ADMINISTRATIVE HEARINGS REGARDING APPLICATION OF

SECTION 4(c)

"SUBSTANTIAL VARIANCE" AND "ARM'S-LENGTH" NEGOTIATIONS

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INTRODUCTION TO SECTION 4(c) "SUBSTANTIAL VARIANCE" AND "ARM'S-LENGTH" ADMINISTRATIVE HEARINGS

There are two types of hearing appeals under the SCA concerning section 4(c) wage determinations:

- ◊ an appeal based on "substantial variance" issues; or
- ◊ an appeal based on issues concerning "arm's-length negotiations."

Section 4(c) of the SCA and its implementing regulations provide that whenever a section 4(c) wage determination is issued:

- ◊ The successor contractor is required to pay the wage rates and fringe benefits contained in the predecessor contractor's collective bargaining agreement (CBA).
- ◊ These rates are to be paid unless there is found to be a "substantial variance" between the collectively bargained rates and those prevailing in the locality, and/or the lack of "arm's-length negotiations" in arriving at the collectively bargained rates.
- ◊ The implementing regulations are at 29 C.F.R. §§ 4.10 – 4.11.
- ◊ AAM No. 166 provides guidance regarding "Requirements for Substantial Variance Proceedings Under Section 4(c) of the Service Contract Act" and AAM No. 159 discusses types of arrangements that generally reflect a lack of arm's-length negotiations.

"Substantial Variance" 29 C.F.R. § 4.10

A finding that a 4(c) "substantial variance" exists, at a hearing before an Administrative Law Judge (ALJ), requires that such wage rates and/or fringe benefits in the CBA are found to vary substantially from those that would otherwise prevail for services of a similar character in the locality.

- ◊ The SCA does not define the term "substantial variance." However, the plain meaning of the term requires that a considerable disparity in rates must exist before the successorship obligation may be avoided. Furthermore, no discrete comparison

rate is conclusive. Collectively bargained rates often can be expected to exceed service industry "prevailing rates," and where some variance should be the norm, a finding of "substantial variance" would require a collectively bargained rate clearly to fall out of line when compared to a comprehensive mix of rates.

◊ A request for a hearing must contain information and analysis concerning the differences between the collectively bargained rates issued and the rates contained in:

(a) Corresponding federal wage board rates and surveys. While it is not necessary that the challenged rate be higher than the corresponding federal rate, this is an important factor.

(b) Relevant Bureau of Labor Statistics survey data and the comparable SCA area wage determination.

(c) Other relevant wage data. For example, rates paid in local hospitals would be appropriate for comparison on contracts for hospital aseptic services, while the rates paid in local schools could be of value in comparison for janitorial or food service workers.

(d) Other collectively bargained wages and benefits.

◊ It is expected that a request for a hearing will address all relevant issues.

◊ However, it is recognized that a petitioner may not be able to submit complete data at the time the hearing request is made. Where efforts to obtain supporting evidence are in progress, information must be provided concerning the approximate time necessary to complete the gathering of additional data. Merely providing a statement that data are not available is not sufficient. The request must adequately demonstrate the effort made to obtain or develop such information.

◊ The WHD Administrator can grant or deny the "substantial variance hearing" request. A request is granted only if the review results in a determination that a "substantial variance" may exist. The WHD must respond to the request within 30 days of receipt.

If a "substantial variance" is found to exist, a new wage determination must be issued which reflects prevailing rates for the locality rather than those found in the predecessor contractor's CBA. The collectively bargained rates in the 4(c) wage determination apply until a final decision from the ALJ or ARB.

"Arm's-Length Negotiations" 29 C.F.R. § 4.11 and AAM No. 159

Under section 4(c), the wages and fringe benefits provided in the predecessor's CBA must be reached "as a result of arm's-length negotiations."

- ◊ This provision precludes arrangements by parties to a CBA who either separately or together, act with an intent to take advantage of the wage determination process. In short, it addresses the "Sweetheart Agreement," between contractor and union, which includes making a CBA contingent upon the issuance of a supporting wage determination requiring reimbursement of the contractor by the funding agency.

- ◊ The primary example of these types of agreements involves contingent CBA provisions that attempt to limit the contractor's obligations by such means as requiring issuance of a wage determination by the WHD, requiring the contracting agency to include the wage determination in the contract, or requiring the contracting agency to adequately reimburse the contractor. Such contingent arrangements are evidence of an intent to take advantage of the wage determination scheme under the SCA and, generally, reflect a lack of "arm's-length negotiations."

- ◊ The determination as to whether the CBA has application for section 4(c) purposes must be made pursuant to the SCA and its implementing regulations by the WHD, not by the contracting agency.

- ◊ As a result of a section 4(c) "arm's-length" hearing, investigation or otherwise pursuant to the SCA, if it is found that the CBA itself or any of the wage rates or fringe benefits contained therein were not established through "arm's-length negotiations," the CBA wage rates and fringe benefits cannot be issued for wage determination purposes. If a lack of "arm's-length negotiations" is found to exist, a new wage determination must be issued that reflects the prevailing rates for the locality rather than those found in the predecessor contractor's CBA.

For "arm's-length negotiations" issues, however, a two-step process may be needed.

- ◊ The WHD Administrator must first issue findings before a hearing can be initiated.

- ◊ Such findings may result in the Administrator's referral of the case to a hearing by an ALJ or the ARB.

- ◊ If the Administrator's determination does not include referral of the case for a hearing, an interested party may then request a hearing.

REQUEST PROCEDURES AND RELEVANT TIME FRAMES

The following information on section 4(c) appeals discusses the use of the ALJ and the ARB hearing processes to adjudicate "substantial variance" or "arm's-length negotiations" issues.

"Substantial Variance" Hearing and "Arm's-Length" Determination Requests

Either request can be submitted by any affected interested party, including, but not limited to, contracting agencies, incumbent contractors, prospective contractors, contractor and employer associations, employees or their representatives, or other interested government agencies. The interested party submits a written request for the "substantial variance" hearing or "arm's-length" determination to the WHD Administrator.

The request must contain information as specified in the regulations at 29 C.F.R. § 4.10(b)(1)(i) for "substantial variance" proceedings, and at 29 C.F.R. § 4.11(b)(1) for "arm's-length" determinations, including the following information:

- ◊ The number of all wage determinations at issue, name of the contracting agency involved, and a brief description of the services to be performed under the contract ("substantial variance" request only).

- ◊ A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, or commencement date of the contract or its follow-up option period.

- ◊ That the applicable CBA wage rates and fringe benefits contained therein were not reached as a result of "arm's-length negotiations," or that the CBA rates substantially vary from those prevailing in the locality.

  (Note: Supportive evidence such as data concerning wages and/or fringe benefits prevailing in the locality or information concerning "arm's-length negotiations" should be included. If the only information submitted concerning a "substantial variance" of fringe benefits is an SCA wage determination, it is insufficient, and the party requesting the hearing will be so advised.)

- ◊ Names and addresses (to the extent known) of any interested parties.

For either type of request, information must be submitted as follows (according to 29 C.F.R. § 4.10(b)(3) for "substantial variance" hearing requests; and 29 C.F.R. § 4.11(b)(2) for "arm's-length" determinations):

◊ Prior to 10 days before contract award of an advertised contract; or

◊ Prior to the contract or option period start date, if a negotiated contract, or existing contract with an option extension period.

Administrator's "Arm's-Length" Ruling

◊ The WHD Administrator, on his or her own motion or after receipt of a request for a determination, may make a finding on the issue of arm's-length negotiations

◊ For "arm's-length" determination requests, the WHD Administrator issues findings as to whether the wages and fringe benefits at issue were reached as a result of "arm's-length negotiations" or that such negotiations did not take place, or a finding that there is insufficient evidence to make a determination, and the Administrator may refer the case to an ALJ for a hearing.

◊ If the Administrator determines that there may not have been arm's-length negotiations, but finds that there is insufficient evidence to render a final decision, the Administrator may refer the case to an ALJ for a hearing.

◊ The regulations do not state a required response time frame for the Administrator's decision.

"Arm's-Length" Hearing Requests

For those cases not referred by the WHD Administrator for a hearing before an ALJ, any interested party may subsequently request a hearing, as follows:

◊ Submit a written request for a hearing to the Administrator within 20 days of the Administrator's ruling.

◊ Include in the request a detailed statement of the following:

◊◊ Reasons why the Administrator's finding is incorrect.

◊◊ Facts alleged to be disputed.

If no hearing is requested within the time limit, the Administrator's ruling stands.

If an arm's-length hearing is requested, the Administrator refers the request:

◊ If the Administrator finds facts to be in dispute, to the Chief ALJ for designation of an ALJ to conduct a hearing, or

◊ To the ARB if the Administrator determines that no material facts are in dispute.

ALJ Hearing Granted

◊ Once a hearing is granted by the Administrator, an Order of Reference, with supporting documentation attached, is submitted by the Administrator to the Chief ALJ and served on all interested parties. Hearings are conducted by a designated ALJ in accordance with procedures outlined in 29 C.F.R. Part 6.

◊ Within 20 days of the Order of Reference mailing date as indicated by the Certificate of Service, interested parties wishing to participate in the hearing must submit a hearing response to the Chief ALJ. The Chief ALJ appoints an ALJ to hear the case who will then notify all interested parties of the time and place for the prehearing conference and subsequent hearing. These must be scheduled within 60 days from the mailing date of the Order of Reference.

APPEAL TO THE ADMINISTRATIVE REVIEW BOARD

◊ Any interested party may appeal an ALJ decision to the ARB pursuant to the procedures set forth in 29 C.F.R. Part 8: "Practice before the Administrative Review Board with regard to Federal Service Contracts."