

include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, 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 not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.

(b) Under this provision, the fringe benefits, if any, which the contractor or subcontractor is required to furnish the service employees engaged in the performance of the contract are specified in the contract documents (see § 4.6). How the contractor may satisfy this obligation is dealt with in §§ 4.170 through 4.177 of this part. A change in the fringe benefits required by the contract provision will not result from the mere fact that other or additional fringe benefits are determined to be prevailing for such employees in the locality at a time subsequent to the award but before completion of the contract. Such fringe benefit determinations are effective for contracts not yet awarded (see § 4.5(a)), or in the event that changes in an existing contract requiring their insertion for prospective application have occurred (see §§ 4.143 through 4.145). However, none of the provisions of this paragraph may be construed as altering a successor contractor's obligations under section 4(c) of the Act. (See § 4.163.)

§ 4.163 Section 4(c) of the Act.

(a) Section 4(c) of the Act provides that no "contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract:

Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." Under this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaining agreement (i.e., irrespective of whether the successor's employees were or were not employed by the predecessor contractor). The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.

(b) *Section 4(c) is self-executing.* Under section 4(c), a successor contractor in the same locality as the predecessor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which were contained in the predecessor contractor's collective bargaining agreement. This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement. Pursuant to section 4(b) of the Act, a variation has been granted which limits the self-executing application of section 4(c) in the circumstances and under the conditions described in § 4.1b(b) of this part. It must be emphasized, however, that the variation in § 4.1b(b) is applicable only if the contracting officer has given both the incumbent (predecessor) contractor and the employees' collective bargaining representative notification at least 30 days in advance of any estimated procurement date.

(c) *Variance hearings.* The regulations and procedures for hearings pursuant to section 4(c) of the Act are contained in § 4.10 of subpart A and parts 6 and 8

of this title. If, as the result of such hearing, some or all of the wage rate and/or fringe benefit provisions of a predecessor contractor's collective bargaining agreement are found to be substantially at variance with the wage rates and/or fringe benefits prevailing in the locality, the Administrator will cause a new wage determination to be issued in accordance with the decision of the Administrative Law Judge or the Administrative Review Board, as appropriate. Since "it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved" (53 Comp. Gen. 401, 402, 1973), the solicitation, or the contract if already awarded, must be amended to incorporate the newly issued wage determination. Such new wage determination shall be made applicable to the contract as of the date of the Administrative Law Judge's decision or, where the decision is reviewed by the Administrative Review Board, the date of that decision. The legislative history of the 1972 Amendments makes clear that the collectively bargained "wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after a hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services" (S. Rept. 92-1131, 92nd Cong., 2d Sess. 5). Thus, variance decisions do not have application retroactive to the commencement of the contract.

(d) *Sections 2(a) and 4(c) must be read in conjunction.* The Senate report accompanying the bill which amended the Act in 1972 states that "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme." (S. Rept. 92-1131, 92nd Cong., 2nd Sess. 4.) Therefore, since section 4(c) refers only to the predecessor contractor's collective bargaining agreement, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement. The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe bene-

fits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract nor does it negate the application of a prevailing wage determination issued pursuant to section 2(a) where there was no applicable predecessor collective bargaining agreement. 48 Comp. Gen. 22, 23-24 (1968). In addition, because section 2(a) only applies to covered contracts in excess of \$2,500, the requirements of section 4(c) likewise apply only to successor contracts which may be in excess of \$2,500. However, if the successor contract is in excess of \$2,500, section 4(c) applies regardless of the amount of the predecessor contract. (See §§4.141-4.142 for determining contract amount.)

(e) *The operative words of section 4(c) refer to "contract" not "contractor".* Section 4(c) begins with the language, "[n]o contractor or subcontractor under a contract, which succeeds a contract subject to this Act" (emphasis supplied). Thus, the statute is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc. (See §§4.143-4.145.) Further, since sections 2(a) and 4(c) must be read in harmony to reflect the statutory scheme, it is clear that the provisions of section 4(c) apply whenever the Act or the regulations require that a new wage determination be incorporated into the contract (53 Comp. Gen. 401, 404-6 (1973)).

(f) *Collective bargaining agreement must be applicable to work performed on the predecessor contract.* Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, section 4(c) would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the

predecessor contract. Likewise, the requirements of section 4(c) would not apply if the predecessor contractor's collective bargaining agreement applied only to other employees of the firm and not to the employees working on the contract.

(g) *Contract reconfigurations.* As a result of changing priorities, mission requirements, or other considerations, contracting agencies may decide to restructure their support contracts. Thus, specific contract requirements from one contract may be broken out and placed in a new contract or combined with requirements from other contracts into a consolidated contract. The protections afforded service employees under section 4(c) are not lost or negated because of such contract reconfigurations, and the predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts, provided that the new or consolidated contract is for services which were furnished in the same locality under a predecessor contract. See § 4.163(i). However, where there is more than one predecessor contract to the new or consolidated contract, and where the predecessor contracts involve the same or similar function(s) of work, using substantially the same job classifications, the predecessor contract which covers the greater portion of the work in such function(s) shall be deemed to be the predecessor contract for purposes of section 4(c), and the collectively bargained wages and fringe benefits under that contract, if any, shall be applicable to such function(s). This limitation on the application of section 4(c) is necessary and proper in the public interest and is in accord with the remedial purpose of the Act to protect prevailing labor standards.

(h) *Interruption of contract services.* Other than the requirement that substantially the same services be furnished, the requirement for arm's-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c). Thus, the application of section 4(c) is not negated because the contracting authority may change and the successor contract is awarded by a different con-

tracting agency. Also, there is no requirement that the successor contract commence immediately after the completion or termination of the predecessor contract, and an interruption of contract services does not negate the application of section 4(c). Contract services may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract or because a bid protest has halted a contract award requiring the Government to perform the services with its own employees. In all such cases, the requirements of section 4(c) would apply to any successor contract which may be awarded after the temporary interruption or hiatus. The basic principle in all of the preceding examples is that successorship provisions of section 4(c) apply to the full term successor contract. Therefore, temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of section 4(c) to a full term successor contract.

(i) *Place of performance.* The successorship requirements of section 4(c) apply to all contracts for substantially the same services as were furnished under a predecessor contract in the same locality. As stated in § 4.4(a)(2), a wage determination incorporated in the contract shall be applicable thereto regardless of whether the successful contractor subsequently changes the place(s) of contract performance. Similarly, the application of section 4(c) (and any wage determination issued pursuant to section 4(c) and included in the contract) is not negated by the fact that a successor prime contractor subsequently changes the place(s) of contract performance or subcontracts any part of the contract work to a firm which performs the work in a different locality.

(j) *Interpretation of wage and fringe benefit provisions of wage determinations issued pursuant to sections 2(a) and 4(c).* Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective

§ 4.164

bargaining agreement. However, failure to include in the wage determination any job classification, wage rate, or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirement to comply at a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned. Since the successor's obligations are governed by the terms of the collective bargaining agreement, any interpretation of the wage and fringe benefit provisions of the collective bargaining agreement where its provisions are unclear must be based on the intent of the parties to the collective bargaining agreement, provided that such interpretation is not violative of law. Therefore, some of the principles discussed in §§ 4.170 through 4.177 regarding specific interpretations of the fringe benefit provisions of prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). As provided in section 2(a)(2), a contractor may satisfy its fringe benefit obligations under any wage determination "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash" in accordance with the rules and regulations set forth in § 4.177 of this subpart.

(k) No provision of this section shall be construed as permitting a successor contractor to pay its employees less than the wages and fringe benefits to which such employees would have been entitled under the predecessor contractor's collective bargaining agreement. Thus, some of the principles discussed in § 4.167 may not be applicable in section 4(c) successorship situations. For example, unless the predecessor contractor's collective bargaining agreement allowed the deduction from employees' wages of the reasonable cost or fair value for providing board, lodging, or other facilities, the successor may not include such costs as part of the applicable minimum wage specified in the wage determination. Likewise, unless the predecessor contractor's agreement allowed a tip credit (§ 4.6(q)), the successor contractor may not take a tip credit toward satisfying

29 CFR Subtitle A (7-1-13 Edition)

the minimum wage requirements under sections 2(a)(1) and 4(c).

§ 4.164 [Reserved]

COMPLIANCE WITH COMPENSATION STANDARDS

§ 4.165 Wage payments and fringe benefits—in general.

(a)(1) Monetary wages specified under the Act shall be paid to the employees to whom they are due promptly and in no event later than one pay period following the end of the pay period in which they are earned. No deduction, rebate, or refund is permitted, except as hereinafter stated. The same rules apply to cash payments authorized to be paid with the statutory monetary wages as equivalents of determined fringe benefits (see § 4.177).

(2) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions. (See § 4.176 regarding fringe benefit payments to temporary and part-time employees.)

(b) The Act does not prescribe the length of the pay period. However, for purposes of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods, and the records must be kept on this basis. It is appropriate to use this workweek for the pay period. A bi-weekly or semimonthly, pay period may, however, be used if advance notification is given to the affected employees. A pay period longer than semimonthly is not recognized as appropriate for service employees and wage payments at greater intervals will not be considered as constituting proper payments in compliance with the Act.

(c) The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in