



# SCA, DBA, and CBAs: Where Labor Law and Government Contracting Collide

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# About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs & Advisory Services
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# Learning Objectives

- Understanding the unique labor law requirements that apply to federal contractors
- Familiarize yourself with the Service Contract Act timelines that apply when negotiating collective bargaining agreements (CBAS)
- Knowing how to bid a contract that includes a unionized workforce
- Identify Impact and Potential Liabilities

# Service and Construction Contracts

- **The Davis Bacon Act** – Contractors performing on federal contracts for construction, alteration or repair must pay employees no less than the locally prevailing wages and fringe benefits.
- **The Service Contract Act** : Contractors performing on service contracts must pay employees no less than locally prevailing wage rates and fringe benefits, OR the rates in a predecessor contractor's CBA.
- Purpose of these laws is to remove wages as a bidding factor in the competition for Federal service and construction contracts.

# SCA Wage Determinations

- **Prevailing Wage WDs:** Issued by DOL for specific geographic localities by occupational groups. These are based on surveys of wages and benefits paid in the specified locality.
- **WDs based on CBAs:** Successor contractors must pay wages and fringe benefits at least equal to those contained in a CBA entered into under the predecessor's covered SCA contract.
  - The WD applicable to the successor contract period will reflect the CBA between the predecessor contractor and the collective bargaining representative of the employees.

# How to Bid a CBA Wage Determination...

- You bid on a contract that includes a CBA wage determination. What wages and benefits must you consider when pricing your bid?
  - Wages, shift differentials
  - Health and welfare
  - Funeral leave, jury leave, military leave
  - Retirement, Pension Plans
  - Vacation pay, Holiday pay, Sick leave, etc. (consider FAR 48 CFR 52.222-62)
- Remember: No need to provide specific fringe benefits, just the equivalent value.
- New contracts, monetary provisions control for first year

# Scenario 1

You receive a solicitation with a CBA attached. You bid the contract based on the wages in the CBA. You are awarded the contract! Once you begin work, the union contacts you and advises you that you need to pay into the pension fund. You tell the union that there was no rate for the pension in the CBA and therefore you are not paying it. The Union claims that the pension was referenced in the CBA. You offer to negotiate it next year.

- Are you correct?
- If you submit a claim to the CO, what are your chances that you will receive a price adjustment?

# Contractor Bargaining Obligations Upon Award?

- **Successor Obligations to Bargain with Employees' Union:** An employer is considered a “successor” if: (1) there is substantial continuity in the predecessor’s and successor’s business operations, and (2) the predecessor’s employees constitute a majority of the new employer’s work force in a separate and appropriate bargaining unit.
  - Under Nondisplacement of Qualified Workers Under Service Contracts requirements, successor obligations generally apply to service contractors.
  - However, **no** obligation to recognize seniority rights, job security, grievance procedures, work rules, etc.

# Caveat for Perfectly Clear Successors!

- **Perfectly Clear Successor:** A “new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,” or when the employer “has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.”
- In these circumstances, contractor will be bound to the predecessor’s CBA.

# Important Practices for Negotiating a CBA

- Employers required to meet at reasonable times to confer in good faith with employees' designated bargaining representative on mandatory subjects of bargaining
- Duty to bargain includes duty to:
  - Deal with **whomever** is designated by the employees to conduct negotiations
  - On request, **supply information** relevant to wages, hours, and other conditions of employment
  - Refrain from **unilateral changes** in terms and conditions of employment without consulting with the employees' representative

# Important Practices for Negotiating a CBA, cont'd

- Timeliness (signed, ratified, delivered)
  - Not effective if received after award and performance starts within 30 days
  - If performance starts more than 30 days after award, CBA effective if received 10 days prior to start of performance
  - Time limitations only apply if the CO has given both the contractor and the Union written notification at least 30 days in advance of all applicable estimated procurement dates
  
- Arms-Length
  - Precludes arrangements by parties to a CBA who, either separately or together, act with an intent to take advantage of the wage determination scheme.

# Important Practices for Negotiating a CBA, cont'd

- Substantial Variance
  - Does not apply if the Secretary finds that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character
- Effective Dates
  - CBAs must be effective prior to expiration of the predecessor contract
  - But, for price adjustment purposes wage rates should not become effective until option year
- Contingency Clauses
  - Wage and fringe benefit provisions based on contingencies, such as agency acceptance of the CBA's terms, will be rejected by the DOL

# Consequences of Ignoring These Rules

- Failure to satisfy these SCA requirements may result in the government's failure to provide contractors with a price adjustment
- However, does not cancel a contractor's obligation to comply with the CBA terms

## Scenario 2

You have been negotiating a CBA with a union on site for almost a year. Option Year 1 begins September 1. You finalize the CBA on August 28. You have not received a modification or other documentation officially exercising the option so you do not turn in the CBA. You begin performance on September 1 and the same day receive a modification. You then turn in the CBA. The CO rejects it as untimely and says that the SCA rate will apply for the next year.

- Does the CO have a basis to reject the CBA?

# Requesting a Price Adjustment

- It is the contractor's responsibility to request a price adjustment!
- Submit your request within **30 days** of a new wage determination being incorporated into the contract
  - Remember that CBAs are incorporated upon effective date
- Submit calculations and documents to support amounts requested in adjustment
  - All payroll data showing the previous amounts paid to employees and the amounts paid as of the date the new WD applied to the contract.
  - Documentation of contract work hours
  - Documents supporting accompanying costs (i.e. payroll taxes and workers comp)
  - Fringe benefit cost support
- The more detail you provide, the easier (and faster) it will be for the agency to approve your request).

# Upcoming Webinar

- **Wednesday, October 31:** Bargaining with Your Employees' Labor Representative: The Dos and Don'ts of Union Negotiations

# Thank You.

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