Federal Register

Thursday,
January 18, 2001

Part X

Department of Labor

Office of the Secretary

29 CFR Part 4

Service Contract Act; Labor Standards for Federal Service Contracts; Final Rule

DEPARTMENT OF LABOR

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29 CFR Part 4

RIN 1215–AB26

Service Contract Act; Labor Standards for Federal Service Contracts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule an amendment to the regulations exempting certain contracts for commercial services meeting specific criteria from coverage under the McNamara-O'Hara Service Contract Act (SCA). The proposed regulation was issued based on a request by the Administrator for Federal Procurement Policy, Office of Federal Procurement Policy (OFPP), in a May 12, 1999, letter to the Secretary of Labor, representing that the requested exemptions were both necessary and proper in the public interest, and in accord with the remedial purpose of the SCA to protect prevailing labor standards. Amendments/modifications were made to the OFPP-requested exemptions based on the written comments submitted in response to the proposed rule.

EFFECTIVE DATE: March 19, 2001.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3028, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–0062. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The existing information collection requirements contained in Regulations, 29 CFR part 4 were previously approved by the Office of Management and Budget under OMB control number 1215–0150.

II. Background

On October 1, 1995, the Federal Acquisition Regulations were amended to implement provisions of the Federal Acquisition Streamlining Act (FASA). One provision of the final regulation, 48 CFR 12.504(a)(10), provided that the requirements of the McNamara-O'Hara Service Contract Act (SCA) are not applicable to subcontracts at any tier for the acquisition of commercial items or services. This provision of the final rule had not been included in the proposed regulation. When the Department of Labor became aware of the regulation, the Administrator of the Wage and Hour Division wrote to the Administrator for Federal Procurement Policy, OFPP, questioning the appropriateness of the FAR regulation. The Department of Labor stated its view that questions of coverage and exemptions under the SCA were properly within the purview of the Secretary of Labor pursuant to section 4 of SCA. After a review of the issue by the FAR Council the Administrator for Federal Procurement Policy wrote to the Secretary of Labor and requested that the Department propose an exemption for a more limited group of commercial service contracts (both prime contracts and subcontracts). The Administrator stated that the FAR Council had concluded that a blanket exemption of all subcontracts for commercial items may not adequately serve the Administration's policy of supporting exemptions of the SCA only where they do not undermine the purposes for which the SCA was enacted. In addition, the FAR Council recognized the Department's authority to exempt contracts as well as subcontracts on all types of contracts. Therefore the FAR Council agreed that any exemption from the coverage of SCA for subcontracts for the acquisition of commercial items or components should be accomplished under the Secretary of Labor's authority in the SCA, and stated that it would withdraw the FAR provision.

The FAR Council indicated that the adoption of their recommendations would further the commitment of the Administration to be more commercial-like, encourage broader participation in government procurement by companies doing business in the commercial sector, and reinforce their commitment to reduce government-unique terms and conditions from their contracts. Furthermore, the FAR Council represented that the limited exemptions that it proposed could be accomplished without compromising the remedial purpose of the SCA to protect prevailing labor standards.

On July 26, 2000, the Department of Labor published an NPRM, proposing the limited exemption from the SCA recommended by the FAR Council. On the same date, the FAR Council published a final rule in the **Federal Register** removing SCA from the list of laws inapplicable to subcontracts for commercial items, previously at FAR at 48 CFR 12.504(a)(10). The FAR final rule became effective August 25, 2000. As a result, a small group of commercial subcontracts that were previously exempted under the FAR rule and that also meet the requirements of DOL's proposed rule could change from exempt to nonexempt and back to exempt if the DOL proposal becomes final as it was proposed. Therefore, to prevent the disruption that could be caused by such changes, including the possible disruption of services if the current subcontractor did not agree to continue the subcontract services under the requirements of SCA, the Department also published a final rule in the same **Federal Register**, temporarily exempting from the SCA those commercial subcontracts which met the criteria of the proposed rule. The rule was to remain in effect for one year, or until final action was taken on the NPRM, whichever occurred first. With the publication of this final rule, the final rule for commercial subcontracts is superceded and is withdrawn.

The NPRM addressed two separate but somewhat related issues. First, the NPRM proposed to modify the current exemption for the maintenance and repair of Automated Data Processing (ADP) equipment, 29 CFR 4.123(e)(1), to reflect terminology changes in law that have occurred since the exemption was originally established; broaden the exemption to cover information technology as currently defined; apply the exemption to installation services; and apply the exemption to subcontracts as well as prime contracts. Second, a new exemption was proposed, similar to the current ADP exemption, to exempt both prime contractors and subcontractors for a specified subset of commercial services that meet certain criteria.

III. Summary/Analysis of the Comments

A total of eleven comments were received. Three comments from contractor associations are generally supportive of but recommend certain changes to the proposed exemption. Eight comments—one from a contractor association and seven from union organizations—are generally opposed to all or specific portions of the proposed exemption. Since most of the comments focus on the proposed services or the proposed criteria for exemption, this summary also is organized on the basis of individual services and criteria.

Before addressing the individual services, however, several commenters raise an overarching issue regarding the statutory and regulatory requirements for exemption under the Service Contract Act. The American Federation

of Labor—Congress of Industrial Organizations (AFL–CIO), the Laborers' International Union of North America (LIUNA), and the Building and Construction Trades Department, AFL–CIO (Building Trades), note that section 4(b) of SCA limits the Secretary of Labor the authority to grant exemptions from SCA to those situations where the exemption is ''necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.'' The AFL–CIO and LIUNA further note that 29 CFR 4.123, the Department's regulation implementing section 4(b) of SCA, provides that ''a request for exemption from the Act's provisions will be granted upon a strong affirmative showing'' that the statutory requirements for exemption are met. They argue that the reasons proffered are inadequate as a matter of law. The AFL–CIO further states that the FAR Council offers no factual support for its requested exemption, and that ''the Department cannot defer to the FAR Council's unsupported 'representations' as to whether the exemptions satisfy the 'public interest' and serious impairment' standards.''

The Department agrees that exemptions from the SCA may only be granted upon a strong affirmative showing that the statutory requirements for exemption are met. This does not mean, however, that the Department cannot or should not give great weight to the representations of the FAR Council. The FAR Council's experience with and knowledge of the Federal procurement process is clear, and we believe it is appropriate to give the FAR Council's representations due consideration. Absent evidence or arguments to the contrary, a representation by the FAR Council may constitute a ''strong affirmative showing'' that the requirements for exemption are met. Therefore, on the one hand, we did not summarily reject the FAR Council's request, and on the other hand, the FAR Council's representations have not been accepted without question. They have been evaluated in light of the comments received.

The AFL–CIO also argues that there is no basis for the proposal to expand the FAR exemption for subcontracts to both prime contracts and subcontracts. The Department disagrees with this comment. The Department notes that SCA coverage and exemptions are commonly applicable to both prime contracts and subcontracts, and the Department sees no basis for limiting the exemption for certain commercial services to subcontracts, provided the required showing is met.

A. Expansion of the current ADP exemption

Based upon the recommendation of the FAR Council, the Department proposed that the current ADP maintenance exemption be updated to reflect the current statutory definition of ''information technology'' and be consistent with other regulations. Further, the proposal added installation services to the current regulatory exemption where those services are not subject to the Davis-Bacon Act. The FAR Council noted that service contracts often involve installation of information technology (IT) equipment, for example installing and maintaining a local area network, or installing and maintaining new telephones or a telephone system. The same employees are performing installation as are performing maintenance and repair services. Thus, the FAR Council argued that the same conditions supporting the exemption for the maintenance services also support an exemption for installation services. Finally, the FAR Council recommended that the exemption be made applicable to subcontracts as well as prime contracts.

The Council of Defense and Space Industry Associations (CODSIA) and the Contract Services Association (CSA) support the expansion of the current ADP exemption to a broader IT definition. CODSIA states that it is ''pleased that the Department of Labor has virtually exempted all IT prime and subcontracts from the Service Contract Act.'' CSA states that the ''new 'ADP' exemption has been significantly enlarged to a new definition of IT.'' Both CODSIA and CSA state that the proposed rule recognizes that ''the IT marketplace provides a vibrant and effective guarantor of fair wage practices for virtually all IT workers.''

The AFL–CIO, LIUNA and the Building Trades all oppose changing the current ADP exemption to adopt a new information technology definition. The unions also oppose the addition of installation services. The AFL–CIO states that the ''growth of data networks does not change the fundamental distinction between the manipulation of data by computers—which is automated data processing—and the transmission of data over telecommunications networks—which is a telecommunications service.'' The AFL–CIO further states that installing and maintaining new telephone lines or a telephone system is not automated data processing. The AFL–CIO states that the proposal ''inappropriately extends the ADP exemption to service work that involves the 'switching, interchange, transmission, or reception of data or information.' ''

It goes on to note:

> ''Installation and maintenance of telephone lines (where unregulated) has historically been covered by the SCA. The service work has not changed substantially even when installation and maintenance involves data rather than voice networks. The service work involved in the installation and maintenance of a local area data network is comparable to the service work involved in the installation and maintenance of a voice PBX or Centrex system, work which is currently covered by the SCA.''

The FAR Council's request to change the current ADP definition was made primarily to reflect the current statutory definition of information technology and be consistent with other regulations. The FAR Council did not indicate that the definition needed to be expanded because it was having difficulty procuring telecommunications services. With respect to the addition of installation services, the FAR Council indicated only that the same employees are performing installation services as are performing maintenance and repair services. Thus, the FAR Council concluded that the same conditions supporting the exemption for maintenance services also support an exemption for installation services.

Based upon this description, the Department did not view the change in definition to ''information technology'' and the addition of installation services to be a significant expansion to the ADP exemption. Rather, the Department considered these changes to be mostly language changes to reflect other statutory terminology changes. The comments—both for and against the proposed change—clearly indicate that the proposed change is a significant expansion of the current exemption. In this light, we have concluded that the present record does not constitute a ''strong affirmative showing'' that the proposed exemption meets the requirements for exemption in section 4(b) of the Act. Therefore, the current ADP definition will be retained and installation services will not be added to the scope of exempt ADP maintenance services.

With respect to applying the ADP exemption to subcontracts, the Department specifically asked ''whether there is any reason that the exemption at the prime contract level should not be applied equally to subcontracts that meet the criteria.'' As mentioned above, SCA coverage and exemptions ordinarily apply to both prime and

subcontracts, where the criteria are met. There were no substantive comments against the application of the ADP exemption to both prime and subcontracts. That aspect of the proposed change will be retained. However, the certification requirement is modified to make it clear that a certification by a prime contractor that it meets the criteria also constitutes a certification that if it subcontracts the services, the subcontractor in turn will meet the criteria.

CODSIA and CSA also express concern that the NPRM apparently eliminated ''scientific equipment and medical apparatus equipment'' from the exemption. To the contrary, the Department did not propose to eliminate such equipment. Rather, the NPRM simply did not reprint those portions of the regulation that were not affected by the proposal. The final regulation reprints the exemption in its entirety, with the clarification that in order to be exempt, a contract or subcontract must be principally for the services in question.

B. New exemptions for Commercial Services

The NPRM was intended to address certain situations where an employee's work on a government contract represents a small portion of his or her time and the balance of the time is spent on commercial work. In such cases, the FAR Council represented that the Government loses the full benefits of competition for its service contracts because some contractors decline to compete for Government work due to specific government requirements. To remedy this situation, the FAR Council recommended an exemption framework that it believed would protect prevailing labor standards and avoid the undercutting of such standards by contractors. The proposed exemption would apply only to a specified list of commercial services for which the FAR Council has found a particular need for an SCA exemption. In addition, in order that the exemption comport with the statutory requirement that it be in accord with the remedial purposes of the Act to protect prevailing labor standards, the proposed regulation provided a number of criteria which must be satisfied.

In selecting the services to which it believed the new exemption should apply, the FAR Council focused on services which the Government is having difficulty acquiring or for which the Government is getting limited competition, or where the Government is unable to acquire the quality of services needed because commercial sources are reluctant to do business with the Government, thereby causing impairment to Government business. The FAR Council stated that it avoided selecting services where the Government may be in a position to motivate the payment of less than prevailing wages by contractors striving to win Government contracts. The factual basis for the FAR Council's view that the proposed exemption for each of the specified services is necessary and proper in the public interest or to avoid the serious impairment of Government business was set forth in the NPRM.

1. Proposed Exempt Services

a. Automated data processing and telecommunication services. Unlike the current exemption for ADP equipment, which applies to maintenance and service of ADP hardware, the new proposed exemption for ADP and telecommunications services would have exempted a broad range of software-type services within the information technology industry. The FAR Council explained that in this information age, the Federal Government is contracting for more and more information technology (IT) services. This is driven by the need to maximize the use of technology to improve the efficiency and effectiveness of agency performance. However, increasingly the Government is less of a player in the IT marketplace in terms of market share (less than 3%). IT providers have an abundance of work in an industry with a tight labor market. The FAR Council stated that IT providers are often reluctant or unwilling to deal with Government unique requirements such as the Service Contract Act when they have an abundance of work available and are experiencing difficulty keeping pace with their commercial work. The FAR Council further represented that unless the Federal Government can more closely align the Government's contracting practices and requirements with commercial practice, it will not be able to generate enough interest to permit the Federal Government to take full advantage of the opportunities to use information technology and to obtain the requisite quality of services needed to satisfy critical agency mission needs.

Many of the comments group this new proposed exemption for software services with the ADP maintenance services and the comments clearly address both proposed exemptions. For example, CODSIA and CSA are ''pleased that the Department of Labor has virtually exempted all IT prime and subcontracts.'' Other than this broad reference to IT, CODSIA and CSA do not separately comment on the individual services on the proposed list. With respect to the new list of services, both CODSIA and CSA primarily express concern that this list is too limited.

Similarly, most of the union commenters comment together on both the new ADP/telecommunications exemption and the expansion of the current ADP exemption. In commenting on the proposed new exemption for ADP and telecommunication services, the AFL–CIO states that ''one of the predominant purposes and effect of the proposed rule is to eliminate coverage in one of the largest growth sectors of the Nation's economy, the ADP, IT and telecommunications industry.'' The AFL–CIO and the Building Trades contend that the services within the scope of this proposed new exemption ''are performed by many employees enjoying the protection of prevailing wage standards under the SCA. There is no guarantee that these service employees will not experience a reduction in wages and benefits or lose their jobs as a result of application of the exemption in the proposed rule.''

These union commenters also challenge the FAR Council's justification for the proposed exemption. In addition to the comments on telecommunications, summarized above, the AFL–CIO states that the Communications Workers of America (CWA) (one of its member unions) represent employees performing ''network integration'' services for several large companies, and that these firms would be at a disadvantage in bidding for government contracts under the proposed exemption. They also state that the International Brotherhood of Teamsters (IBT) perform ''a multitude of very technical work with regard to data collection and distribution for the Department of Defense'' in Alaska. LIUNA states that the FAR Council stated that the Government ''is contracting for more and more information (IT) services * * * [but n]owhere has the FAR Council stated that it cannot obtain these services or that there are actual instances where this has occurred.'' The union commenters also state that the proposed ADP exemption is contrary to Congressional intent, as expressed in the 1976 amendments to the SCA, to comprehensively cover white collar service workers.

Based upon the comments, it is clear that all parties—those in favor of the proposal as well as those opposed—view the combined expansion of the current ADP exemption and the addition of ADP and telecommunication

services to the proposed additional list of exempt services as an intent to exempt virtually the entire ADP, IT and telecommunications industry. While the Department still believes that the additional criteria would limit the proposed exemption to a smaller set of contracts than those apparently envisioned by the commenters, the Department also recognizes that the scope of the new ADP and telecommunications exemption is broadly defined. Compared with the other exemptions proposed, the proposed ADP exemption is not as tightly focused on an area where the Government has been having trouble obtaining bidders. In light of the comments and representations challenging the need for a broad-based ADP and telecommunications exemption, the Department has concluded that the record does not adequately demonstrate that the statutory requirements for exemption have been met for this broad classification of ADP and telecommunication services. If at some future time the FAR Council or an individual agency can demonstrate that the statutory requirements for exemption are met for a more specific type of ADP or telecommunications service, then the Department will consider such a request based upon the facts applicable to that specific type of procurement or specific service.

b. Automotive or other vehicle maintenance services. Federal agencies that maintain a fleet of automobiles have a need for services such as normal maintenance (*e.g.,* changing oil and filters, rotating tires, etc.), mechanical repairs, paint and body work, glass replacement, and other repairs needed to maintain the automobile or other vehicle. Unless the agency has a dedicated Government facility for such work, it is contracted out to commercial firms. The FAR Council stated that the General Services Administration (GSA), which is responsible for providing Interagency Fleet Management Services, has been unsuccessful in contracting for these services because of the unwillingness of commercial sources to deal with Government unique requirements such as the Service Contract Act for the small amount of Government work involved. As a result, GSA and other agencies often acquire these services on an as needed basis using micro-purchase procedures and the Government Purchase Card. The FAR Council stated that unless GSA and other agencies can more closely align the Government's contracting practices and requirements with commercial practice, it will not be able to generate enough interest or business to permit the Federal Government to take advantage of the quality improvements and lower prices that will likely result from establishing contractual relationships with commercial service centers. While the individual transactions are small (typically under $2,500), the aggregate volume and dollar value of transactions across the nation is substantial. The Federal Government would benefit from the lower prices it can negotiate for parts and supplies used to service vehicles if it were able to contract for services rather than treat each transaction individually. Additionally, the Federal Government could expect to receive better service because it will be viewed as a ''corporate'' customer who gives its business to a particular contractor(s) in a certain location. The FAR Council stated that an exemption is necessary to permit the Government to enhance the quality of service while reducing its cost through leveraging the Federal Government's collective buying power.

The FAR Council provided the following specific example: The Department of Interior's Office of Aircraft Services in Boise, ID, contracts for maintenance of about 100 of its own aircraft and also provides contract support for other agencies such as the U.S. Forest Service. The Office of Aircraft Services reports that it has about a dozen contracts at various locations around the country. These are commercial services procured from commercial sources where the maintenance of Government aircraft is performed alongside regular non-government aircraft. Contractors' work is predominantly non-government. Some commercial contractors have refused to do work for the Government because of concerns with the SCA requirements. The result has been limited competition for such contracts.

Only a few comments were received regarding this service, and none of those comments provide any detailed information. The AFL–CIO states that contractors supplying ''automotive and other vehicle maintenance services to the government often subcontract these services, and members of IBT perform this work for both prime contractors and subcontractors and enjoy SCA protection. An exemption for this work risks a loss of that protection, particularly under fixed price contracts where there may be an incentive to cut employment costs.'' This comment, however, does not address the limiting effect that the application of the required criteria will have on the application of the exemption to these services. As noted in the proposal, the exemption would not apply to contracts for the operation of a Government motor pool or similar facility. Further, the exemption would not apply where the volume of the government work is such that the contractor could perform the work with a workforce dedicated to the government contract. As noted in the FAR Council's request, GSA and other government agencies often acquire these services on an as needed basis using micro-purchase procedures and the Government Purchase Card. Thus, in many cases the services that would be covered by this exemption are not now subject to the prevailing wage requirements of SCA, and in these cases the exemption would not result in loss of SCA protection for employees currently working on SCA covered contracts. Furthermore, under the criteria discussed below, the exemption would not be available unless price is equal to or less important than the combination of other non-price or cost factors in selecting the contractor. Therefore, the Department has concluded that the statutory requirements for exemption are met for this narrow vehicle maintenance service category.

c. Financial services. Increasingly, the Government is contracting for and using the services of financial institutions that provide credit, debit, or purchase cards. These cards are used by Federal employees while traveling or to make small purchases for commercial items to meet the day-to-day needs of their organizations. The providers of these services use the financial networks of firms like VISA, MASTERCARD, and American Express to provide the services. The FAR Council stated that while the Federal Government's use of these services is significant, it represents a small fraction of the transactions that flow through the financial infrastructure. Transactions flowing through the networks are processed in the same fashion and by the same workforce regardless of the ultimate user of the cards. As a result, the FAR Council stated that it is very difficult to get competition for these services when the Federal Government imposes unique requirements on the contractors. It stated that contractors will not change their way of doing business to accommodate a customer that represents a small portion of their business; it is impossible for them to segregate what is done for the Federal Government from commercial activity.

None of the comments specifically opposes this category of services. Therefore, based upon the FAR Council's recommendation, this

exemption for financial services meeting the specified criteria is adopted.

d. Lodging at hotels/motels. Agencies of the Federal Government often contract with hotels/motels for meeting rooms for conferences of limited duration (*e.g.,* one to five days). These contracts may be for conferences where attendance is limited to Government employees or may involve attendance by other organizations and/or the public. These contracts may also involve furnishing lodging and meals to those participating in the conference. In other cases, agencies establish contractual arrangements with hotels/motels to obtain special rates for lodging when the agency has a large number of employees that frequently travel to a particular location. The hotel/motel agrees to special reduced rates in exchange for being designated a preferred provider for the agency travelers to that city/location. In both of these cases, the FAR Council stated that hotels/motels are unwilling to agree to contract with the Government when it would mean they would have to pay different rates to employees as a result of a Service Contract Act wage determination or would have to keep special/different payroll or other records. Typically these contracts are for relatively small dollar amounts (less than $25,000). The FAR Council stated that this severely limits the Governments ability to contract for these services when needed.

Several union commenters oppose the inclusion of this service category. The Hotel Employees and Restaurant Employees International Union (HERE) state that this exemption ''clearly disadvantages hotels/motels which are unionized or paying prevailing wages as compared to the status quo existing under the SCA.'' HERE states that if ''certain hotels/motels are unwilling to contract with the Government, the Government can simply contract with unionized hotels/motels, which * * * will have no problem fulfilling the requirements of the SCA without paying different rates to employees just for Government events.'' HERE's comments also focus on the prevailing fringe benefit requirements of SCA, and it notes that maintaining the level of benefits is particularly important in a low-wage industry such as the hotel/motel industry. HERE also states that there is no justification for eliminating the protections of section 4(c), which it considers an ''integral aspect of the SCA's attempt to protect prevailing wages and fringe benefits.'' The AFL–CIO makes very similar comments regarding this service category, and points out that the FAR Council does not assert that it has been unable to contract for its required services, but just that ''certain hotels/motels'' have refused to enter into contracts.

The Department has considered these comments within the context of the types of lodging services outlined in the proposal. With respect to conferences, the Government does not always contract for these services in the same manner. In some cases, the Government may simply have the hotel/motel hold a block of rooms for conference participants. The rooms are then reserved and paid for by the participants. In these situations the Government may also reserve and pay for meeting rooms. In other cases, especially if the conference participants are all from the same agency and the number of participants is known, the agency may award a contract not only for meeting rooms but also for lodging. In the first situation, the contract is typically less than $2500 and SCA prevailing wage requirements would not be applicable; however, in the latter situation SCA would apply. Under the proposal, both types of contracts would be treated the same and neither would be covered by SCA where the regulatory criteria are met.

The Department is sympathetic to the issues raised by the union commenters, especially their comments relative to fringe benefits. However, as the above examples demonstrate, even if this proposal were not adopted, SCA still would not apply to a large number of Government meetings and conferences at private hotels/motels. Furthermore, while the comments regarding the availability of union hotels/motels willing to accept the application of SCA might be true in large cities with a substantial number of union establishments, that scenario might not always be the case for meetings in smaller metropolitan or nonmetropolitan areas. While government meetings and conferences may be frequent in cities such as Washington, DC, they would not be frequent in small metropolitan areas. As HERE acknowledges, hotels/motels are not likely to change their pay practices simply to attract Government conferences or meetings.

With respect to other types of lodging contracts, these are ordinarily long-term contracts where the Government has a continuing need for a block of rooms, *e.g.,* lodging for military recruits or government employees attending training at an agency training center, and the agency enters into a contract with a hotel/motel for number of rooms over a longer period of time. The application of SCA to this type of contract is more direct, and determining compliance with SCA is simpler. Unlike conferences or meetings that are one-time contracts, these lodging contracts fulfill a continuing lodging need. Furthermore, contrary to the comments of HERE, section 4(c) provisions would apply to options, and to renewals for services currently subject to section 4(c).

Based upon the foregoing, the Department has determined that it will revise the proposed exemption for lodging services and apply the exemption only to contracts for meetings or conferences. Contracts for a block of rooms on a continuing basis would be outside the scope of the exemption. As already noted, the application of SCA to contracts with hotels/motels for conferences currently varies depending upon the form of the contract. Further, it is the Department's view that the application or non-application of SCA to these contracts does not impact the remedial purpose of the Act to protect prevailing labor standards. On the other hand, contracts for a block of rooms on a continuing basis are different. Regardless of their form, these contracts should all be subject to SCA at the present time, and the record does not provide adequate support for extending the exemption to this type of lodging contract.

e. Maintenance services for all types of specialized building or facility equipment. Agencies that operate and maintain Government owned and/or operated buildings often contract for operation and maintenance of the building or facility and the prime contractor will then typically subcontract for services related to specialized equipment. In other cases, the Government will contract directly for the maintenance and servicing of such equipment. In either case, the FAR Council reported that it is very difficult to acquire the quality of service needed from contractors who are not authorized representatives of the manufacturer and therefore do not have access to parts needed for repairs and training that is essentially only available from the original equipment manufacturer. While there may be other contractors who indicate they have the capability to provide the service, the FAR Council states that experience often shows that the quality of service obtained from such sources is not satisfactory. The FAR Council stated that the Government, as a result of the reluctance of some of the best contractors to accept Government unique requirements such as those related to the Service Contract Act, is deprived of the opportunity to improve the quality of service for the

maintenance and servicing of critical building equipment and systems.

The Mechanical Contractors Association of America (MCAA), AFL–CIO, LIUNA, International Union of Elevator Constructors (IUEC), United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (UA), International Union of Operating Engineers (IUOE), and Building Trades all strongly oppose the proposed exemption for this category. Although the comments all provide slightly different individual perspectives, the thrust of these comments is similar: (1) qualified contractors and employees can and do perform these services with the application of SCA; and (2) this exemption would have a negative impact upon workers currently covered by SCA.

Several commenters challenge the FAR Council statement that the exemption is needed because ''some of the best contractors'' are reluctant to accept government unique requirements such as SCA. MCAA—a mechanical construction industry trade association with about 2,000 member firms—states that its member firms compete for federal agency building systems contracts that are the subject of the NPRM. It also asserts that alternate procurement and contracting planning would be a better way to address any problems with lack of offerors or diminished contracting leverage. MCAA states that ''[c]ompetent firms will compete for federal contract opportunities when those contracts are fairly awarded and administered and are performed with high business and labor standards applied to all contractors.'' The AFL–CIO, and others contend that the ''best'' contractors do not have a problem paying prevailing wages, and this exemption would ''attract lower quality contractors that pay lower wages, hire less skilled and less productive employees and perform less well.'' Several commenters note that the proposed exemption would encourage agencies to replace on-site stationary engineers employed by SCA covered contractors with employees assigned to a number of buildings on a service route. To the extent that a legitimate problem exists, the commenters contend that it is not caused by the application of SCA and the FAR Council should seek other solutions. The IUOE stated that it has 120,000 members who are stationary engineers employed in the field of operations and maintenance of mechanical, electrical, electronic and plumbing systems, including computer-operated HVAC systems and/or automated building control systems, fire life safety systems, elevators, and escalators. The IUOE expressed its concern that the proposed rule would have the potential to replace more highly skilled stationary engineers in Government facilities with entry level workers. They also state that there are very few HVAC applications where ''a manufacturer or original equipment supplier can validate that only their mechanics or technicians can properly service the equipment in question. If that were true, the commercial facilities that exist in the United States would not be able to function without constant interaction and a mandatory lifetime service agreement from the manufacturer.'' The IUEC notes that the proposed exemption does not ''make any sense'' in the context of the elevator industry. The IUEC states that ''in the elevator industry, the lead, national manufacturing companies * * * are all signatory to collective bargaining agreements with the IUEC under which they are obligated to pay contractual rates that are tantamount to prevailing wages. Thus, if there is in fact reluctance on the part of these manufacturers to bid on federal maintenance, it is not because they do not want to pay prevailing wages, because they are doing that already.''

Based upon the comments, the record does not support the conclusion that the statutory requirements for exemption are met, and this category of service will be deleted from the final rule. It is evident that this work is currently performed under SCA contracts. Furthermore, as discussed below, if the Government needs to contract only with the original manufacturer or supplier, that exemption remains available.

f. Installation, maintenance, calibration or repair services for all types of equipment where services are obtained from the equipment manufacturer or supplier of the equipment. Agencies acquire a wide range of equipment and often have a need to acquire services to install, maintain, calibrate, service or repair the equipment from the manufacturer or original supplier in order to avoid compromising a warranty or because proprietary information needed to perform the work is only available from the manufacturer, an authorized representative of the manufacturer or the supplier of the equipment. Typically, these contracts involve sophisticated equipment that requires access to proprietary information or requires employees involved in performing the work to have extensive training that is often only available through the manufacturer or equipment supplier. In such cases, the Government's need to contract with a particular source or a limited number of sources must be properly justified and approved, if applicable, under the statutory competition requirements outlined in 48 CFR part 6 of the Federal Acquisition Regulation. Examples of the types of equipment include automated building control systems, HVAC equipment, building security systems, and elevators or escalators. The FAR Council reported that in many of these cases, the Government has limited leverage to negotiate with the contractor to accept Government unique requirements such as those related to the Service Contract Act and has had great difficulty obtaining services from commercial sources who are unwilling to accommodate such requirements.

The commenters that oppose the exemption for specialized building or facility equipment also oppose the exemption for other equipment services obtained from the manufacturer of supplier of the equipment. Many of their comments apply equally to both service categories. For example, IUEC notes that the major elevator manufacturers are already paying prevailing wages pursuant to their collective bargaining agreements. Therefore, any reluctance to contract with the Government on the part of these companies should not be caused by a concern with the SCA.

The Department believes, however, that there is an important difference between the proposed exemptions. While the services for specialized building or facility equipment could be performed by the manufacturer or supplier of the equipment, the services relative to this category must be performed by the manufacturer or supplier. Further, this exemption was not intended to provide an exemption for the manufacturer or supplier when they are competing with other service providers, but to limit the exemption to situations where the manufacturer or supplier is the only source for the services. In a sole source situation, as set forth in the FAR at 48 CFR 6302–1, other contractors are not disadvantaged because there are not other contractors available to perform the services. Therefore the Department believes that the statutory requirements for exemption are met for this narrow sole source exemption. The Department notes that the sole source aspect of this exemption was discussed in the preamble, but was not set forth in the regulatory language. The regulatory language of the final rule has been clarified to specify that the exemption

shall only apply when the contract is awarded on a sole source basis.

g. Transportation of persons by air, motor vehicle, rail, or marine on regularly scheduled routes or via standard commercial services (not including charter services) The General Services Administration (GSA) enters into contracts with airlines called ''City Pairs'' so that Federal employees traveling on Government business can get discount air fares.

Under these contracts, Federal employees typically obtain tickets through travel management contracts awarded by GSA or other agencies and the Federal employee travels on regularly scheduled routes of commercial airlines but receive tickets at a substantial discount. While the Federal Government's use of these services is significant, it represents a small fraction of the transactions that flow through the airlines. Tickets that are issued to Federal travelers flow through the same networks and are processed in the same fashion as other travelers. As a result, the FAR Council reported that it is very difficult to get competition for these services if the Federal Government imposes unique requirements like those in the Service Contract Act on the contractors. The airlines will not change their way of doing business to accommodate a customer that represents a small portion of their business. It is impossible for them to segregate what is done for the Federal Government from commercial activity. The Federal Government also enters into similar contracts for the carriage of passengers by other modes of transportation.

The AFL–CIO and LIUNA both oppose this exemption. The AFL–CIO states that ''[m]any IBT members work in the industries covered by this proposed exemption. The FAR Council's rationale for this exemption is unpersuasive and it could have a serious detrimental impact on service workers.'' LIUNA comments that the ''FAR Council nowhere states that it cannot obtain these services or that any contractor has refused to bid in these categories of services.''

The proposed exemption mirrors an exemption for the carriage of mail that was granted prior to the 1972 amendments to SCA. The exemption was necessary because mail is not considered to be freight and the transportation of mail did not fall within the scope of the transportation exemption in section 7(3) of SCA. Because the exemption for the carriage of mail was granted prior to the 1972 amendments, it was not accompanied by a finding that the exemption was in accord with the remedial purpose of the Act to protect prevailing labor standards. Nevertheless, the Department is not aware of any instance where the exemption for the transportation of mail has adversely impacted prevailing labor standards.

The exemption for the transportation of persons is necessary at this time because of deregulation in the transportation industry. When the ''City Pairs'' contracts were first awarded, these contracts fell within the scope of the transportation exemption in section 7(3). With deregulation, it is not clear that ''City Pair'' fares still constitute published tariffs. Since SCA has not been applied to these contracts previously, the Department has concluded that the exemption would not have a detrimental impact on service workers. In addition, the Department has concluded that the application of SCA to these contracts would seriously impair government business and would likely cause the contracts to be discontinued. Therefore, the statutory requirements for exemption are met for these transportation services. The Department wishes to emphasize that this exemption is narrow, extending only to common carriers providing the services in question to the general public, as well as the Government. It does not extend to charter services, where the Government contracts with a carrier to provide the service just to the Government, such as shuttle buses between Government buildings. The wording of the proposal has been clarified in the final rule.

h. Real estate services. Federal agencies involved in acquiring and disposing of real property often contract for real estate services, including lease acquisition, real property appraisal, broker, space planning, lease re-negotiation, tax abatement, and real property disposal services. The primary classes of workers that are involved in performing the work are appraisers, leasing specialists, brokers, space planners, interior designers, fire safety engineers, and project managers. In many cases, the employees are required by contracts with the Government to be licensed. In many cases, the Department of Labor has not established wage determinations that apply to these classes of workers. The individual requirements are typically relatively low dollar value (under $25,000) and require that services be performed in a variety of different geographic locations. Knowledge of the local real estate market is required to perform the services effectively. Therefore, individual employees, particularly in rural areas, spend only a small fraction of their time working on Government contracts.

While the Federal Government's use of these services is significant, it represents a small fraction of the transactions that flow through the industry/commercial sources. As a result, the FAR Council reported that it is very difficult to get competition for these services where the Federal Government imposes unique requirements like those in the Service Contract Act on the contractors. The contractors will not change their way of doing business to accommodate a customer that represents a small portion of their business. The FAR Council stated that as the Government continues to downsize, it must rely more and more on commercial sources for these services and it is critical that the Federal Government has access to well-qualified sources of supply for these types of services.

LIUNA opposed this exemption simply by commenting that the ''FAR Council nowhere states that it cannot obtain these services or that any contractor has refused to bid in these categories of services.'' No other comments were directed specifically at this service category. While LIUNA is correct that the FAR Council did not state that contractors had ''refused to bid,'' the FAR Council did report that it is very difficult to get competition for these services. The Department does not believe that LIUNA's comment, unsupported by factual statements as to how the work is currently done or as to how the Government could obtain the services, is of sufficient weight to counter the FAR Council's representations. Therefore the exemption for real estate services is retained in the final rule.

i. Relocation services. Employee relocation services are available for Federal employees or military personnel and their families being transferred to new duty stations anywhere within the continental United States and Puerto Rico. These contracts offer a multitude of flexible services to customize a solution that best meets the employee's needs. The contracts save time and money and reduce stress by offering Federal employees and military these services: Home marketing assistance, home sales services, destination area services, management reporting services, mortgage counseling, property management services, and other related services. The individual requirements are typically relatively low dollar value (under $25,000) and require that services be performed in a variety of different geographic locations.

Knowledge of the local real estate market is required to perform the services effectively. Therefore, individual employees, particularly in rural areas, spend a fraction of their time working on Government contracts.

While the Federal Government's use of these services is significant, the FAR Council stated that it represents a small fraction of the transactions that flow through the industry/commercial sources. As a result, it is very difficult to get competition for these services if the Federal Government imposes unique requirements like those in the Service Contract Act on the contractors. The contractors will not change their way of doing business to accommodate a customer that represents a small portion of their business. The FAR Council stated that it is in the Government's interest to maximize the availability of these services to its personnel; accordingly it is detrimental to the Government's interests when it is unable to attract commercial sources as providers of these services.

LIUNA opposed this exemption with the same comments that it made relative to real estate services. In this case also, although the FAR Council did not state that contractors had ''refused to bid,'' the FAR Council did report that it is very difficult to get competition for these services. LIUNA's comment is not sufficient to change the Department's preliminary conclusion in the NPRM that the statutory criteria for exemption have been met.

The American Moving and Storage Association (AMSA) supported the proposed exemption and stated that the term ''relocation services'' should be clarified to specifically include moving and storage services. AMSA states that its members have ''usually performed their services pursuant to FAR-exempt rate tenders rather than contracts. Formerly, the rates contained in tenders were predicated upon published tariff rates that were also filed with the Interstate Commerce Commission. Today, the rates and charges offered for Federal Government service are contained in published tariffs that must be available for inspection * * * but are not filed with a Federal regulatory agency although the tariffs are filed with contracting Government Agencies.'' AMSA notes that the Department of Defense has recently replaced rate tenders with contracts subject to SCA for several test relocation programs. AMSA analyzes moving and storage services to demonstrate how these services meet all of the proposed exemption criteria.

The application of the SCA section 7(3) exemption for transportation services is not the subject to this rulemaking. That exemption is explained in § 4.118 and the Department has not proposed any change to that section. As indicated in that section, the section 7(3) exemption has only had application to services performed under rate tenders. Even before deregulation, DOD agencies had numerous contracts for moving and storage services that have always been subject to SCA. Since deregulation, it is the Department's experience that even those previously exempt tender services are now performed pursuant to contracts subject to SCA, rather than by tender agreement, as evidenced by the DOD test relocation contracts noted in the AMSA comments.

When the Department proposed the exemption for relocation services, it never considered moving and storage services within the scope of the proposed exemption. None of the services listed in the preamble to the proposed rule—home marketing assistance, home sales services, destination area services, management reporting services, mortgage counseling, or property management services—is similar to moving and storage services. If the Department intended moving and storage to be included within the scope of this exemption, it certainly would have listed moving and storage services and not have included this dominant aspect of the relocation within the catch-all phrase ''other related services.''

Based upon the comments and the recommendation of the FAR Council, the Department has concluded that the statutory requirements for exemption are met for the relocation services described in the proposal. The final rule will be clarified, however, to indicate clearly that moving and storage services are not within the scope of this exemption.

j. Other Services. The preamble to the proposal specifically solicited comments regarding the listed services and asked whether other services should be added to that list. The Department indicated that if sufficient justification were received for any additional service, it would issue a new proposal to add the new service. As noted in the discussion of relocation services AMSA submitted comments recommending that the definition of relocation services be clarified to specifically indicate that moving and storage services would fall within the scope of that exemption. As discussed above, the Department never intended moving and storage services to be a part of relocation services and has not adopted that recommendation. The Department believes that the AMSA comment is more appropriately considered as a recommendation for the addition of a new service to the list. In that regard, while AMSA has submitted comments to show how moving and storage services typically meet the proposed criteria, it has not demonstrated that such an exemption is ''necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of [the] Act to protect prevailing labor standards.'' Accordingly, the Department is not issuing a new proposal at this time to add moving and storage services to the list of exempt services.

CODSIA and CSA both comment that the criteria should be applied to all commercial services and should not be limited to those services listed in the proposal. CODSIA and CSA specifically identify trash pickup, pest control, and childcare as services for which an exemption would be appropriate. As with AMSA's comments regarding moving and storage services, however, CODSIA and CSA have not provided a more specific justification to demonstrate that their recommended expansion of the list of services (to either all commercial services or the three specified additional services) meets the statutory requirements for exemption, and the Department is not issuing a new proposal at this time to add these services to the list.

Finally, a clarifying revision has been made to the introductory language to the list of exempt services to make it clear that the contract must be principally for the listed service in order to be exempt.

2. Proposed Criteria

As explained above, the listed services would only be exempt if specified criteria were satisfied. The recommended criteria were intended to limit the exemption to those procurements where the services being procured are such that it would be more efficient and practical for an offeror to perform the services with a workforce that is not primarily assigned to the performance of government work. Thus, contracts for base support services where the work is performed by an on-site dedicated workforce would not meet the exemption criteria. Similarly, contracts where the services have been performed by a dedicated group of federal employees (A–76 procurements) would be unlikely to meet the exemption criterion that the workers perform only a small part of their time on the contract; however, the NPRM explained that it is possible that some

subcontracts for a portion of those services might meet the criteria for exemption.

The criteria were designed to ensure that the remedial purpose of the Act to protect prevailing labor standards is preserved. This would be accomplished in two ways. First, the proposed exemption would apply only when the contract award is not determined primarily upon the factor of cost. Therefore, the contractor providing the best service at a somewhat higher cost would not be at a competitive disadvantage. Second, the criteria would limit the application of the exemption to circumstances where the nature of the procurement dictates that the most efficient and practical performance of the workload can be accomplished with a workforce that is not dedicated to working primarily on the Government contract. Thus, the competitive pressures upon employee wages that might exist if the services were performed by a workforce dedicated to the Government contract would not come into play on the contracts within the scope of the recommended exemption. Furthermore, even if a contractor might be inclined use a dedicated workforce or to reduce wages to secure the Government contract, the criteria would forbid that practice.

Several comments were received regarding the proposed criteria for exemption. These comments will be organized and analyzed based upon each individual criterion.

(1) *The services are commercial services.* The NPRM explained that a basic underlying purpose of the proposed exemption was to permit a prospective contractor to utilize its commercial compensation practices for both Government and private commercial work. If the prospective contractor does not currently perform the solicited services, then conforming to the SCA requirements would not cause the contractor to alter its commercial compensation practices.

The AFL-CIO commented that this criterion is easily met, covering virtually all commercial contractors that do not exclusively rely upon government contracts. CODSIA commented, ''if the contracting officer is using FAR part 12, then presumption should exist that the service being solicited will be COMMERCIAL.'' CSA made comments similar to CODSIA's.

This criterion was not intended to be limiting to any considerable extent. This criterion is intended only to distinguish services that are unique or specially adapted for the government contract from those that are not provided in the commercial marketplace. The Department agrees that services of the type described in paragraph (f) of the definition of ''commercial item'' at FAR 2.101 would meet the requirements of this criterion; however, other aspects of the definition of ''commercial item'' in FAR 2.101 are not fully consistent with all aspects of this proposed exemption. Also, the definition in FAR 2.101 may change in the future. Therefore, the Department has not included any reference to FAR parts 2, 10, or 12 in the commercial service criterion, and the final rule retains the language in the proposal for this criterion.

(2) The prime or subcontract will be awarded on a sole source basis or primarily upon factors other than cost. One of the basic purposes of the Service Contract Act is to counteract the negative impact that competition based on price alone may have upon wages. If a contract is awarded on a sole source basis, there is no competition and price is clearly not the basis for awarding the contract. For the majority of other contracts that are competitively awarded, this criterion would attempt to largely remove wages from consideration by making quality of service and other non-cost factors equal to or more important than the bottom-line price. If one assumes that the best employees (contractors) are paid (pay) higher wages, then this criterion would allow these employees (contractors) to compete on the basis of the employees' increased productivity and higher quality service. These employees/contractors should not be disadvantaged even though the employee wages and possibly the resulting contract price are somewhat higher than the lowest offer.

The AFL–CIO comments that ''[e]ven in best value contracting, price will always play a critical and often decisive role. . . If the Government truly wished to obtain the best quality services at the best cost, the better approach is for agencies to fully maintain SCA rates, and then use best value contracting to hire the most qualified contractors that offer the best price.''

This criterion is not intended to imply that all best value contracts should be exempt from SCA. In fact, the opposite is true and most best value service contracts will remain subject to SCA. This criterion is intended to operate in conjunction with all of the other criteria, and help to ensure that prevailing wage and benefit rates are not adversely affected by the application of this exemption. This criterion is retained without change in the final rule.

(3) The services are furnished at catalogue or market prices. This criterion was designed to ensure that the contractor will provide the services to the Government on the same basis that the contractor services commercial accounts. Combined with the other criteria, this requirement should ensure that contractors do not decrease employee compensation as a part of the competitive contracting process.

The AFL–CIO commented that this criterion differs from § 4.123(e)(1)(ii)(B) because it contemplates that market price information could also be established by surveying firms in a particular industry or market. This additional sentence in the criterion applicable to the new services was not intended to imply that the market price would or could be determined in a manner different from the determination of market price under § 4.123(e)(1)(ii)(B). To avoid any confusion, however, this additional sentence will be deleted from the criterion in the final rule, and this criterion will be consistent with the language currently used in § 4.123(e)(1)(ii)(B).

(4) The service employees performing the exempt services will spend only a small portion of their time (a monthly average of less than 20%) servicing the government contract. The NPRM explained that if the employees spend only a small portion of their available work hours on the Government contract, the contractor would not likely be willing to alter its compensation practices simply to obtain the Government contract. (Note: Criterion 5 would also specifically preclude any such change in compensation practices.) Furthermore, the criteria for exemption would not be satisfied by rotating the workforce and having different employees work on the contract each day of the week. In the Department's experience it would be extraordinary for a contractor to staff a contract in this manner. Therefore in such a case, although each individual employee would spend less than 20% of his/her work hours on the Government contract, a contracting officer or prime contractor (in the case of a subcontract) could not certify—as required by Criterion 6—that all or nearly all offerors would staff the contract with service employees who spend only a small portion of their time on the project.

This criterion generated considerable comment on both sides of the issue. CODSIA and CSA both strongly oppose any type of hours restriction whatsoever. CODSIA notes that several of the proposed criteria have their foundation in the current ADP exemption, but it states that ''the Department has effectively eviscerated

the previous foundation by adding a new qualification that requires a potential commercial subcontractor to perform the work without being able to dedicate the company's workforce in excess of more that 20% of the service worker's annualized hours to the government contract.'' CODSIA further states that ''no commercial company would execute a government subcontract with the understanding (and obligation) that its service workers cannot be dedicated to the subcontract until completion . . . [t]herefore, no prudent company will seek to meet this qualification and the SCA will apply.'' CODSIA concludes that ''SCA wages should not be superimposed upon the commercial market place due to an artificial, ill-founded criterion,'' and ''the workforce requirement should be eliminated.''

CSA makes many of the same comments as CODSIA but focuses those comments on the application of the criterion to subcontracts. CSA also states ''no commercial service subcontractor will contract under an obligation that clearly impairs the efficient performance of its work.'' CSA concludes that ''the 20% limitation should be eliminated for commercial service subcontractors.''

On the other side of the issue, several union commenters take the position that the 20% criterion should be more limiting. The AFL–CIO comments that under the proposed rule a service contract worker could spend virtually all of his or her time performing work that has been covered by SCA, but receive no SCA protection. ''[I]f a contractor had numerous service contracts with one or more government agencies, and no employee spent more that 19.9 percent of his or her time on any one contract, the contractor could be exempt from the SCA even if one or more of its employees spent 99 percent of his or her time on five separate contracts, taken together.'' The AFL–CIO states that this criterion ''would encourage bid splitting by government agencies and contractors to avoid SCA coverage.'' Therefore, it recommends that § 4.123(e)(2)(ii)(D) require that ''contractors treat the total time spent on government contracts or subcontracts cumulatively in calculating employee time allocated to government contract work.'' Also, ''[t]o further ensure that contractors perform a significant amount of government contract work remain subject to the SCA,'' AFL–CIO recommends that ''the Department should also place a cap on the total amount of time a contractor can devote to government contracts and still be eligible for the exemption.'' AFL–CIO suggests five percent as a reasonable level. Finally, the AFL–CIO states that ''[w]ithout recordkeeping requirements, the contractor itself may not know if any employee works a monthly average of more than 20 percent of available hours on an annualized basis on a government contract or subcontract.'' ''To address the exemptions' failure to include recordkeeping requirements,'' the AFL–CIO suggests that ''the regulation define a 'small portion' of a worker's time as 'no more than 20 percent in any one month.' ''

The Department believes that these comments overlook the primary purpose of this criterion. The criterion is not designed to dictate how the contractor manages its workforce, but rather to describe the nature of the services being procured. The proposed criteria are designed to complement each other and to work as a whole. Therefore, each individual criterion must be evaluated within the context of the whole. In evaluating this criterion, therefore, it is important to remember that a subsequent criterion requires that the contracting officer (or the prime contractor in the case of a subcontract) determine in advance that all or nearly all of the prospective contractors will meet the criteria. Therefore, the 20 percent criterion should primarily serve as a guide for the contracting officer in evaluating the services to be procured. A hypothetical example might illustrate this point better. An agency is contracting for routine maintenance on a fleet of automobiles. The fleet is large enough that the agency expects to have at least five cars in the shop at all times. In this example, a contractor could clearly perform the government work with a dedicated workforce. Because it is therefore highly unlikely that all or nearly all the bidders would perform the contract in a way that would meet this criterion, the contracting officer would make the determination that the exemption would not apply to this procurement. The fact that a large repair shop could divide the work and ensure that none of its mechanics spends more than 20 percent of his or her time (on an annualized monthly basis) servicing the government vehicles would not alter the determination that SCA applies to this contract. An example of an exempt vehicle maintenance contract would be one where the government's fleet is relatively small or dispersed so that it is not likely that more than one or two vehicles per month will be serviced by one facility. In this case, the mechanics for all or nearly all of the offerors would clearly spend less than 20 percent of their time servicing the government vehicles. The contractor's certification that its employees will not spend more than 20 percent of their time servicing the government vehicles is largely a confirmation that the contracting officer's evaluation of the nature of the contract work was correct.

Because the contracting officer should have already determined that all or nearly all offerors would meet this criterion, no contractor should be required to restructure its workforce to comply with the 20 percent limitation. Furthermore, the limitation requires employees to spend no more than 20 percent of their hours on the contract on an annualized basis, thereby permitting longer hours where required by the interim exigencies of the contract or to accommodate short-term workforce fluctuations. Therefore, the underlying basis for the CODSIA and CSA recommendation to delete this criterion should not exist. If a contractor could perform the services with a dedicated workforce, then the contracting officer should not consider the exemption to be applicable.

Further, with respect to the AFL–CIO's recommendation that the 20 percent limitation be based upon all government work and not just the contract in question, this is a question for which the contracting office would not have direct knowledge, and is something that would change from one contractor to the next. If the AFL–CIO's recommendation were adopted, one company might be exempt because it only had one government contract whereas another would be subject to SCA because it had numerous contracts. This would convert the determination on application of the exemption from one based upon the overall requirements of the contract to a determination based upon the individual contractor's workforce utilization. The Department does not intend this exemption to permit the situation where an exempt contractor would compete against a nonexempt contractor, and we have not adopted the AFL–CIO recommendation. Similarly, we have not adopted the AFL–CIO recommendation to limit the overall amount of Government work that an exempt contractor would be allowed to perform.

Finally, the Department has not adopted the AFL–CIO's recommendation to apply the 20 percent limitation on a month-by-month basis rather than an annualized monthly average. As already explained, this criterion was established primarily to describe the nature of the exempt services. In the automotive maintenance example described previously, the

Department does not believe that the exemption should be denied simply because in one month the agency's entire fleet of twenty vehicles needs servicing and for the remainder of the year no more than one car per month is in the shop. While the contracting officer should have informed knowledge about the amount of work anticipated over a normal year period, the contracting officer may not always be able to predict when repairs will be needed. The application of the exemption should not be impacted by unexpected fluctuations in service needs as long as the overall nature of the contract is not changed. Accordingly, the Department has not changed this annualized monthly average concept.

The criterion is adopted with a minor wording change to make it clear that the 20% limitation applies on an employee-by-employee basis, rather than an average of all of the employees working on the contract.

(5) The contractor utilizes the same compensation plan for both contract and commercial work. This criterion would ensure that the employees servicing the government contract will be compensated exactly as they would be if they were servicing a commercial account. Thus, the prevailing labor standards for private work would not be impacted in any way by the award of the Government contract. Furthermore, because contract award is not determined primarily on the basis of cost (Criterion 2), the contractor paying the lowest wages would not have a competitive advantage over other employers who pay average or above average wages. These contractors would compete for the Government work on the same basis that they compete for private work—quality of service and overall value.

The AFL–CIO and LIUNA commented that the Department improperly substituted the term ''equivalent commercial wage'' for the statutory term ''prevailing.'' The AFL–CIO recommended that this criterion be changed to require that the contractor's compensation plan be not less than the SCA wages and benefits. If this recommendation were adopted, the exemption would serve no purpose. If the contractor is already paying SCA rates then it should not matter whether SCA is applied to the contract. This comment, however, also goes to the issue of whether the exemption is ''in accord with the remedial purpose of the Act to protect prevailing labor standards.'' The Department believes that the criteria as a whole achieve this goal. If the employer does not change its pay practices to obtain the Government contract, prevailing wages should not be affected. Furthermore, an employer would be unlikely to change its pay practices in any event where no worker spends more than 20% of his or her time on the Government contract. In addition, the criteria limit the application of the exemption to situations where employee wages are not a primary factor in deciding which company is awarded the contract. Thus, the Government contract should not serve to either increase or decrease prevailing labor standards. This recommendation, therefore, is not adopted, and the criterion is retained in the final rule as proposed.

(6) The contracting officer determines in advance that all or nearly all of the offerors will meet the requirements of the criteria. This requirement was designed to ensure that all contractors compete on an equal basis, and that a contractor subject to SCA would not be forced to compete against a contractor that would be exempt from SCA. Furthermore, as noted in the discussion of Criterion 4, this requirement—which takes into consideration not only the practices of likely offerors but also the nature of the contract requirements—is a necessary safeguard to prevent individual offerors from juggling staffing patterns simply in an effort to avoid SCA coverage. This criterion also would serve to protect those employees (either contractor or Federal employees) who might currently be engaged in performing the solicited services on a full-time basis.

The AFL–CIO noted that this criterion is designed to ensure that all contractors compete on an equal basis. The AFL–CIO questions whether the criterion accomplishes this goal since it only requires that all or ''nearly all'' of the offerors meet the requirements of the other criteria. The AFL–CIO suggests that this standard be changed to require that all offerors meet the requirements.

The Department's intention is that a contracting officer would not make this determination unless he or she has a high degree of confidence that all offerors will meet the requirements. It is unlikely that any contracting officer would feel able to determine absolutely that every offeror will qualify for the exemption. The ''or nearly all'' language therefore would permit the extraordinary situation where one bidder might not qualify as exempt. Returning to the automotive maintenance example described previously, an employer with a single employee and a relatively small number of commercial customers could bid on the contract to maintain on average a few vehicles a month. With that small volume of government work, the workforce for ''nearly all'' prospective contractors would spend less than 20 percent of their time working on the contract. The single employee working for a company with relatively few commercial accounts, however, might spend more than 20 percent of his or her time performing work on the contract. While this company's offer might be rejected for other reasons (*e.g.,* the contract might require a capacity to service more than one vehicle at a time—a capacity that the two-person shop might not possess), the fact that one non-exempt contractor might bid on the contract should not negate the application of the exemption to everyone else. The Department believes that retaining some amount of flexibility in this regard is appropriate, and the criterion is retained.

The Department would like to emphasize that ''nearly all'' does not mean most or a majority. The words ''nearly all'' are intended to recognize the possibility of exceptional circumstances where an individual offeror might not meet all of the criteria. If this offeror receives the contract, of course, the contract would be subject to SCA prevailing wage requirements. On the other hand, the Department realizes that there may be circumstances where, once bids are received, the contracting officer determines that he or she was incorrect in the determination that all or nearly all bidders would meet the exemption requirements. The regulation has therefore been revised to provide that in such circumstances SCA will apply to the procurement.

(7) The exempted contractor or subcontractor certifies to the provisions of criteria (1) and (3) through (5). This criterion would provide a mechanism for addressing and correcting situations where the exemption may have been misapplied. If the Department of Labor, in its enforcement, determines that the contract is not in fact exempt, it would require that SCA stipulations be included in the contract. In the case of a subcontract, the prime contractor, who in almost all cases would have SCA stipulations already included in its contract, would be ultimately responsible for compliance with the requirements of the Act. The Department could therefore require that the SCA requirements be effective as of the date of contract award. The Department noted in the NPRM that an exempt contractor or subcontractor would not be required to keep any particular records to meet its burden of showing that the criteria are satisfied.

CODSIA and CSA both comment that this was an unauthorized certification

requirement. They note that section 4301 of the Clinger-Cohen Act of 1996 (Pub. L. 104–106) prohibits the imposition of contractor and subcontractor certification requirements in the Federal Acquisition Regulations unless the certification is required by statute or justified in writing and approved by the FAR Council and the Administrator of the Office of Federal Procurement Policy (OFPP). While CODSIA and CSA correctly identify the procedural requirements for approval of these certifications, the Department does not consider this to be a substantive deficiency since the FAR Council and the Administrator of OFPP recommended the certifications. The Department notes that no contracting officer can be expected to know whether individual contractors in fact satisfy the exemption. Therefore the Department considers certification essential to ensure that the criteria for the exemption have been met. The FAR Council has now made the required justification, and it has been approved by the Administrator of OFPP. Therefore the certification requirement is retained, and modified to make it clear that a certification by a prime contractor that it meets the criteria also constitutes a certification that if it subcontracts the services, the subcontractor in turn will meet the criteria.

CSA also ''recommends that the Department adopt the same policy that accompanies the Buy America Act (BAA) certification. Under the BAA policy, the contracting officer is permitted to accept the contractor's self-certification.'' In considering this comment the Department notes that the contracting officer or the prime contractor has already reviewed the requirements of the proposed contract/subcontract and has determined that all or nearly all of the offerors will meet the criteria. Therefore, the contracting officer or prime contractor should have no reason to question the contractor/subcontractor's certification. Accordingly, the Department has concluded that it is not necessary for the contracting officer or prime contractor to review the contractor/subcontractor's certification and this requirement has been deleted from the final rule. The fact that the requirement for review has been eliminated, however, does not mean that the contracting officer or prime contractor may not review the certification if they choose to do so, such as where they possess information which causes them to question the validity of the certification. Further, if it is determined that the certification is not correct, then the contracting officer or the prime contractor should not proceed with award of an exempt contract or subcontract. Because the contracting officer will no longer be required to review the certification in advance, the Department has also amended the regulation to delete the language applying SCA as of the date of the Department's determination. As provided in § 4.5(c)(2) of the regulations, the Department may require retroactive application of the SCA where it determines it is appropriate under the circumstances.

The AFL–CIO, while not opposing the criterion, commented that in the absence of a formal monitoring system, it is unlikely that any misapplication of the exemption would ever be identified. The Department shares the AFL–CIO's concern that this exemption not be misapplied. Certainly, the Department expects that contracting agencies and prime contractors would exercise their responsibilities to ensure that such misapplication is minimized. At the same time, the Department recognizes that mistakes may be made; however, the Department does not believe that the mere possibility of a mistake should preclude adopting an exemption that is otherwise justified. The Department will monitor allegations of abuse to determine whether future changes in this exemption are warranted.

3. Other Issues

Several commenters raised additional issues that were not specifically related or limited to a single aspect of the proposed exemptions. Those issues are addressed separately in this section.

Several union commenters, including the AFL–CIO and LIUNA, recommended that the exclusion for contracts subject to the provisions of section 4(c) of SCA be expanded to include ''resolicitations and other successor contracts for substantially the same services.'' They also recommended that this limitation be added to contracts under the current ADP exemption. The Department agrees that the regulation should be revised to make it clear that the exemption does not apply to any contract which is subject to section 4(c), as well as all options exercised and extensions of the contract. The Department does not believe, however, that there is sufficient justification to extend this limitation to all future resolicitations for substantially the same services, where the predecessor contract was not subject to section 4(c). In addition, the Department does not believe sufficient justification has been presented to add this requirement to the existing ADP exemption. This exemption has been in existence for nearly twenty years and the Department is not aware of any problems arising from the absence of this requirement.

Several union commenters recommended that the Department promulgate a new procedure under which the contracting agency is required to demonstrate in advance of issuing the solicitation that the section 4(d) requirements are satisfied for a proposed exemption of a particular contract or subcontract. This recommendation is consistent with other union comments that the contracting officers and prime contractors should not be delegated the responsibility to decide whether a contractor is exempt from SCA coverage. The purpose of the proposed exemptions, however, is to carefully describe a class of contracts where exemption from SCA is appropriate. Every day contracting officers decide whether SCA should be applied to a particular contract, and the decisions required to be made in this case are no different. The Department does not believe that case-by-case determination is necessary where, as in the instant situation, the record supports an exemption for a particular class of contracts.

4. Conclusion

For the reasons discussed above, the Department has concluded that the exemptions as set forth in this rule are necessary and proper in the public interest or to avoid serious impairment of Government business, and are in according with the remedial purpose of the Service Contract Act to protect prevailing labor standards. The list of services is narrowly tailored to include only commercial services which the Government has had difficulty in acquiring or where the Government is getting limited competition because of unique requirements imposed by the Government. The additional criteria, when viewed as a whole, are designed to ensure that the contractor will not be motivated to change its wage practices and pay less than the prevailing wage in order to obtain the Government contract, and that the Government in turn will not be motivated to award contracts to offerors who pay less than prevailing wages.

IV. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96–354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal Agencies are required to prepare and make available for public comment and initial regulatory flexibility analysis that describes the anticipated impact of

proposed rules on small entities. The Department received no comments regarding the Regulatory Flexibility Analysis prepared for this rule.

(1) The Need for and Objectives of the Rule

This rule was made at the request of the Administrator for Federal Procurement Policy, OFPP, in her letter of May 12, 1999. The Administrator, on behalf of the FAR Council, stated that the exemption ''will further the commitment of the Administration to be more commercial-like, encourage broader participation in government procurement by companies doing business in the commercial sector, and reinforce our commitment to reduce government-unique terms and conditions from our contracts. We believe that all of this can be accomplished without compromising the purpose of the SCA to protect prevailing labor standards.'' The FAR Council developed a short list of services to which it believed an exemption should apply in the best interest of the Government and to avoid impairment to Government business.

Pursuant to section (4)(b) of SCA, the Secretary of Labor may grant reasonable exemptions to the provisions of the Act, but only in special circumstances where the ''exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.''

After a review of the comments and the representations of the FAR Council, the Department of Labor determined that the exemption, as revised based upon the public comments, will be both ''necessary and proper in the public interest'' and will also be ''in accord with the remedial purpose of th[e] Act to protect prevailing labor standards.''

(2) Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

The Department received a number of comments regarding the proposed exemptions. Those comments are discussed in detail in the preamble to this rule. The Department did not receive separate comments concerning its initial regulatory flexibility analysis.

(3) Number of Small Entities Covered Under the Rule

The definition of ''small business'' varies considerably depending upon the policy issues and circumstances under review, the industry being studied, and the measures used. The Small Business Administration's Office of Advocacy generally uses employment data as a basis for size comparisons, with firms having fewer than 100 employees or fewer than 500 employees defined as small. The types of services covered by the proposed exemptions span a variety of industries. Based upon analyses done by the U.S. Small Business Administration, Office of Advocacy, some of the industries affected by the proposed exemptions are characterized as ''large-business-dominated industries'' (*e.g.,* air transportation and business credit institutions) and others are characterized as ''small-business-dominated industries'' (*e.g.,* automotive repair and real estate).[1] Thus, at least some of the services covered by the exemption would be performed primarily by small businesses. In fact, with the exception of those contracts for financial services involving the issuance and servicing of cards, the contracts for the transportation of persons, and contracts with equipment manufacturers, it would appear that a majority of the contracts affected by the proposed exemption likely would be performed by small businesses.

It is also difficult to determine with precision the value of Federal contracts that would be affected by the exemption. Federal Procurement Data System (FPDS) compiles and reports information on approximately 500,000 annual transactions exceeding $25,000; however, as discussed above, many of the contracts covered by the exemption (*e.g.,* food and lodging contracts for conferences) are currently or would likely be less that $25,000. Also, the criteria that must be met for the specified services to be within the scope of the exemption will limit the application of the exemptions to a relatively small subset of contracts within a specific SIC code. Thus, FPDS data does not provide an accurate estimate of the contracts potentially covered by the exemption. Nevertheless, in view of the limiting criteria for the listed services, the total value of the exempt contracts should be relatively small, and it is believed that the SCA would no longer apply to only a relatively small number of contracts that currently contain SCA wage determination provisions.

(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

The exemption does not impose any new reporting or recordkeeping requirements. Although offerors are required to certify that the criteria for exemption are met, offerors are not required to maintain records to support the certification. The certification, which can be submitted as part of the bid package, is an important element to satisfy the statutory requirement that exemptions be ''in accordance with the remedial purpose of the Act to protect prevailing labor standards.'' Contractors and subcontractors to whom the exemption applies will not be required to comply with the wage and reporting requirements of the SCA.

(5) Description of the Steps Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Objectives of the Service Contract Act

The exemption does not contain any new reporting, recordkeeping, or other compliance requirements applicable to small business. Rather, the exemption would relieve small businesses and other contractors from the requirements of the SCA on certain contracts where the contractor certifies that the requirements of the exemption have been met. Furthermore, any contractor performing on a contract within the scope of the exemption may elect to perform the contract under the requirements of SCA rather than make the necessary certifications. Because application of the exemption will have been determined in advance by the contracting officer, the Department anticipates that questions regarding proper application of the exemption will be rare. Contractors will not be required to maintain any records to support the exemption, although they may be required to furnish payroll and other existing records to the Department in the event of an investigation.

V. Executive Order 12866 and 13132; Section 202 of the Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act

This rule is being treated as a ''significant regulatory action'' within the meaning of Executive Order 12866 because of the significant impact of this rule on other agencies. Therefore, the Office of Management and Budget has reviewed the rule. However, the Department concurs with the view of the Federal Acquisition Regulatory Council that this rule is not ''economically significant'' as defined in section 3(f)(1) of E.O. 12866, and therefore it does not require a full economic impact analysis under section 6(a)(3)(C) of the Order. Under the new exemption, contracts would not be exempt unless price is equal to or less important than the combination of other non-price or cost factors in selecting the

[1] The State of Small Business: A Report of the President, 1996 (1997).

contractor. Therefore it is not anticipated that the changed rule will have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

The Department has similarly concluded that this rule is not a ''major rule'' requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). It will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate, or by the private sector. Furthermore, the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1532, do not apply here because the rule does not include a ''Federal mandate.'' The term ''Federal mandate'' is defined to include either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include an enforceable duty which is ''a duty arising from participation in a voluntary program.'' 2 U.S.C. 658(7)(A). A decision by a contractor to bid on Federal service contracts is purely voluntary in nature, and the contractor's duty to meet Service Contract Act requirements arises ''from participation in a voluntary Federal program.''

The Department has also reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

VI. Document Preparation

This document was prepared under the direction and control of Thomas M. Markey, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 4

Administrative practice and procedures, Employee benefit plans, Government contracts, Investigations, Labor, Law enforcement, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, wages.

Accordingly, for the reasons set out in the preamble, 29 CFR part 4 is amended as set forth below:

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

1. The authority citation for part 4 is revised to read as follows:

Authority: 41 U.S.C. 351 *et seq.*; 41 U.S.C. 38 and 39; 5 U.S.C. 301.

2. Section 4.123(e) is revised to read as follows:

§ 4.123 Administrative limitations, variances, tolerances , and exemptions.

* * * * *

(e) The following types of contracts have been exempted from all the provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor found are necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business, and are in accord with the remedial purpose of the Act to protect prevailing labor standards:

(1)(i) Prime contracts or subcontracts principally for the maintenance, calibration, and/or repair of:

(A) Automated data processing equipment and office information/word processing systems;

(B) Scientific equipment and medical apparatus or equipment where the application of microelectronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, ''Medical Diagnostic Equipment''; Class 6525, ''X-Ray Equipment''; FSC Group 66, Class 6630, ''Chemical Analysis Instruments''; Class 6665, ''Geographical and Astronomical Instruments'', are largely composed of the types of equipment exempted under this paragraph);

(C) Office/business machines not otherwise exempt pursuant to paragraph (e)(1)(i)(A) of this section, where such services are performed by the manufacturer or supplier of the equipment.

(ii) The exemptions set forth in this paragraph (e)(1) shall apply only under the following circumstances:

(A) The items of equipment are commercial items which are used regularly for other than Government purposes, and are sold or traded by the contractor (or subcontractor in the case of an exempt subcontract) in substantial quantities to the general public in the course of normal business operations;

(B) The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, and/or repair of such commercial items. An ''established catalog price'' is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An ''established market price'' is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor; and

(C) The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers;

(D) The contractor certifies to the provisions in this paragraph (e)(1)(ii). Certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. The certification shall be included in the prime contract or subcontract.

(iii)(A) Determinations of the applicability of this exemption to prime contracts shall be made in the first instance by the contracting officer on or before contract award. In making a judgment that the exemption applies, the contracting officer shall consider all factors and make an affirmative determination that all of the conditions in paragraph (e)(1) of this section have been met.

(B) Determinations of the applicability of this exemption to subcontracts shall be made by the prime contractor on or before subcontract award. In making a judgment that the exemption applies, the prime contractor shall consider all factors and make an affirmative determination that all of the conditions in paragraph (e)(1) have been met.

(iv)(A) If the Administrator determines after award of the prime

contract that any of the requirements in paragraph (e)(1) for exemption has not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Administrator's determination. In such case, the corrective procedures in § 4.5(c)(2) shall be followed.

(B) The prime contractor is responsible for compliance with the requirements of the Service Contract Act by its subcontractors, including compliance with all of the requirements of this exemption (see § 4.114(b)). If the Administrator determines that any of the requirements in paragraph (e)(1) for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable, and the prime contractor may be responsible for compliance with the Act effective as of the date of contract award.

(2)(i) Prime contracts or subcontracts principally for the following services where the services under the contract or subcontract meet all of the criteria set forth in paragraph (e)(2)(ii) of this section and are not excluded by paragraph (e)(2)(iii):

(A) Automobile or other vehicle (*e.g.,* aircraft) maintenance services (other than contracts to operate a Government motor pool or similar facility);

(B) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services);

(C) Contracts with hotels/motels for conferences, including lodging and/or meals which are part of the contract for the conference (which shall not include ongoing contracts for lodging on an as needed or continuing basis);

(D) Maintenance, calibration, repair and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in § 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis;

(E) Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services);

(F) Real estate services, including real property appraisal services, related to housing federal agencies or disposing of real property owned by the Federal Government; and

(G) Relocation services, including services of real estate brokers and appraisers, to assist federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

(ii) The exemption set forth in this paragraph (e)(2) shall apply to the services listed in paragraph (e)(2)(i) only when all of the following criteria are met:

(A) The services under the prime contract or subcontract are commercial—*i.e.,* they are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

(B) The prime contract or subcontract will be awarded on a sole source basis or the contractor or subcontractor will be selected for award on the basis of other factors in addition to price. In such cases, price must be equal to or less important than the combination of other non-price or cost factors in selecting the contractor.

(C) The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices. An established price is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the contractor or subcontractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(D) Each service employee who will perform services under the Government contract or subcontract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the government contract or subcontract.

(E) The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract or subcontract as the contractor uses for these employees and for equivalent employees servicing commercial customers.

(F) The contracting officer (or prime contractor with respect to a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the requirements in paragraph (e)(2)(ii) of this section. Where the services are currently being performed under contract, the contracting officer or prime contractor shall consider the practices of the existing contractor in making a determination regarding the requirements in paragraph (e)(2)(ii). If upon receipt of offers, the contracting officer finds that he or she did not correctly determine that all or nearly all offerors would meet the requirements, the Service Contract Act shall apply to the procurement, even if the successful offeror has certified in accordance with paragraph (e)(2)(ii)(G) of this section.

(G) The contractor certifies in the prime contract or subcontract, as applicable, to the provisions in paragraph (e)(2)(ii)(A) and (C) through (E) of this section. Certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the prime contract or subcontract.

(iii)(A) If the Administrator determines after award of the prime contract that any of the requirements in paragraph (e)(2) for exemption has not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the corrective procedures in § 4.5(c)(2) shall be followed.

(B) The prime contractor is responsible for compliance with the requirements of the Service Contract Act by its subcontractors, including compliance with all of the requirements of this exemption (see § 4.114(b)). If the Department of Labor determines that any of the requirements in paragraph (e)(2) for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable, and the prime contractor may be responsible for compliance with the Act, as of the date of contract award.

(iv) The exemption set forth in this paragraph (e)(2) does not apply to solicitations and contracts:

(A) Entered into under the Javits-Wagner-O'Day Act, 41 U.S.C. 47;

(B) For the operation of a Government facility or portion thereof (but may be applicable to subcontracts for services set forth in paragraph (e)(2)(ii) that meet all of the criteria of paragraph (e)(2)(ii)); or

(C) Subject to section 4(c) of the Service Contract Act, as well as any

options or extensions under such contract.

Signed at Washington, DC, on this 11th day of January, 2001.

T. Michael Kerr,

Administrator, Wage and Hour Division.

[FR Doc. 01–1337 Filed 1–17–01; 8:45 am]

BILLING CODE 4510–27–P