



# MAY THE CLAUSE BE WITH YOU<sup>SM</sup>

Fair Labor Standards Act and Service Contract  
Labor Standards-Price Adjustment  
(Multiple Year and Option Contracts)

**FAR 52.222-43**

**Presented by**



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# Learning Objectives

- When to use FAR 52.22-43
- Discuss the categories of recoverable costs under a price adjustment and how to calculate them
- Provide real-life circumstances where these situations arise
- Learn what supporting documentation should be provided to support the requests
- Review the various methods of calculating increased costs

## FAR 52.222-43 (a)

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements

- McNamara O'Hara Service Contract Act of 1965
- Requires general contractors and subcontractors providing services on prime contracts (United States and D.C.) in excess of \$2,500 to pay service employees in various wage classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by DOL, or the rates contained in the predecessor's collective bargaining agreement
- Applies to contracts "...the principal purpose of which is to provide services...in the US...through the use of service employees..."

## FAR 52.222-43(b)

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause

- Cannot escalate in your original bid for labor or fringe benefits
- You have to choose a method for accounting for increases and decreases in labor costs

## FAR 52.222-43 (c)

- (c) The wage determination, issued under the Service Contract Labor Standards statute, (41 U.S.C. chapter 67), by the Administrator, Wage and Hour Division, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract. If no such determination has been made applicable to this contract, then the Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206) current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract

# FAR 52.222-43 (d)

(d) The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect the Contractor's **actual increase or decrease** in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) **The Department of Labor wage determination applicable** on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of \$4.00 per hour. The Contractor chose to pay \$4.10. The new wage determination increases the minimum rate to \$4.50 per hour. Even if the Contractor voluntarily increases the rate to \$4.75 per hour, the allowable price adjustment is \$0.40 per hour;

(2) **An increased or decreased wage determination otherwise applied to the contract by operation of law**; or

(3) **An amendment to the Fair Labor Standards Act of 1938** that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law

# Wage Determinations

- The U.S. Department of Labor (DOL) issues SCA wage determinations (WDs) which establish the minimum wages and fringe benefits a contractor must pay its employees performing work on covered contracts
- DOL revises these WDs from time to time to reflect the current prevailing wage and benefit rates for each locality or area
- CBAs will also become WDs when turned in timely
- The most current WD will be incorporated into an existing contract at the issuance of each modification to exercise an option, to extend a contract, or to change the scope of work.
- This is where price adjustments come into play

# Important Notes

- When the contract is modified to incorporate new rates, these clauses provide that the contractor is entitled to a change in contract price
- This is not optional
- If the contractor changes the rates BEFORE the modification, there is no actual difference in rates and the contractor loses the entitlement to an adjustment
- Example:
  - WD Rates increase by 0.25 in July
  - Contract option is October 1
  - Contractor increases rates in July to be fair

## FAR 52.222-43(e)

(e) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (d) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall **not otherwise include any amount for general and administrative costs, overhead, or profit**

- Exception: If the SCA is incorporated into the contract after the start of performance, the adjustment can fall under the changes clause which would allow for additional costs to be claimed

# FAR 52.222-43(f)

(f) The Contractor shall notify the Contracting Officer of any increase claimed under this clause **within 30 days after receiving a new wage determination** unless this notification period is extended in writing by the Contracting Officer. The Contractor shall promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice shall contain a **statement of the amount claimed and the change in fixed hourly rates** (if this is a time-and-materials or labor-hour contract), **and any relevant supporting data, including payroll records**, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price, contract unit price labor rates, or fixed hourly rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date. 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)

# How to Calculate Recoverable Costs

- **Adjustments may include:**

- Associated labor costs as a result of changes in social security and unemployment taxes, and workers' compensation insurance in some states
- Increased costs due to increased fringe benefits, such as vacation, holidays, sick days

- **Adjustments do not include:**

- General administrative costs, overhead and/or profit
- Costs which reimburse employees, such as for travel expenses, uniform allowances, or per diem rates
- Costs associated with exempt employees (e.g. administrative, executive or professional employees)
- Any costs where there is an escalation of option period pricing

## FAR 52.222-43(g)

- (g) The Contracting Officer or an authorized representative shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor until the expiration of 3 years after final payment under the contract

# Additional Considerations with Unionized Contractor

- Incorporating the CBA
- Timely (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
- Arms-Length, Substantial Variance, Contingency Clauses
- Rates must be effective prior to date of option and effective date must be prior to day of option
- Reimbursable vs. non-reimbursable costs

# Price Adjustments Example

ABC Contracting is awarded a contract with the Navy. The predecessor CBA includes a provision that requires severance pay be paid to workers not hired by a future successor contractor. At the end of ABC's option, the Navy determines to set aside the work for blind and disabled workers, triggering the CBA's severance clause for most workers

Is ABC entitled to a price adjustment for the cost of employees' severance?

- A. Yes
- B. No
- C. Not Sure

# Price Adjustments Example

Contractor classifies a bookkeeper as exempt. DOL conducts an audit and determines that the employee should have been classified as non-exempt. DOL requires contractor to pay thousands of dollars in back pay and fringe benefits

DOL contacts contractor about their failure to pay SCA wage rates. The contract makes no mention of SCA or a WD. Contractor increases employee wages to the correct wage determination without waiting for the government to incorporate the WD into the contract

- A. Yes
- B. No
- C. Not Sure

# Price Adjustments Example

Same example, but in this case the contracting officer incorporated the correct WD and then the contractor asks for a price adjustment. What costs will the contractor be eligible to recover?

- A. The difference in wages and fringe only
- B. The difference in wages and fringe plus taxes
- C. The difference in wages and fringe, taxes, G&A, overhead, and profit
- D. None of the above

# Common Questions and/or Pitfalls

- What if I'm issued the wrong WD?
- What if the WD isn't included at all in the contract?
- What if I included escalation?
- Can I get an adjustment for salaried, exempt employees?
- What if I receive a bi-lateral modification?

# Thank You.



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