

SCA Covered or Not? Special Challenges with IDIQ Contracts

February 2020

Federal service contractors face additional challenges when applying the McNamara-O'Hara Service Contract Act (SCA) to indefinite-delivery/indefinite-quantity (IDIQ) contracts. Deciding whether the SCA applies to an order is not always straightforward, especially when the underlying IDIQ contract includes some labor categories subject to the SCA and others that are not. Two Civilian Board of Contract Appeals (CBCA) decisions have drawn focus to these challenges in applying the SCA—and underscore the need to be vigilant in assessing which IDIQ orders, if any, are SCA-covered.

Ordinarily, contractors and contracting agencies each have responsibilities for applying the SCA. U.S. Department of Labor (DOL) regulations and the Federal Acquisition Regulation (FAR) require contracting agencies to determine whether a service contract is covered by the SCA. The contracting agency must refer any questions or uncertainty about SCA application to the agency labor advisor and, if necessary, to the DOL. From there, responsibility shifts to the contractor to identify the appropriate DOL-defined labor categories for their SCA-covered personnel (service employees) and pay at least the corresponding wage rates and prevailing fringe benefits. The CBCA recognized these ground rules in *Sotera Defense Solutions, Inc. v. Department of Agriculture*, CBCA 6029, 6030 (Aug. 29, 2019), a decision we analyzed in a prior newsletter article.

These ground rules can be straightforward for many IDIQ contracts. Most notably, the SCA does not apply to contracts “exclusively” or “essentially” performed by bona fide professional, administrative, and executive employees exempt from the Fair Labor Standards Act (FLSA). So some IDIQ contracts, and their resulting orders, will involve

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only FLSA-exempt or non-exempt personnel—making it clear whether the SCA should apply to individual orders. But other IDIQs might include a mix of FLSA-exempt and non-exempt positions. For orders under these IDIQs, who bears the responsibility to evaluate the labor mix and decide whether the SCA applies to the order? And who bears the risk of cost increases if DOL finds an order was incorrectly treated as not covered?

The CBCA's recent decisions show that the answer may come from the IDIQ contract itself. In *Sotera Defense Solutions*, the contract had a special provision requiring the contracting officer to specify line items for any SCA-covered labor in each task order. See CBCA 6029, 6030 (Aug. 29, 2019). When the contracting officer did not do so for an order, the agency was ultimately responsible for cost increases when DOL ordered the SCA applied to the order.

More recently, a contract H-clause in *Harris IT Services Corporation* required the contractor to notify the agency when task orders would include SCA-covered labor. See CBCA No. 5814, 5815, 5816 (Nov. 1, 2019). Harris did not notify the agency of any SCA-covered personnel for three task orders it had been awarded, but a subcontractor ultimately performed services with SCA-covered personnel on one of the orders. After a DOL investigation, the contracting agency retroactively incorporated wage determinations into the relevant task orders. Harris sought but was denied compensation for these cost increases. Harris argued that the IDIQ contract's H-clause had improperly placed the obligation on the contractor to determine whether the SCA applied to the task orders. The CBCA disagreed, finding that the IDIQ contract had clearly incorporated the SCA obligations, and the H-clause requiring contractor notice of SCA-covered labor "provided an efficient procedure for incorporating wage determinations into the task order in the event the contractor decided to use SCA employees to perform some of the work."

Sotera Defense Solutions and *Harris IT Services* provide timely reminders about how contractors can minimize the risk of noncompliance and unreimbursed costs, as well as claim and litigation costs through proactive contract management:

- **Read the IDIQ and Order Together:** An IDIQ contract's structure adds a layer to contract administration by having two overlapping sets of contract documents imposing obligations on the services being performed. For larger IDIQ contracts, such as GSA Schedule contracts, the contractor team managing the underlying contract may be functionally separate from the team responsible for performing an individual order. But no matter the contract size and team structure, contractors should have a process for reviewing the SCA and labor provisions in the IDIQ and order together. For example, an order awarded without incorporating any SCA clauses could still be SCA-covered if the IDIQ contract incorporates SCA clauses—coverage that may not be apparent from the face of the order documents, alone.
- **Check for SCA Provisions in Unfamiliar Places:** Contractors experienced with SCA-covered contracts will be familiar with the FAR 52.222-41 clause and SCA wage determinations. But *Sotera Defense Solutions* and *Harris IT Services* both involved contract-specific provisions found in Section H of the

contract, which is not an area of the contract that traditionally includes standard SCA terms and conditions. Both cases serve as yet another reminder that contractors need to be vigilant of all terms and conditions throughout the contract, including Section H, when assessing potential SCA obligations. (Notably, SCA coverage is not the only area in which recent litigation has highlighted nuanced Section H obligations that depart from standard FAR or DFARS clauses incorporated into the contract. For example, other recent cases have highlighted a similar trend involving H-clauses governing rights in technical data and computer software.)

- **Monitor the Order Labor Mix:** Many task orders afford contractors flexibility in selecting the labor mix to perform the required services. When this flexibility allows for performing with SCA-covered or non-covered personnel, contractors must track the mix closely to assess whether the SCA should apply to the order. *Harris IT Services* provides a cautionary example: The SCA-covered personnel worked for a subcontractor, and the record indicates the prime contractor was unaware that covered personnel were performing. Monitoring the labor mix is important in other scenarios as well, such as when contractors green their staffs to help manage labor costs over a multi-year task order—which may involve adding new SCA-covered employees to the project.
- **Be Proactive with the Contracting Agency:** When questions arise as to the applicability of the SCA and wage determinations in either the base contract or task orders, don't try to read the tea leaves. Instead, approach the contracting agency to clarify SCA-related obligations as early as possible. And if the agency's response differs from your analysis of SCA application, notify the agency in writing. Taking these steps can help avoid the costs and administrative efforts to apply the SCA mid-performance and potentially retroactively.

While *Harris IT Services Corporation* and *Sotera Defense* provide examples of who must decide whether the SCA applies to particular orders, contractors avoid having to make these arguments at all by ensuring the contract and performance mix are evaluated comprehensively up front.