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Recovering the Costs of DoL Wage Increases Under the Service Contract Act

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I. INTRODUCTION

In 1990, the United States Government purchased more goods than services.\(^1\) By 1995, however, the tables had turned, as the Government purchased eighty billion dollars worth of services, but only sixty-five billion dollars worth of goods.\(^2\) Moreover, by 1996, total Government spending on commercial support service contracts had exceeded \$114 billion.\(^3\) As might be expected, the growth of service contracting is directly related to federal downsizing.\(^4\) In 1990, the federal civilian workforce was approximately 2.25 million, whereas it stood at approximately 1.9 million in 1996.\(^5\) Accordingly, the ABA’s Section of Public Contract Law recently observed that “service contracting is booming.”\(^6\) The ABA further

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noted that "[s]pending on services will continue to outstrip all other spending well beyond the year 2000." Consequently, it is important for virtually any labor lawyer—or Government contracts lawyer—to understand the special rules and regulations that apply to federal service contracting.

As in commercial contracting, the terms and conditions of Government contracts are largely established by the parties to the contract. Service contracts are one significant exception, however, because a third party—the Department of Labor ("DoL")—may dictate the minimum wages that a contractor must pay its employees. The ability of a non-party to modify the payment terms of a contract poses an inherent risk to both the contractor and the Government, and provides fertile ground for contract disputes.

This article examines the relationship between the DoL and the parties to service contracts and the allocation of risk between the parties concerning labor cost increases effectuated by the DoL. The article begins with an overview of the Service Contract Act ("SCA") and a description of the process by which the DoL determines the wage rates applicable to employees under Government contracts. Next, it discusses the means by which contractors have recovered their labor cost increases through contractual remedy-granting clauses. Finally, the article considers the various common law theories of recovery that contractors have used to convince the courts and boards of contract appeals to grant relief.

II. OVERVIEW OF THE SERVICE CONTRACT ACT

In 1965, Congress enacted the SCA to provide wage and safety protection for the growing number of employees working under service contracts with the United States Government. Under the SCA, employees of service contractors must be paid wages and fringe benefits that are no less than the 'prevailing' wages and fringe benefits paid to private and public sector employees in the

7. CONFERENCE BROCHURE, supra note 1.
same locality who perform similar work. Also, starting in 1972, the SCA prohibited successor contractors from paying their employees less than the wages and fringe benefits provided under the collective bargaining agreement ("CBA") of the predecessor contractor, if the previous agreement was the product of arms-length negotiations.

The DoL's Wage and Hour Division makes the determination of the "prevailing wage" as to specific positions or "classes" of employees for a particular contract, consistent with the prevailing market rates in the particular locality in which the contract will be performed.

The SCA applies to Federal Government and District of Columbia contracts in excess of $2,500 performed inside the United States. To fall within the coverage of the SCA, the "principal purpose" of a contract must be to furnish services.

The DoL will generally determine a contract's primary purpose by examining the facts and circumstances of a particular case, with an emphasis on the primary contract functions, as opposed to any secondary functions.

13. See id. However, there are exceptions. These are:
   (a) Any contract for construction, alteration, or repair of public buildings, including painting and decorating; [the Davis Bacon Act typically applies to construction contracts];
   (b) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. §§ 35-45 (1994));
   (c) Any contract for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;
   (d) Any contract for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;
   (e) Any contract for public utility services;
   (f) Any employment contract providing for direct services to a Federal agency by an individual or individuals; or
   (g) Any contract for operating postal contract states for the U.S. Postal Service.

FAR 22.1003-3 (1993); see 41 U.S.C. § 356 (1994); 29 C.F.R. § 4.115 (1997). Apart from the foregoing statutory exemptions, FAR 22.1003-4 lists several other exemptions, most of which deal with mail service.
15. See generally 29 C.F.R. § 4.131 (1997) (providing examples of contracts whose "principal purpose" is to provide services).
III. DoL Wage Determinations

The DoL Wage and Hour Division has been delegated the duty of establishing wage determinations as they relate to monetary wages and fringe benefits for particular positions under a given contract. The DoL generally makes three types of wage decisions: (1) prevailing wage determinations; (2) determinations based upon applicable CBAs; and (3) determinations based upon contractor wage conformance requests.

A. The Wage Determination Process

The contracting agency is responsible for the initiation of the wage determination process. The Contracting Officer is required to submit the DoL Standard Forms 98 and 98a titled “Notice of Intention To Make a Service Contract and Response to Notice” (“SF-98”) not more than 60 days prior to or 120 days after the issuance of a solicitation, modification, or extension (in cases where added scope significantly affects contractor labor requirements) under an SCA-covered contract. The DoL utilizes the SF-98 as the primary means to determine the employee and wage classifications required under the contract. At a minimum, the SF-98 must list: (1) the number and classes of service employees expected to be employed under the contract; and (2) the wage rates and fringe benefits that would be paid by the Government to each class. To determine the positions and titles to be included in the SF-98, the Contracting Officer must consult the DoL’s Service Contract Directory of Occupations.

After receiving the SF-98, the DoL issues either a new or revised wage determination applicable to the particular locality in which the contract will be performed. The Contracting Officer must incorporate the wage determination into the solicitation before it is issued.

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16. See infra notes 18-26 and accompanying text.
18. See id. § 4.4. For a detailed discussion of the wage determination process, see Fontana, supra note 9, at 495-505.
20. See id. § 4.4(b).
22. See 29 C.F.R. § 4.54(c) (1997).
issued, and into the resulting contract.\textsuperscript{23} Any interested party, including the contracting agency, prospective contractors, or employees, may challenge the propriety of the wage determination before the Wage and Hour Division.\textsuperscript{24} Upon issuance of an adverse decision by the Wage and Hour Division, the party has a right to appeal to the Board of Service Contract Appeals, which issues the final decision of the DoL.\textsuperscript{25} This decision, in turn, is reviewable in federal district court in accordance with the standards of the Administrative Procedure Act ("APA").\textsuperscript{26}

\section*{B. Collective Bargaining Agreements}

Where there is a predecessor contract and the incumbent contractor had a CBA, the SCA prohibits the successor contractor from paying its employees less than the wages and fringe benefits provided under the previous agreement.\textsuperscript{27} Thus, to ensure compliance with the SCA, the Contracting Officer should determine early in the acquisition cycle whether there was a predecessor contract

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\footnotesize
\textsuperscript{23} See id. § 4.55(c).
\textsuperscript{24} See id. § 4.56(a)(1).
\textsuperscript{25} See id. § 4.56(b).
\textsuperscript{26} 5 U.S.C. §§ 701-706 (1994). For a general discussion of the APA, see \textsc{Kenneth Davis \& Richard Pierce, Administrative Law} (3d ed. 1994); \textsc{Jerry Mashaw et al., Administrative Law: The American Public Law System} (3d ed. 1992). The scope of review under the APA is as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

\ldots

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; \ldots


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and whether the incumbent contractor and its service employees had a CBA.\footnote{See FAR 22.1008-3(b) (1997).}

To the extent that a CBA exists, the Contracting Officer must further determine whether: (1) the services to be furnished under the proposed contract will be substantially the same as those being furnished by the incumbent contractor; and (2) the services will be performed in the same locality.\footnote{See 29 C.F.R. § 4.1b(a) (1997); FAR 22.1008-3(b).} If the answer to both of these inquiries is affirmative, the SCA generally provides that the prior CBA will operate as the prevailing wage determination for the succeeding contract and, thus, the successor contractor will be bound by the terms of the prior CBA for the first year of the contract.\footnote{See 29 C.F.R. §4.1b(a).}

This general rule does not apply, however, if the Contracting Officer determines that the incumbent contractor entered into the CBA for the first time after award of the existing contract, and the agreement does not become effective until after the expiration of the incumbent’s contract.\footnote{See id. § 4.1b(b).} Moreover, if the incumbent contractor enters into a new or revised CBA during the period of the performance on an existing contract, the terms of the new or revised CBA will not become effective upon the successor contract where: (1) in a sealed bidding, the contracting agency receives notice of the terms of the CBA less than ten days prior to bid opening and finds that there is not reasonable time still available to notify all the bidders;\footnote{See FAR 22.1008-3(c)(2)(i)(A) (1997).} or (2) in all other contractual actions, the contracting agency receives notice of the terms of the CBA after award, where the start of performance is within thirty days of award.\footnote{See 29 C.F.R. § 4.1b(b)(2); FAR 22.1008-3(c)(2)(i)(B) (1997); see Raytheon Serv. Co., ASBCA Nos. 28721 et al., 86-3 BCA ¶ 19,094.}

Where the CBA satisfies all preliminary requirements, the Contracting Officer must submit a copy of each CBA and any related documents to the DoL together with the SF-98 Notice.\footnote{See FAR 22.1008-3(d) (1997).} After receipt of the CBAs, however, the DoL may later find the CBAs inapplicable if it determines that: (1) the wages and benefits in the predecessor CBA are substantially at variance with those that pre-
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vail for services of similar character in the locality;\textsuperscript{35} or (2) the wages and fringe benefits of the predecessor’s contractor’s CBA were not the result of arms length negotiations.\textsuperscript{36}

\textbf{C. Determinations Based Upon Wage Conformance Requests Process}

Contractors are often faced with instances in which a particular class of service employee is not listed or does not precisely correspond to any of the worker classifications contained in the DoL wage determination. In these situations, the Contracting Officer must direct the contractor to submit a conformance request to classify the unlisted categories of service employees "so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed on the wage determination."\textsuperscript{37} The conformance request must be contained in an SF 1444, “Request for Authorization of Additional Classification and Rate,” (“SF 1444”) and must include the proposed list of employee classifications to be conformed, detailed job descriptions, wage rates, and justification for the proposed classifications.\textsuperscript{38} The contractor must submit the SF 1444 conformance request before the unlisted classes of employees begin work.\textsuperscript{39} In turn, the Contracting Officer must promptly review the SF 1444 conformance request, submit a report on the proposed action recommending approval or rejection of the new classification to the

\textsuperscript{35} Such a finding can be made only after a hearing. See 29 C.F.R. § 4.10 (1997). In order to request a hearing, the interested party must submit a statement setting forth why, among other things, it believes that a substantial variance exists regarding some or all of the wage and/or fringe benefits. See id. § 4.10(b)(c). The Administrator will only grant a hearing if his or her review determines that there may be a substantial variance. See id. § 4.10(b)(D)(2).

\textsuperscript{36} See 29 C.F.R. § 4.1b(a); FAR 22.1008-3(e) (1997). For a case discussing the significance of arms-length negotiations, see Trinity Servs., Inc. v. Marshall, 593 F.2d 1250 (D.C. Cir. 1978). Moreover, sometimes a CBA has a provision that increases wages or benefits upon the occurrence of a contingency, i.e., the issuance of a wage determination. In 1992, because of what it understood to be an increase in the number of such CBAs, the Wage and Hour Division issued a policy memorandum stating that such provisions did not result from arms-length bargaining. See DoL Wage and Hour Division, Acting Administrator Mem., No. 159, (Jan. 21, 1992). For the process regarding arm's length proceedings, see 29 C.F.R. § 4.11 (1997).

\textsuperscript{37} 29 C.F.R. § 4.6(b)(2)(i).

\textsuperscript{38} See FAR 53.301-1444 (1997); FAR 22.1019(a) (1995).

\textsuperscript{39} See 29 C.F.R. § 4.6(b)(2)(ii) (1997); FAR 22.1019(a).
Wage and Hour Division.\textsuperscript{40} The Wage and Hour Division will approve, modify or reject the SF 1444 conformance request within thirty days of receipt, or will notify the Contracting Officer within thirty days of receipt if additional time to render the decision is necessary.\textsuperscript{41}

Like the issuance of a wage determination, a Wage and Hour Division decision denying or modifying a conformance request may be appealed to the Board of Service Contract Appeals, and the resulting decision may be challenged in federal district court pursuant to the APA.\textsuperscript{42} The Wage and Hour Division's final determination on a conformance request is retroactive to the date the proposed class of employees commenced work.\textsuperscript{43}

\section*{IV. RECOVERY OF INCREASED WAGES AND BENEFITS}

As a third party to Government service contracts, the DoL can interject considerable uncertainty into contract performance. For example, the DoL may issue a revised wage determination increasing wages for the base or option years of a contract or render a conformance decision many months, or even years, after contract performance has commenced.\textsuperscript{44} A revised wage determination applicable to the base or option years of a contract may result in higher costs to the contractor in the form of additional wages, taxes, pension costs, number of paid vacation days, and other enhanced fringe benefits.\textsuperscript{45} Similarly, the denial of a conformance request may result in higher contract costs where the DoL requires the contractor to compensate employees at a rate higher than anticipated at award.\textsuperscript{46} The Federal Acquisition Regulation ("FAR"), however, prohibits service contractors from including contingencies in their proposals to cover unforeseen labor cost increases.\textsuperscript{47} When

\begin{itemize}
\item \textsuperscript{40} See id.
\item \textsuperscript{41} See id.
\item \textsuperscript{42} See supra notes 25-26 and accompanying text.
\item \textsuperscript{43} See 29 C.F.R. § 4.6(c) (1997).
\item \textsuperscript{44} See, e.g., Lockheed Support Sys., Inc. v. United States, 36 Fed. Cl. 424 (Ct. Cl. 1996) (DoL issued a revised wage determination); Burnside-Ott Aviation Training Ctr. v. United States, 985 F.2d 1574, 1575-76 (Fed. Cir. 1993) (DoL issued a conformance decision after commencement of contract performance).
\item \textsuperscript{45} See Lockheed, 36 Fed. Cl. at 427.
\item \textsuperscript{46} See Burnside-Ott, 985 F.2d at 1576.
\item \textsuperscript{47} See FAR 52.222-43(b) (1997). This provision states: "The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this contract." Id.
\end{itemize}
faced with higher wage rates and fringe benefits, contractors have two primary avenues of recovery: (1) the Price Adjustment Clause; and (2) "common law" theories, such as constructive change, mutual mistake, superior knowledge, and equitable estoppel.48

A. Jurisdictional Issues

Under the Contract Disputes Act ("CDA"),49 the courts and boards of contract appeals have jurisdiction to consider certain claims for increased contractor costs resulting from DoL wage decisions. However, that jurisdiction is limited. Specifically, courts and boards do not have the authority to adjudicate direct challenges to the validity of a DoL wage determination or conformance decision and, therefore, will not consider claims disputing the correctness of the DoL determinations.50 Rather, as stated previously, any challenge to the propriety of a particular wage determination or conformance decision must be brought before the DoL itself.51 Once the contractor has exhausted its administrative remedies before the DoL, and if the DoL ultimately determines that the wage determination or conformance decision was proper, the contractor must pay its employees the new wages or fringe benefits specified by the DoL wage decision, but can submit a CDA claim for its increased costs under the contract resulting from the increase in pay or benefits.52

Burnside-Ott Naval Aviation Training Center v. United States,53 which involved Navy contracts for helicopter maintenance services, is such a case. Burnside-Ott employed both aircraft workers and technicians to perform its contracts.54 The Contracting Officer incorporated a DoL wage determination into one of the contracts,

48. See, e.g., Burnside-Ott, 985 F.2d at 1576.
52. See Burnside-Ott, 985 F.2d at 1580; ASI Sys. Int'l, ASBCA No. 46001, 95-1 BCA ¶ 27,540.
53. 985 F.2d 1574 (Fed. Cir. 1993).
54. See id. at 1575.
which included wage classifications for both aircraft workers and technicians.\textsuperscript{55} During performance of the contract, several of Burnside-Ott's technicians submitted a complaint to the DoL regarding their being classified as technicians.\textsuperscript{56} Burnside-Ott eventually submitted a conformance request to the DoL.\textsuperscript{57} In the meantime, the DoL issued new wage determinations, which did not include a classification for technicians.\textsuperscript{58}

Shortly thereafter, the DoL rejected the conformance request, ordering that the technicians be reclassified as aircraft workers.\textsuperscript{59} Burnside-Ott then submitted a petition for review of the ruling.\textsuperscript{60} The Deputy Secretary of Labor upheld the DoL's decision.\textsuperscript{61} Accordingly, having exhausted its administrative remedies, Burnside-Ott submitted a claim for an equitable adjustment to the Contracting Officer seeking to be compensated for the increased costs associated with higher wage rates.\textsuperscript{62} The Contracting Officer denied the claim, which allowed Burnside-Ott to file suit in the U.S. Claims Court pursuant to the CDA.\textsuperscript{63} The Claims Court, relying on \textit{Emerald Maintenance, Inc. v. United States},\textsuperscript{64} determined that it lacked jurisdiction.\textsuperscript{65} On appeal, however, the Federal Circuit disagreed. The Federal Circuit determined that Burnside-Ott was seeking its increased costs rather than challenging the decision itself.\textsuperscript{66} The Court observed that, "the contractor simply requests the Claims Court to determine the effect that the DOL's classification has on its contract rights."\textsuperscript{67} Moreover, the Federal Circuit noted that just because a case originates as the result of a DoL determination "does not necessarily mean that Burnside-Ott's claim arose exclusively out of the labor standards provision of the contract."\textsuperscript{68}

\textsuperscript{55} See id. at 1576.
\textsuperscript{56} See id.
\textsuperscript{57} See Burnside-Ott, 985 F.2d at 1576.
\textsuperscript{58} See id.
\textsuperscript{59} See id.
\textsuperscript{60} See id.
\textsuperscript{61} See id.
\textsuperscript{62} See Burnside-Ott, 985 F.2d at 1576.
\textsuperscript{63} See id.
\textsuperscript{64} 925 F.2d 1425 (Fed. Cir. 1991).
\textsuperscript{66} See Burnside-Ott, 985 F.2d at 1580.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
On the other hand, in *Emerald Maintenance*, the contractor had received a DoL ruling indicating that it had improperly classified roofer employees and therefore had to pay those employees higher wages. The contractor failed to challenge the DoL ruling administratively and did not pay the higher wages. Instead, it submitted a claim directly to the Contracting Officer. The Contracting Officer denied the claim, and the contractor appealed to the Armed Services Board of Contract Appeals ("ASBCA"), which dismissed several counts due to lack of subject matter jurisdiction. On appeal to the Federal Circuit, the contractor argued that the "Disputes Concerning Labor Standards" provision of the contract did not carve out an exception to the CDA, which grants courts and boards jurisdiction over disputes arising out of Government contracts.

In considering the contractor's appeal, the Federal Circuit framed the issue as whether or not the problem before it "[arose] out of the labor standards [provision]." Specifically, the Court stated:

"However Emerald chooses to style its complaint, whether as a defective specification or a misrepresentation, the essence of its complaint relates to the wage rate it had to pay all workers doing roofing work, and the listing of job categories and wage rates in the contracts is surely one of the labor standards provisions. The dispute here thus "arises out of" the labor standards provisions of the contracts, and the Disputes provisions requires that it be resolved by Labor."
Accordingly, the differing results in *Burnside-Ott* and *Emerald Maintenance* clearly demonstrate that it is crucial for a contractor to exhaust all administrative remedies before pursuing a CDA claim. That means that a service contractor must bring its dispute before the DoL itself prior to going to a court or board. Second, when a contractor goes to a court or board, it must do so to seek compensation for increased costs associated with the DoL's determination rather than to challenge the actual correctness of the wage determination that gave rise to such increased costs.

B. Remedies Under the Price Adjustment Clause

In order to prevent contractors from assuming open-ended risks associated with DoL determinations in contract "out years," the Government established the "Fair Labor Standards Act and Service Contract Act - Price Adjustment" Clause ("Price Adjustment Clause") for inclusion in all fixed-price SCA contracts. The Price Adjustment Clause provides in pertinent part:

The contract price or contract unit price labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with—

(1) An increased or decreased wage determination applied to this contract by operation of law. . . .

In promulgating the Price Adjustment Clause, the drafters realized that, at the time of bidding, a contractor cannot predict its labor costs with reasonable accuracy for the option years of the contract. The drafters of the Price Adjustment Clause sought to eliminate the potential for contractors to underestimate or overestimate these future costs by prohibiting the inclusion of contingency costs in contract proposals for the option years. In return, the drafters provided a mandatory adjustment for "increases or decreases of wages or fringe benefits made by a contractor as a result of Department of Labor determinations" in the contract option years.

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78. See FAR 52.222-44 (1997).
79. *Id.*
80. See Memorandum to Chairman, ASPR Committee: ASPR 7-107(d) “Price Adjustment Clause” 1 (Oct. 22, 1969).
81. See Memorandum to Chairman, ASPR Committee: ASPR § 7-107(d) “Price Adjustment Clause” (June 16, 1969).
82. See *Id.*
Accordingly, the Price Adjustment Clause is intended to cover increases or decreases in wages or fringe benefits resulting from: (1) revisions in minimum wage rates applied to the contract by operation of law; and (2) revisions in wage determinations in connection with the exercise of a contract option or extension of a multi-year contract. Thus, the Price Adjustment Clause generally is applicable only to revised wage determinations effective for the option years of the contract and is not applicable to the base years of a contract in determining which positions and titles are to be included in the SF-98. Consequently, contractors cannot recover under the Price Adjustment Clause for increased contract costs resulting from wage decisions applicable to the base year of a contract.

Second, the wage determination must result in an “increase” in the wages or fringe benefits of the employees working under the contract. Although this may seem self-evident, the implication of this requirement is important in the context of wage conformance requests. For example, in *International Service Corp.*, the invitation for bids set forth certain worker classifications not included in the DoL wage determination applicable to the contract. The contractor submitted a conformance request and the DoL issued a decision applying higher wage rates to the classifications proposed by the contractor. The Board denied the contractor its additional labor costs, noting that the conformance decision was an “initial” wage rate, rather than an “increased” wage rate compensable under the Price Adjustment clause. Recovery for additional costs resulting from DoL conformance decisions will be more fully discussed below.

If a DoL determination is compensable under the Price Adjustment Clause, a contractor is entitled solely to recovery of increased wage rate costs, including vacation pay, social security, unemployment taxes, and workers’ compensation insurance. A contractor

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83. See FAR 22.1006(c)(3) (1997).
86. ASBCA No. 20971, 77-1 BCA ¶ 12,396 (1977).
87. See *id.* at 60,044.
88. See *id.*
89. See *infra* Part IV. C.
90. See FAR 52.222-44(d) (1997). See, e.g., United States v. Serv. Ventures, 899 F.2d 1 (Fed. Cir. 1990) (holding that a contractor may recover vacation pay).
is not entitled to recovery of additional general and administrative costs, overhead, or profit associated with the increased wage determination.91

As stated previously, the Price Adjustment clause provides compensation for increased wage determinations. However, when the wage determination included in a contract either omits one or more classifications that the contractor intends to employ or when the employee’s duties or skills do not reasonably relate to one of the listed classifications, a conformance determination is warranted.92 Recovery for a conformance determination, as opposed to an increased wage determination, is more problematic.

Courts and boards frequently have held that a prerequisite to recovery under the Price Adjustment Clause is a change in the minimum wages and benefits.93 Following this logic, board and court decisions have established two paradigms regarding wage conformance requests. In the first instance, if the DoL denies the contractor’s conformance request and determines that the work required for the proposed employee category comes within an existing classification already contained in the wage determination, then the contractor cannot recover for the increased costs.94 In such instances, the boards have concluded that there is no increase in the “mandated minimum wages” and hence no increased wage determination within the meaning of the Price Adjustment Clause.95 By

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91. See FAR 52.222-44(d) (1997).
92. See 29 CFR § 4.6(b)(2) (1997); Burnside-Ott Naval Aviation Training Ctr. v. United States, 985 F.2d 1574, 1586, n.2 (Fed. Cir. 1993).
94. See Holmes & Narver, 93-3 BCA ¶ 26,246; Johnson Controls World Servs., ASBCA Nos. 40233, 47885, 96-2 BCA ¶ 28,458. For instance, in Johnson Controls, the Request for Proposals (“RFP”) explicitly noted that the wage determination included with the RFP did not include all of the labor classifications required to perform the contract. See Johnson Controls, 96-2 BCA ¶ 28,458, at 142,136-37. The RFP then placed the burden on the offerors to submit job classifications and wages for the various employees required to perform the contract but not included in the wage determination. See id. Johnson Controls was awarded the contract. See id. at 142,138. However, the DoL rejected several of the labor classifications proposed by Johnson Controls in its offer. See id. at 142,138-39. As a result, Johnson Controls was forced to pay many of its service employees at a rate higher than that included in its offer. See id. However, the ASBCA denied Johnson Controls’ claim for an equitable adjustment under the Price Adjustment Clause because it determined that there was no change in the mandated minimum wages under the contract. See id. at 142,143.
95. See Johnson Controls, 96-2 BCA ¶ 28,458.
contrast, a wage conformance decision that provides for an entirely new employee classification generally will be recoverable under the Price Adjustment Clause, because the DoL has in essence added a new and increased wage rate to the wage determination.96

C. Common Law Remedies

The Price Adjustment clause is not the only means of recovery for a contractor that has incurred increased contract costs as a result of a DoL wage determination or denial of a wage conformance request. As an alternative, contractors faced with increased labor costs can pursue various common law remedies, such as contract change, superior knowledge, mutual mistake and equitable estoppel.97 These common law remedies can often provide a contractor with the same adjustment in the contract price as the Price Adjustment Clause.98 Moreover, remedies under these common law theories can extend to wage determinations affecting a contract’s base year as well as its option years.99 Thus, even if a wage determination revises the wages in the base year of a contract, the contractor can proceed under the Changes Clause to recoup any increased costs.100 Furthermore, the contractor may recover its indirect as well as its direct costs.101 Moreover, because the courts and boards that have denied recovery for increased contract costs resulting from a wage conformance request have based their decisions on pure contract interpretation,102 it would seem that the dichotomy between wage determinations and wage conformance requests would not be applicable when a contractor bases its theory of recovery on one of the common law remedies.

1. Changes Clause Recovery

A change to a contract can occur when the Contracting Officer directs changes to either the scope of the work under the contract,

96. See Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714.
97. For a general discussion of these theories, with exception of contract changes, see E. Allen Farnsworth, Contracts (2d ed. 1990).
100. See id. at 428.
101. See id. at 430.
or increases or decreases the contract price by issuing a formal change order.\textsuperscript{103} As described above, wage decisions are not automatically incorporated into a contract.\textsuperscript{104} Rather, the Contracting Officer must incorporate a wage determination or decision as to a wage conformance request into the contract through a formal modification.\textsuperscript{105} Such direction by the Contracting Officer can be characterized as a formal change to the contract in that the decision has resulted in an increase in the price of the contract for the contractor.\textsuperscript{106}

Courts have stated that, as a prerequisite to the treatment of a wage decision as a contract change, two elements must be satisfied: (1) the contractor must give the Contracting Officer written notice stating the date, circumstances, and source of the order, and (2) the contractor must affirmatively state to the Contracting Officer that the contractor regards the order implementing the wage decision as a change order.\textsuperscript{107}

In \textit{Lockheed Support Systems}, the contractor entered into four contracts with the Postal Service that were governed by the SCA.\textsuperscript{108} When the contracts were in their pre-production phase, Lockheed contacted the Contracting Officer regarding what it believed was an inaccurate wage determination.\textsuperscript{109} The Contracting Officer informed Lockheed that it had to pursue its claims with the DoL.\textsuperscript{110} The DoL eventually sent a letter to the Contracting Officer enclosing revised wage determinations, which the DoL stated had to be incorporated into the contract.\textsuperscript{111}

In \textit{Lockheed}, the Contracting Officer issued unilateral modifications to each of the four contracts.\textsuperscript{112} The contractor informed the Contracting Officer that it would have difficulty performing because of the increased costs.\textsuperscript{113} Therefore, the contractor and the Government eventually entered into bilateral modifications to the

\textsuperscript{103} See Cibinic & Nash, supra note 98, at 429-31.
\textsuperscript{104} See supra notes 22-23 and accompanying text.
\textsuperscript{105} See supra notes 22-23 and accompanying text.
\textsuperscript{106} See Lockheed Support, 36 Fed. Cl. at 429-30.
\textsuperscript{107} See id. at 429.
\textsuperscript{108} See id. at 426.
\textsuperscript{109} See id.
\textsuperscript{110} See id.
\textsuperscript{111} See Lockheed Support, 36 Fed. Cl. at 426.
\textsuperscript{112} See id. at 427.
\textsuperscript{113} See id.
contracts that would compensate the contractor for the direct cost increases associated with the new wage determinations.\textsuperscript{114} However, the modification did not cover general and administrative costs ("G&A"), overhead, and profit.\textsuperscript{115} Accordingly, the contractor requested that there be additional modifications to cover these indirect costs.\textsuperscript{116} The Contracting Officer denied this request, relying on the Price Adjustment Clause.\textsuperscript{117} The contractor then sent four letters to the Contracting Officer claiming that it was entitled to an additional sum of $639,142.56 for the indirect costs.\textsuperscript{118} The Contracting Officer issued final decisions that denied these claims.\textsuperscript{119} In the Court of Federal Claims, the contractor successfully argued that the Price Adjustment Clause did not apply to revisions for contracts during their base period.\textsuperscript{120} Specifically, the contractor argued that the wage revisions made during the base period were subject to the changes clause, which therefore allowed it to recover for G&A, overhead and profit.\textsuperscript{121} The Court agreed, stating: "[W]age revisions made outside the Price Adjustment Clause are not prohibited. Rather such wage revisions are governed by the Changes Clause, and not subject to the recovery limits found in the Price Adjustment Clause."\textsuperscript{122} Thus, because the contractor had provided the Government with adequate notice of the change, the Court granted summary judgment in the contractor's favor.

\begin{itemize}
\item \textsuperscript{114} See id.
\item \textsuperscript{115} See id.
\item \textsuperscript{116} See Lockheed Support, 36 Fed. Cl. at 427.
\item \textsuperscript{117} See id.
\item \textsuperscript{118} See id.
\item \textsuperscript{119} See id.
\item \textsuperscript{120} See id. at 428.
\item \textsuperscript{121} See Lockheed Support, 36 Fed. Cl. at 428.
\item \textsuperscript{122} Id. at 429. In discussing the issue, the court noted that the Price Adjustment Clause covers the following adjustments: "(1) at the beginning of renewal option period; (2) when an increased or decreased wage determination 'is otherwise applied to this contract'; or (3) when the FLSA is amended after the defendant awards the contract." \textit{Id.} at 428. In \textit{Lockheed}, the Government had contended that the wage revision "otherwise applied to this contract." \textit{Id.} However, the court rejected this argument by noting that "such an interpretation sweeps within its scope the third provision, which covers wage revisions resulting from future amendments to the FLSA.” \textit{Id.}
\end{itemize}
2. Superior Knowledge

A superior knowledge claim may be available to a contractor in instances when contracting officials may be aware of prior DoL wage determinations that may be instructive for a contractor in determining whether the DoL may affirm or deny a wage conformance request under a contract that does not have a classification for every employee required for performance of the contract. However, because several decisions have held that a contracting agency is not required to disclose information pertaining to prior wage determinations or conformance decisions, even when confronted with a direct request by the contractor for such information, the viability of such a claim is tenuous.123

To establish a claim based on superior knowledge, a contractor must prove that:

(1) it undertook to perform the contract without vital knowledge of a fact that affects performance costs or direction, (2) the Government was aware the contractor had no knowledge of and had no reason to obtain the information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the Government failed to provide the relevant information.124

A contracting agency may have a duty to disclose information, and therefore a claim based on superior knowledge may succeed, if the contracting agency has misled the contractor in some way.125 For instance, Ralph Construction, Inc.126 involved a solicitation that included the applicable wage determination, which did not have a wage rate for Trouble Desk/Operator/Clerk-Dispatcher.127 However, the solicitation did include Federal Wage Board and General

125. See Ralph Constr., Inc., ASBCA No. 35633, 88-2 BCA ¶ 20,731; Johnson Controls, 96-2 BCA ¶ 28,458.
126. ASBCA No. 35633, 88-2 BCA ¶ 20,731.
127. See id. at 104,751.
Schedule wages and fringe benefits applicable to the classes of employees expected to be employed under the contract. This provision listed Trouble Desk/Operator/Clerk-Dispatcher and specified a minimum wage rate of $7.14 per hour. The contractor used this rate as an estimate for its bid. The ASBCA raised the possibility that the contracting agency would have a duty to disclose to an offeror that a wage rate included in a solicitation for a class of employees was not an accurate basis for computing the applicable wage for this class of employees because the Agency knew that there had been a prior wage determination specifying a higher wage.

However, in Johnson Controls World Services, Inc., the ASBCA rejected the contractor's arguments relating to superior knowledge. In Johnson Controls, the contractor's appeal arose from its claim for increased costs associated with a wage determination. The contractor sought to recover on the ground that the Government did not disclose its superior knowledge of a DoL non-conformance determination on an earlier contract. However, the RFP clearly identified contract provisions that, in the Board's view, "clearly placed offerors on notice of the prominent role that the DoL plays in determinations under the Service Contract Act." In denying the contractor's common law theory, the ASBCA stated that a contractor cannot base a claim on superior knowledge when the contractor has ready access to the information in question.

3. Equitable Estoppel

Certain courts have raised the possibility that if a contracting agency does provide clarification of a wage determination in a manner that suggests that a particular employee comes within a particular classification, the agency may be estopped from denying a claim with respect to whether the employee fell within that classifica-

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128. See id.
129. See id. at 104,750.
130. See id. at 104,751.
131. See id. at 104,759-60.
132. See 96-2 BCA ¶ 28,458, at 142,140.
133. See id.
134. See id. at 142,134.
135. See id. at 142,133-34.
136. Id. at 142,141.
137. See id. at 142,140.
Because a claim for an adjustment to the contract is based on a right to payment under a contract, the Supreme Court's decision in *Office of Personnel Management v. Richmond*, holding that equitable estoppel is not available against the Government on claims for the payment of money from the Treasury contrary to a statutory appropriation, is not applicable.  

Under standard Government contracts principles, the Government official who made the representation and on whom the contractor relies for its equitable estoppel claim, must have had the authority to make the representation in the first instance.  

There is the question of whether, because the authority to make wage determinations and wage conformance decisions resides with the DoL, the Contracting Officer has the authority to make representations of whether certain employees under a contract come within a particular wage classification. However, if the Contracting Officer were to make representations as to whether prior wage determinations by the DoL classified certain employees under a contract within certain wage classifications, it is arguable that the contracting agency would be estopped to deny this representation because the contracting agency is simply making representations as to prior factual occurrences.

### 4. Mutual Mistake

A mutual mistake of fact occurs where both parties to a contract, at the time the contract was entered into, are mistaken as to a basic assumption on which the contract was made and the mistake has a

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138.   *See* Collins Int'l Serv. Co. v. United States, 744 F.2d 812, 815 (Fed. Cir. 1984) ("If the Navy had taken a position on the classifications, it could later have been accused of misleading the contractor . . . or the Navy could even have been estopped from thrusting the burden of its incorrect classification back to the contractor.").


140.  *See id.* at 434; *see also* Burnside-Ott Naval Aviation Training Ctr. v. United States, 985 F.2d 1574, 1581 (Fed. Cir. 1993) (concerning the applicability of equitable estoppel).

141. *See* Broad Avenue Laundry & Tailoring, ASBCA No. 25163, 81-1 BCA ¶ 14,895.  

*Broad Avenue* contains a particularly detailed discussion of the applicability of estoppel to the Government. For additional discussion of estoppel in the Government context, see *Shotwell v. United States*, 163 F. Supp. 907, 915 (1958) ("The Government is not subject to estoppel on the same basis as a private person. There must be authority in the Government agency and he must act within the scope of that authority."); *George H. Whike Contr. Co. v. United States*, 140 F. Supp. 560 (Ct. Cl. 1956).
material effect on the agreed-upon exchange of performances.\textsuperscript{142} Obviously, then, this is an available remedy for a contractor in those instances in which both the contracting agency and the contractor are mistaken as to whether a category of employee falls within a particular classification under a contract. The central question under a claim for mutual mistake will be: which party agreed to assume the risk of mistake?\textsuperscript{143} When relief may be available under the doctrine of mutual mistake due to increased contract costs as a result of an adverse wage decision by the DoL, the mutual mistake doctrine would permit reformation of the contract price to reflect the added labor costs.\textsuperscript{144} 

V. CONCLUSION

As the foregoing analysis has demonstrated, the DoL has the ability to significantly alter the nature of the relationship between the Government and private service contractors. Accordingly, contractors must become aware of the operation of the SCA. If they do so, and follow the appropriate administrative and judicial avenues for relief, then they can largely insulate themselves from unexpected economic consequences that stem from DoL wage decisions. If they do not, they subject themselves to significant risks.


\textsuperscript{143} See Burnside-Ott, 985 F.2d at 1582.

\textsuperscript{144} See id. (citing Restatement (Second) of Contracts § 154). For a good example of a case in which a contractor recovered for mutual mistake of fact regarding Davis-Bacon Act wage rates, see Poirer & McLane Corp. v. United States, 120 F. Supp. 209 (Ct. Cl. 1954).