-1005.2(1968).

number 7540-926-8972.)

The Administrator, WHPC, will complete and return the form to the contracting officer advising of any determination of minimum monetary wages and fringe benefits applicable to the classes of service employees who were designated on the Notice. A register of wage determinations and specifications is available at district, regional, and national offices, of the Wage and Hour and Public Contracts Divisions. Also, some large procurement offices have such registers.

If "exceptional circumstances" prevent the filing of the Notice to Make a Service Contract at least thirty days before issuance of the Invitation for Bids or Request for Proposals, the Notice must be forwarded to the Administrator as soon as practicable thereafter, together with a "detailed explanation" for the delay.[291]

The purpose for sending the Notice of Intention is, of course, to secure the most recent wage and fringe benefit determinations or revisions of determinations for the locality where the contract will be performed. Presumably in most cases the thirty day period gives the Labor Department sufficient time to make wage determinations required by a particular contract where none

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291. 29 C.F.R. sec. 4.4(b)(1968); ASPR sec. 12-1005.2(b)(1968).

existed, or to revise extant determinations in the register, as necessary.

Wage Determinations

If in response to the Notice of Intention to Make a Service Contract the Labor Department advises the contracting agency of any applicable currently effective wage determinations, these determinations must be made a part of the proposed contract by inclusion of the determinations as an attachment to the contract.[292] The same is true if the Labor Department revises any determinations contained in the register of wage determinations and fringe benefits and communicates such a revision to the contracting agency.[293] In the case of revisions of the register, the Labor Department has made an exception. Thus, if notification of revision is received by the contracting agency later than ten days before the opening of bids in accordance with competitive bidding procedures the revised determination is not effective and need not be included as an attachment to the contract unless the agency finds there is reasonable time to notify bidders of the revision.[294]

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292. 29 C.F.R. sec. 4.5(1968).
293. Id. sec. 4.5(b).
294. Id.

A close reading of the Labor Department's regulations[295] indicates that the ten day exception applies only to revisions (and not to communications responsive to the Notice of Intent) and then only in the case of formally advertised bids. Contrarily, the Department of Defense interprets the exception to apply to both communications responsive to the Notice of Intent and to revisions of the register and both in the case of negotiated as well as formally advertised contracts.[296]

Under the Department of Defense interpretation, either a revision of determinations contained in the register or a communication responsive to the Notice of Intent received later than ten days before bids opening, or the date for receipt of proposals in the case of negotiated procurements is not effective unless a reasonable time for notifying bidders or offerors is found to exist. If the contracting officer finds there is not a reasonable time remaining during which bidders can be notified, the wage determination is omitted from the contract.[297]

In some cases the Labor Department will make neither wage nor fringe benefit determinations for any

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295. Id.
296. ASPR sec. 12-1005.3(1968).
297. See generally ASPR sec. 12-1005.4(a)and(b)(1968).

class of service employees who were listed on the Notice of Intention. The Secretary of Labor has made an administrative exemption in such cases. Where no class of contract employee is covered either by wage or fringe benefit determinations, it is impossible to make such determination a part of a contract by an attachment thereto and none is required.[298] Nevertheless, the contractor is required to pay the minimum wage required by Section 6(a)(1) of the Fair Labor Standards Act.

The contracting agency may create for itself a number of problems by total failure to file or by failing to file a Notice of Intent to Make a Service Contract within thirty days prior to the issuance of an invitation for bids on the commencement of negotiations. In the case of late filing of the Notice of Intent the Labor Department under its regulations[299] has a thirty day "grace period" after the tardy Notice is actually filed during which time wage determinations may be communicated to the contracting agency. In cases where no Notice of Intention is filed when in fact such Notice was appropriate the Labor Department has thirty days after discovery of the omission to issue wage determinations to the contracting agency. In either of these situations the contracting

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298. 29 C.F.R. sec. 4.5(b)(1968).
299. 29 C.F.R. sec. 4.5(c).

agency is required to include in any contract which may have been issued any wage determinations received from the Labor Department. The agency may have to negotiate, to pay additional costs, or make changes under any contractual "Changes Clause" in order to include the wage determinations.[300]

Implementing Defense Department regulations[301] require the contracting officer to attempt to negotiate a bilateral contract modification. The modification should incorporate the required Service Contract Clause,[302] the wage determination(s),[303] and equitably adjust the contract price to compensate for any increased cost of performance.

If the contracting officer is not able to negotiate a contract modification incorporating the wage determination he must document the contract file to show his efforts made in the attempt.[304]

If the contracting officer questions the appli-

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300. Id.
301. See generally ASPR sec. 12-1005.3(Defense Procurement Circular No. 68, dated 17 March 1969).
302. ASPR sec. 12-1004a(1968).
303. The wage determination is effective on the date of issuance unless otherwise specified. ASPR sec. 12-1005.3(b)(i)(B)(1969).
304. Id. sec. 12-1005.3(b)(ii)(1969).

cability of the Service Contract Act to the contract he is required to forward the matter for resolution to the Departmental level of his particular agency.[305] The contracting officer then need take no further action, pending resolution of the matter and a specific determination by the Secretary of Labor that the contract is subject to the Act.[306]

Conformable Wage Rates

In other cases the Labor Department will make a wage determination or a fringe benefit determination which is applicable to some but not all classes of employees who are listed on the Notice of Intention. In these cases the exemption does not apply to any class of employees[307] and all classes must ultimately be brought under an appropriate classification. The contracting officer deletes from the attachment any classes of employees for whom no determination was made by the Labor Department and proceeds with the procurement.

Wage and fringe benefit determinations for the class or classes of employees not covered by Labor Department determinations, and therefore deleted

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305. See ASPR 12-1005.3(b)(iii)(1969).
306. Id.
307. Id.

from the attachment, are established[308] by a tri-party agreement involving the contracting officer, the contractor and the service employees involved.

Any bidder on the contract agrees to the tri-party procedure mentioned above since it becomes a part of any service contract for more than $2,500.[309] The prescribed procedure requires the contractor to classify any class of service employees not covered by a Labor Department determination so as to provide a reasonable relationship between their classification and the Labor Department classification(s) contained in the attachment. The contractor is required to submit a report to the contracting officer of the wages and fringe benefits to be paid each such employee.[310] The contractor-classified employees must receive wages and fringe benefits appropriate to their classification. If any disagreement as to appropriate classification(s) or wages or fringe benefits arises between the contractor and the employees or their representative, the contracting officer enters the picture. If, then, agreement cannot be reached, the contracting officer submits the question, together with his own recommendation, to the Administrator of the Wage and Hour and Public

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308. 29 C.F.R. sec. 4.6(b).
309. Id. See also ASPR sec. 12-1004(a)and 12-1005.4(1968).
310. 29 C.F.R. sec. 4.6(k)(1968).

Contracts Divisions, Department of Labor, who will make a final binding determination.[311]

This procedure is also used where after award additional classifications not previously contemplated are found necessary. In either case failure of the contractor to pay the established conformable rates is a violation of the contract.[312]

The Labor Department regulations[313] dealing with conformable rates discussed above are undesirable from the procurement point of view since it leaves for determination after contract award important considerations of employee wages. Specifically, some employee classification and determination of appropriate wages and fringe benefits is left for determination until after contract award by the "interested parties"[314] in cases where the Labor Department has made wage or fringe benefit determinations for some but not all classes of employees. This practice introduces unnecessary uncertainty into the procurement process, particularly insidious where

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311. 29 C.F.R. sec. 4.6(b)(1968); ASPR sec. 12-1004(a) (1968).
312. 29 C.F.R. sec. 4.6(b)(1968); ASPR sec. 12-1004(a) (1968).
313. 29 C.F.R. sec. 4.5 and 4.6(1968).
314. The contracting agency, the contractor, and the employees who will perform on the contract, or their representative. 29 C.F.R. sec. 4.5(1968).

formal advertising is used. In effect the bidder is being required to bid on an unknown factor - labor costs of one or, perhaps, more classes of workers he will employ. It would be a surprising bidder indeed who did not inflate his bid under such circumstances. This whole process is inimicable to close pricing of Government contracts.

Time and again it was pointed out in the hearings on the Service Contract Act that labor costs are the most essential element of any service contract.[315] Lacking certainty in anticipated labor costs, the bidder and the Government are at a marked disadvantage, especially under formal advertising procedures. In the hearings, Labor Department spokesmen pointed with pride to the fact that it and not the individual procurement agencies would make wage and fringe benefit determinations,[316] that Department being the self-styled "experts in this field."[317] Under its current regulations[318] the Labor Department has abdicated to the procurement agencies part of the responsibility it so zealously desired. It is suggested that the Labor Department

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315. See 1965 Hearings, supra note 38, at 5; 1964 Hearings, supra note 12, at 68.
316. 1965 Hearings, supra note 38, at 7,8.
317. Id.
318. 29 C.F.R. sec. 4.5(1968).

should in all cases furnish wage and fringe benefit determinations for all the classes of employees listed by a procurement agency on the Notice of Intent. If this cannot be done, the exemption[319] for wages and fringe benefits attachments to contracts should be broadened to include those instances where some but not all classes of employees are the subject of wage determinations. Either of these approaches would remove the procurement agency from the wage determination "business" - an occupation it should not be in in any event. More importantly it would remove the uncertainty in procurement obtaining under its present regulation.

Wage Determination Attachments

Assuming he has received the Response Form, forwarded in the Notice of Intent to the Department of Labor, and has received the appropriate wage and fringe benefit determinations, the contracting officer makes the determinations a part of the Invitation for Bids or Request for Proposals as an attachment thereto.[320] Additionally, the contracting officer must make a part of the contract the required clause.[321] If the contract

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319. The omission of wage attachments from the contract which omission is authorized where no attachment is received for any class of service employees. 29 C.F.R. sec. 4.5(b)(1968).

320. Id. See also ASPR sec. 12-1005.3(1958).

321. 29 C.F.R. sec. 4.6(1968); ASPR sec. 12-1004(a)(1968).

is for linen supply services [and exceeds $2,500 in amount] a special Linen Supply Service Clause[322] must be inserted[323] in the contract in addition to the clause required by ASPR sec. 12-1004(a).[324] If the contract exceeds $2,500 and is either a multi-year service contract[325] or contains an option to renew, a price adjustment clause[326] must be inserted.

After the inclusion of any wage and fringe benefit determinations, the contracting officer may proceed with the procurement in ordinary fashion.

Notice of Award

Once the award of a service contract exceeding $2,500 has been made, Labor Department Regulations[327] require that that Department be notified. Implementing Defense Department regulations[328] require the contracting officer to forward a report directly to the Administrator, WHPC, under only three conditions: First, in case of a service contract for $2,500 or more but less than $10,000; second, to report the initial order if less than $10,000 when using an indefinite delivery type contract

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322. ASPR sec. 7-104.26(1968).
323. ASPR sec. 12-1004(d)(1)(1968).
324. A special clause is also required for linen supply contracts amounting to less than $2,500. See ASPR sec. 12-1004(d)(2).
325. ASPR sec. 1-322(1968).
326. ASPR sec. 12-1004(e)(1968); ASPR sec. 7-107(d)(1968).
327. 29 C.F.R. sec. 4.8(1968).
328. ASPR sec. 12-1005.5(a)(1968).

or a basic ordering agreement; and, third, in the case of an initial call under a blanket purchase agreement which contains the service contract clause required for service contracts exceeding $2,500. The form to be used is Standard Form 99.[329]

Award reports directly to the Administrator, WHPC, are not required for service contracts of $10,000 or more and orders of $10,000 or more under indefinite delivery type contracts and basic ordering agreements. This is because the Department of Defense reports this type award directly to the Department of Labor based on information from the Individual Procurement Action Report (DD Form 350).[330]

Notice of Employee Benefits

The contracting officer must furnish the contractor with Labor Department posters which the contractor can use to notify employees of their benefits under the Act. The contracting officer must also insure that the form is in the contractor's possession for appropriate posting prior to the beginning of performance under the contract. The Act itself[331] requires that each service contract for

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329. Id.
330. Id. sec. 12-1005.5(b).
331. 41 U.S.C. sec. 351(a)(4)(Supp. III 1964).

more than $2,500 contain a clause whereby the contractor agrees to notify all employees of their wage and fringe benefits.[332] Department of Labor regulations and implementing Department of Defense regulations[333] set out the appropriate contract clause. The Labor Department requires the use of a form provided by the WHPC Division which may either be delivered individually to the employee by the contractor or posted in an accessible place at the worksite.[334] The Department of Defense imposes upon the contracting officer the duty of obtaining the form[335] and furnishing it to the contractor in sufficient time for the contractor to have it posted prior to beginning performance. The contractor must attach to the poster a listing of all wage and fringe benefits to be furnished employees on the job.[336] Furnishing the contractor the required notice form completes the contracting officer's immediate and mandatory duties required in connection with every service contract for more than $2,500.

Contract Modifications

Other duties he may be required to perform are

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332. 29 C.F.R. sec. 4.6(e)(1968).
333. ASPR sec. 12-1004(d).
334. ASPR sec. 12-1005.6.
335. Department of Labor Form SC-1 which may be obtained from the Wage and Hour and Public Contracts Divisions, Department of Labor, Washington, D.C., 20210.
336. 29 C.F.R. sec. 4.184(1968).

contingent on other factors. His duties in making determinations of comparable employee classifications, wages, and fringe benefits, previously discussed, depends, of course, on whether the Labor Department prior to award furnished wage and fringe benefit determinations for all classes of employees to be used in contract performance. If determinations for some but not all employees were received, the contracting officer may be required to "arbitrate" classifications and appropriate wages upon which the contractor and employees cannot agree. The same situation may arise when the use of additional classes of employees not contemplated before contract award are found necessary thereafter.

Further participation by the contracting officer in service contracts administration may be necessary when an existing service contract is modified by bilateral agreement, or when an existing service contract is extended through the exercise of an option or otherwise. Service Contract Act applicability in such cases exists because of Labor Department regulations[337] carrying out that Department's purpose of extending the Act's application to the maximum extent possible in every situation or circumstance. Thus existing service contracts may be modified, amended, or extended in such a manner or

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337. See generally 29 C.F.R. secs. 4.143-4.145(1968).

at such a time that if the contract had been entered into originally in its changed or extended form, the applicable provisions of the Act would have been different. For example, a service contract entered into prior to the effective date of the Act (20 January 1966) would not have been subject to the Act's provisions at any time during the life of the contract. By its interpretation, however, the Labor Department holds that if the contract is extended beyond its original duration it is in effect a new contract to which the Act's provisions apply.[338] Another example is a service contract which was not subject to any wage or fringe benefit determinations because none had been furnished by the Labor Department before award of the contract; where such determinations are made after award, they become applicable if and when the contract is amended in such a manner that the scope of the work is changed. Such an amendment is deemed to bring the Act's provisions into play. The Labor Department states the general rule thus:

> The general rule with respect to such contracts is, that whenever changes are made in the terms of the contract, the provisions of the Act and the regulations thereunder will apply to the changed contract in the same manner and to the same extent as

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338. 29 C.F.R. sec. 143(1968).

> they would to a wholly new contract in the same terms if such a contract were entered into at the time of the change.[339]

It should be noted that contract modifications or amendments (other than contract extensions) that are unrelated to the labor requirements of a contract are not deemed to create a new contract for purposes of the Act.[340] This concession was made by the Labor Department in response to the suggestion of the Department of Defense.[341] Under earlier proposed interpretations[342] of the Labor Department, any bilateral modification or amendment would have been deemed a new contract subject to the Act. This proposed interpretation was changed by the currently applicable interpretations.[343]

The modification or amendment of an existing service contract which is unrelated to the labor requirements of the contract should be carefully distinguished from an extension of the term of a contract. An extension of the term of the contract pursuant to an option or otherwise is deemed to be a new contract

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339. 29 C.F.R. sec. 4.143(1968).
340. Id.
341. Letter on file at Department of the Army dated 16 August 1967 from Deputy Assistant Secretary of Defense for Civil Rights and Industrial Relations to Administrator, Wage and Hour and Public Contracts Division, U.S. Department of Labor and inclosure thereto.
342. 29 C.F.R. Part 4, Subpart C(10 July 1967).
343. 29 C.F.R. Part 4 (7 July 1968) including Subparts A, B, and C.

to which the Act's provisions apply. Extension of the term of a contract is deemed to be a situation where a contractor is permitted (or required) to furnish services over an extended period of time. Where a contractor is merely granted extra time in which to fulfill his original commitment there has been no "extension" within the meaning of this rule.[344] For example, if a service contract not subject to wage determinations for clearing a specified desert area of cactus is to be completed under the contract terms by 1 August but due to an excusable delay, such as monsoon rains in the desert, the completion date is not met and the contractor is granted extra time until 1 September, there has been no "extension" to which the Act's provisions apply. But if the same contract is extended pursuant to an option clause whereby the contractor is to clear not only the originally specified area but another area as well, an "extension" has occured and the further work performed under the option would be deemed to be a new contract to which the Act would be applicable.

Changes in Contract Amount

Changes in the contract amount may necessitate appli-cation of the Act's provisions where they were not applicable before. Thus where a contract involving less than

344. See 29 C.F.R. sec. 4.143(1968).

$2,500 (therefore not requiring incorporation of applicable wage determinations) is modified by increasing the amount to be more than $2,500, the contract as modified would be subject to the Act's provisions;[345] any currently applicable wage or fringe benefit determinations would have to be included as an attachment to the contract, the required clauses would have to be inserted, and Notice of Intent to Make a Service Contract filed with the Labor Department.

The reverse is true as well. If a modification reduces the contract amount below $2,500, as of the effective date of the modification, the obligation is no longer binding on the contractor to furnish minimum wage and fringe benefits in accordance with Labor Department determinations, safe and sanitary working conditions, and notice of benefits to employees.[346] However, the obligation to pay the minimum wage required by Section 6(a)(1) of the Fair Labor Standards Act would not be altered in any way since its application is not dependent on contract amount. As a practical matter the con tractor would be hard put to explain to his employees why their wages were being reduced, assuming the locally prevailing wage exceeded the minimum required

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345. 29 C.F.R. sec. 4.144(1968).
346. Id.

by Section 6(a)(1). It is problematical as a practical matter whether a contractor could reduce wages under such circumstances.

To facilitate the injection of its prevailing wage and fringe benefit determinations in a multi-year[347] service contract, the Labor Department holds that for purposes of the Act's application a new contract is deemed entered into at the beginning of each new fiscal year during which the terms of the original contract are made effective by a Congressional appropriation for the purpose.[348] The same rule is applied where the procuring agency has a service contract for a specified term which may be unilaterally extended on condition that new appropriations are forthcoming.[349] It may be safely said that the Labor Department deems <u>any</u> exercise of an option a new contract which actuates the Act's provisions.[350]

In two of the situations described above (bilateral contract modifications and extensions of contract through options or otherwise) where a new contract is deemed to exist, the contracting officer is required

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347. ASPR sec. 1-322(1968).
348. 29 C.F.R. sec. 4.145(1968).
349. <u>Id</u>.
350. <u>Id</u>.

to file a Notice of Intention to Make a Service Contract[351] although the Notice in this case is slightly modified. The Armed Services Procurement Regulation does not specifically mention the requirement for a Notice, et cetera, in cases where the Labor Department deems multi-year contract to be new contracts with the beginning of each fiscal year.[352] Presumably, however, such situations would be treated as any other extensions[353] with the concomitant requirement for Notice and other service contract ramifications.

Enforcement Measures

Finally but very importantly the contracting officer may become involved in the enforcement of service contract labor standards. The contracting officer may find it necessary to withhold accrued contract payments or, in some cases, terminate the contract.

Withholding Payments

The Act provides[354] generally that any violation of the required contract stipulations pertaining to minimum

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351. ASPR sec. 12-1005.8(1968).
352. Note 340, supra.
353. ASPR sec. 12-1005.8(b)(1968) refers to the "extention of contracts through the exercise of options or otherwise."(emphasis added) The catchall phrase "otherwise" seems broad enough to include the multi-year situation.
354. 41 U.S.C. sec. 352(a)(Supp. III 1964).

prevailing wages and fringe benefits[355] or a violation of the minimum wage required by the Fair Labor Standards Act renders the party responsible therefor liable for a sum sufficient to pay the underpaid employees. The Act goes on to provide[356] that enough of any payments accrued on the contract or any other contract between the same contractor and the federal Government may be withheld as necessary to pay the underpaid employees. The Act directs that such withheld sums be held in a deposit fund. It is then provided that on order of the Secretary of Labor any compensation which an agency head or the Secretary of Labor has found to be due under the Act is to be paid directly to the underpaid employees from the withheld payment.[357]

The Act also provides for termination of the contract by the contracting agency for any violation of any contract clause. After termination, the agency is authorized to enter into other contracts or arrangements for completion of the original contract and to charge any additional costs to the defaulted contractor.[358]

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355. Id. sec. 351(a)(1)/prevailing minimum wage/; and sec. 351(a)(2)/fringe benefits/.
356. Id. sec. 352(a).
357. Id.
358. 41 U.S.C. sec. 352(c)(Supp. III 1964).

Other enforcement provisions are provided for.[359]

The Labor Department has promulgated the statutory requirements in its regulations[360] by parroting the wording of the statute almost verbatim with no amplification whatsoever. In August 1967, the Department of Defense pointed out[361] to the Labor Department that the regulations are silent as to the mechanics for withholding back wages and transmitting them to a deposit fund. Cogently indicated was the fact that the lack of guidance in these matters can lead to confusion and loss of time at a point when speed is necessary to insure availability of adequate funds for withholding. A recommendation was made urging the Labor Department to amplify in the rules the mechanics of withholding and transferring funds. Specifically requested was a designation by the Labor Department of the official of that Department authorized to initiate a request for withholding of payments and, further, to whom such a request would be directed (for example, the contracting officer

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359. Section 5b [41 U.S.C. sec. 354(b)(Supp. III 1964)] of the Act provides for an action to be instituted against the contractor, subcontractor, or sureties where withheld sums are insufficient to pay undercompensated employees; the contracting officer is not directly involved in this procedure so it will not be discussed further. "Blacklisting" is authorized as well.

360. 29 U.S.C. sec. 4.187(1968).

361. See note 341, supra.

or Finance Officer), and under what authority funds will be transferred to the Department of Labor.

Despite the obvious advisability of such guidance, the Labor Department has republished its regulations[362] without providing any more guidance than the Act itself offers.

Lacking the guidance requested of the Department of Labor, the Department of Defense has recently issued regulations[363] which offer some, but not enough, specific guidance to the contracting officer. These regulations direct that a request for withholding of payment must be in writing and come from a level within Department of Labor no lower than a District Director. Accrued payments due on the contract under which underpayments were made may be freely withheld. On any other contract between the Government prime contractor and the federal Government, payments may be withheld only if the "other" contract has not been assigned pursuant to the Assignment of Claims Act.[364] In cases where funds withheld are insufficient to pay all back wages, reports of this fact must be made to the General Accounting Office, the Wage and Hour and Public Contracts Division, Department of Labor, and the Department of Justice.

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362. See note 343, supra.
363. ASPR sec. 12-1005.9(1968).
364. 31 U.S.C. 203; 41 U.S.C. 15.

No other guidance as to the mechanics of withholding is available to the contracting officer. This is unfortunate since there have been some problems in this area. In one case[365] a service contractor was terminated for default under conditions where an immediate reprocurement was necessary. A substantial amount of accrued payments were being held by the procurement agency. The Labor Department requested the funds in order to pay employees whom the contractor had underpaid in violation of the Service Contract Act provisions of the contract. The question was the priority to be given to the funds; that is, whether the needs of the agency to reprocure overrode the Labor Department's claim on behalf, as it were, of the employees. Not unexpectedly, the agency's internal opinion to its own contracting officer was to use the funds for reprocurement purposes. In another case[366] the Comptroller General had occasion to rule on the proper allocation of funds accrued but unpaid to a defaulted service contractor. Claims were lodged by the contracting agency (Air Force), the Labor Department, and the Internal Revenue Service. Several contracts had been entered into whereby the contractor was to

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365. Documentation on file in the Department of the Army.
366. MS Comp. Gen. B-161460 (25 May 1967).

provide flight instruction at seven Air Force bases. The contractor defaulted on all seven contracts. An immediate reprocurement was required and went out on a cost-plus-fixed-fee basis. The diversity of the seven installations and other factors made it impossible to determine with accuracy the amount of the excess costs of the reprocurement. The Air Force was holding $86,000. The Labor Department's claim was for $48,000 in back wages; the Internal Revenue Service claim was for about $50,000. Under the circumstances of this particular case, the Comptroller General stated no objection to the priority being given to the Labor Department claim, followed in priority by the Air Force claim for excess costs, then the tax claim. The case seems to have been decided on its peculiar facts; it is doubtful the case should be taken for the broad proposition that claims for back wages will always receive priority. A close reading leaves the impression that the priority would have gone to excess costs had the procuring agency been able to show the amount of such costs with any degree of accuracy.

Regardless of the outcome in a particular case, the fact that the cases have arisen indicates that confusion exists and urged the conclusion that further guidance in the entire area of withholding payments is needed.

Contract Cancellation

The contracting officer may also become involved in a contract termination arising from the contractor's failure to comply with the requirements of any of the service contract stipulations.

Section 3(c) of the Act[367] states that

> ...[W]hen a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangments for the completion of the original contract, charging any additional cost to the original contractor.

The Labor Department's regulation concerning contract termination[368] merely restate the statutory language without additional amplification. The Defense Department's implementing regulations[369] are similarly lacking in amplification.

It should be pointed out, however, that the option to terminate the contract for violations of the contract clauses required by the Act arises from violation of any of the contract stipulations which the Act requires to be inserted in a particular service contract. Section 3(a) of the Act[370] (making the party responsible liable for

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367. 41 U.S.C. sec. 352(c)(Supp. III 1964).
368. 29 C.F.R. sec. 4.190(1968).
369. ASPR sec. 12-1005.9(b)(1968).
370. 41 U.S.C. sec. 352(a)(Supp. III 1964).

underpayments) applies only to violations of the contract stipulations wherein the contractor agrees to pay the prevailing wages[371] and provide fringe benefits[372] and to the failure of the contractor to pay the minimum wage required by Section 6(a)(1) of the Fair Labor Standards Act. Therefore for the three violations just described, both enforcement measures are available; that is, first, accrued payments due may be withheld to pay underpaid employees; second, the contract may be cancelled and reprocurement made.

However, merely because both measures are available it does not mean that contract cancellation must automatically follow a withholding of accrued payments. In a recent case[373] the Comptroller General held that the withholding of accrued contract payments, following an administrative determination that the contractor had failed to pay Fair Labor Standards Act wages, did not preclude the award of another service contract to the same contractor. In this case, there had been no debarrment of the contractor nor any administrative proceedings instituted by the Secretary of Labor and as a part of the award of the second contract there had been a specific finding that the withholding of back wages

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371. Sec. 2(a)(1) of the Act [41 U.S.C. sec. 351(a)(1)(Supp. III 1964)].

372. Sec. 2(a)(2) of the Act [41 U.S.C. sec. 351(a)(2)(Supp. III 1964)].

373. M.S. Comp. Gen. B-161867(16 August 1967).

on one contract did not impair the contractor's ability to perform the second contract. Thus not only did the contracting officer not cancel because of the withholding but awarded a second contract to the same contractor.

The remaining required clauses require the contractor to provide safe and sanitary working conditions[374] and to provide notice of available benefits to his employees.[375] Violation of these clauses may subject the contract to cancellation but not withholding of accrued payments.

Neither the Act, the Labor Department regulations, nor the Armed Services Procurement Regulations[376] shed any light on the priority of interest, if any, which may in a particular case exist as between the Labor Department's desire for contract termination as a labor standards enforcement measure and a Government agency's need for uninterrupted performance by the contractor. Situations can be envisioned where a Government agency has an urgent need for continued performance by a particular contractor and delay occasioned by cancellation and reprocurement would be detrimental to the

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374. 41 U.S.C. sec. 351(a)(3)(Supp. III 1964); 29 C.F.R. sec. 4.6(f)(1968); ASPR sec. 12-1004(a)(e)(1968).
375. 41 U.S.C. sec. 351(a)(4)(Supp. III 1964); 29 C.F.R. sec. 4.6(e)(1968); ASPR sec. 12-1004(a)(d)(1968).
376. See generally ASPR sec. 12-1005.9(b)(1968).

Government's best interest.

It is suggested that in such a case the interests of the Government would be best served by a compromise solution. The contracting agency should be allowed to withhold accrued payments due on the contract but allow the contractor to continue performance. Partial or reduced withholding could then be effected if withholding of accrued payments sufficient to pay the total amount owed by the contractor to underpaid employees would seriously impair the contractor's ability to sustain performance. Such a procedure does not appear to violate the withholding provision of the Act itself[377] which is couched in permissive, not mandatory, terms. Additionally, the Act gives the head of the federal agency concerned authority, concurrent with the Secretary of Labor, to make findings as to the amount of compensation due. Taken together, these two provisions appear to support a dual type of finding by the head of a federal agency. The agency head should be permitted to find, first, that a contractor had violated the Act by undercompensating his employees in a specific amount. By operation of law

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377. "So much of the accrued payment due on the contract...may be withheld as is necessary to pay such /underpaid/ employees." /41 U.S.C. sec. 352(a)(Supp. III 1964)/. (emphasis supplied)

this finding would appear to render the contractor liable for the full amount of under-compensation.[378] The second portion of the finding could be a determination to withhold only a portion of the full amount based on the Government's interest in obtaining continued performance.

The balance of money due the employees could be obtained pursuant to the authority of Section 5(b)[379] which permits the United States to sue the contractor, subcontractor, or any sureties" [i]f the accrued payments withheld...are insufficient to reimburse all service employees..."

If adopted, it is felt that such a procedure would best serve the interests of both the underpaid employees and the United States. Outright cancellation of the contract would hinder the Government in obtaining urgently needed services, and in all probability, would delay the obtention of the employee's back wages, particularly where a cancellation would be tatamount to contractor insolvency.

This discussion has not, of course, covered or even identified all the problems which a Government contracting officer may encounter in the administration of service contracts under the Service Contract Act. It is hoped, however, that it has shed some helpful light on the

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378. See 41 U.S.C. sec. 352(a)(Supp. III 1964).
379. 41 U.S.C. sec. 354(b)(Supp. III 1964).

matter, albeit only a glimmer. If it has done nothing more than point up the fact that there are problems and alluded to some of them, its purpose has been served.

TABLE OF CASES, STATUTES, AND REGULATIONS

40 U.S.C. secs. 327-332(1964).

40 U.S.C. sec. 351(1964) Transferred to 40 U.S.C. sec. 33a(1964).

41 U.S.C. sec. 5(1964).

41 U.S.C. secs. 35-45(1964).

41 U.S.C. secs. 251-260(1964).

41 U.S.C. sec. 252a(1964).

41 U.S.C. secs. 351-357(Supp. III 1964).

41 U.S.C. secs. 356, 357(1964).

43 U.S.C. secs. 1331-1343(1964).

Code of Federal Regulations

29 C.F.R. Part 4(1968).

29 C.F.R. Part 541(1968).

29 C.F.R. Part 1516(1968).

32 C.F.R. Parts 1-39(1968).

Armed Services Procurement Regulations

Section VII.

Section XII, Part 10 [Revised by Defense Procurement Circular Nos. 64 (28 October 1968) and 68 (17 March 1969)].