

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS



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Current through P.L. 105-394, approved 11-13-1998

§ 35. Contracts for materials, etc., exceeding \$10,000; representations and stipulations

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(b) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of forty hours in any one week: Provided, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of section 207 of Title 29;

(c) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of Title 18; and

(d) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(e) Redesignated (d)

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 1, 49 Stat. 2036; May 13, 1942, c. 306, 56 Stat. 277; Pub.L. 90-351, Title I § 819(b), formerly § 827(b), as added Dec. 27, 1979, Pub.L. 96-157, § 2, 93 Stat. 1215, and renumbered Oct. 12, 1984, Pub.L. 98-473, Title II, § 609B(f), 98 Stat. 2093; Nov. 8, 1985, Pub.L. 99-145, Title XII § 1241(b), 99 Stat. 734.)

1999 Pocket Part

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(As amended Oct. 13, 1994, Pub.L. 103-355, Title VII, § 7201(1), 108 Stat. 3378.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1979 Act. Senate Report No. 96-695, see 1979 U.S.Code Cong. and Adm.News, p. 2471.

1985 Act. House Report No. 99-235, see 1985 U.S.Code Cong. and Adm.News, p. 472.

1994 Acts. Senate Report Nos. 103-258 and 103-259, and House Conference Report No. 103-712, see 1994 U.S. Code Cong. and Adm. News, p. 2561.

Amendments

1994 Amendments. Subsec. (a). Pub.L. 103-355, § 7201(1), struck out subsec. (a), which required contracts for materials, etc., exceeding \$10,000, to include representations and stipulations that the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract, and redesignated subsec. (b) as subsec. (a).

Subsecs. (b) to (e). Pub.L. 103-355, § 7201(1), redesignated subsecs. (b) to (e) as subsecs. (a) to (d), respectively.

1985 Amendment. Subsec. (c). Pub.L. 99-145 struck out "eight hours in any one day or in excess of" preceding "forty hours".

1979 Amendment. Subsec. (d). Pub.L. 90-351, § 827(b), as added by 96-157, added provisions relating to convict labor which satisfies the conditions of Section 1761(c) of Title 18.

1942 Amendment. Subsec. (c). Act May 13, 1942, added proviso.

Effective Dates

1994 Acts. Amendment by section 7201(1) of Pub.L. 103-355 effective Oct. 13, 1994, except as otherwise provided, see section 10001 of Pub.L. 103-355, set out as a note under section 251 of this title.

1985 Act. Section 1241(c) of Pub.L. 99-145 provided that: "The amendments made by this section [amending subsec. (c) of this section and section 328 of Title 40, Public Buildings, Property, and Works] shall take effect on January 1, 1986."

Short Title

1936 Act. Section 14, formerly § 12, of Act June 30, 1936, as added Pub.L. 103-355, Title X, § 10005(f)(5), Oct. 13, 1994, 108 Stat. 3409, and renumbered § 14 by Pub.L. 104-106, Div. D, Title XLIII, § 4321(f)(1)(B), Feb. 10, 1996, 110 Stat. 675, provided that: "This Act [enacting this section and sections 36 to 45 of this title] may be cited as the 'Walsh-Healey Act'."

Contracting Authority of Government Agencies in Connection with National Defense Functions

Provisions of sections 35 to 45 of this title as applicable to Government agencies exercising certain contracting authority in connection with national- defense functions, see section 13 of Ex. Ord. No. 10789, set out as a note under section 1431 of Title 50, War and National Defense.

Exceptions and Exemptions

7 F.R. 9399 (amending Exemption Order Apr. 21, 1942, 7 F.R. 3003), which exempted female persons under 18 years of age from the provisions of subsec. (d) of this section, was superseded by 10 F.R. 10438.

Exemptions to Federal Restrictions on Marketability of Prison-Made Goods

Amendment of this section by Pub.L. 96-157 not applicable unless representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying of any exemption created by the amendment and such paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services, see section 827(c) of Pub.L. 90-351, as added Pub.L. 96-157, set out as a note under section 1761 of Title 18, Crimes and Criminal Procedure.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

Fair Labor Standards Act, see 29 USCA § 201 et seq.

Indian Self-Determination Act contracts and construction, see 25 USCA § 450j.

Purchases or contracts for armed forces treated as made with sealed bid procedures for purposes of §§ 35 to 45 of this title, see 10 USCA § 2304.

Wage determinations and interpretations of terms, review of, see 41 USCA § 43a.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Validity of state statute or local ordinance requiring, or giving preference to, the employment of residents by contractors or subcontractors engaged in, or awarded contracts for, the construction of public works or improvements. 36 ALR4th 941.

Validity of statute, ordinance, or charter provision requiring that workmen on public works be paid the prevailing or current rate of wages. 18 ALR3d 944.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

What contracts are subject to wage and hour requirements of Walsh-Healey Act (41 USC § 35). 2 ALR Fed 637.

Judicial review under § 10(c) of Walsh-Healy Act (41 USCA § 43a(c)) of legal questions involved in award of government contracts under such Act. 16 ALR Fed 982.

What constitutes trade secrets and commercial or financial information obtained from a person and privileged or confidential, exempt from disclosure under Freedom of Information Act (5 USCA § 552(b)(4)). 21 ALR Fed 224.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

Administrative Law

Bid protests, see West's Federal Practice Manual § 1779 et seq.

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Contract stipulations enumerated, see West's Federal Practice Manual § 1457.33.

Employment of minors and convicts, see West's Federal Practice Manual § 1457.44.

Federal Acquisition Regulations System, see 48 CFR § 1.000 et seq.

Formal advertising award, see West's Federal Practice Manual § 1536.

General enforcement statements, see 29 CFR §§ 775.0, 775.1; 41 CFR §§ 50-210.0, 50-210.1.

Jurisdictional amount, see West's Federal Practice Manual § 1457.29.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Minimum wage determinations, see 41 CFR § 50-202.1 et seq.

Occupational safety and health standards, see 29 CFR § 1910.1 et seq.

Policy and interpretation, wages and hours, see 29 CFR § 775.0 et seq.

Procedural rules for modification, etc., of occupational safety or health standards, see 29 CFR § 1911.1 et seq.

Public contracts law, overview and applicability of, see West's Federal Practice Manual § 1457.28 et seq.

Safety and health standards--

Enforcement by State officers and employees, see 41 CFR § 50-205.1 et seq.

Promulgation and applicability, see 41 CFR § 50-204.1 et seq.

Small business, contract award preference, see West's Federal Practice Manual § 1532.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

Wage deductions and rebates, see West's Federal Practice Manual § 1457.41.

American Digest System

Determination of wage rates, see Labor Relations ☞ 1439 to 1442.

Minimum wages and overtime pay for employees engaged in work under public contracts, see Labor Relations ☞ 1132.

Purpose of regulations of minimum wages and overtime pay, see Labor Relations ☞ 1101.

Encyclopedias

Determination of minimum wages by Secretary of Labor, see C.J.S. Labor Relations § 1240.

Purpose and nature of minimum wage provision in general, see C.J.S. Labor Relations, § 1018.

Requirement that contractor with federal government agree to pay employees not less than prevailing minimum wage, see C.J.S. Labor Relations § 1042.

35 Am Jur 2d, Federal Tort Claims Act § 19.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

65 Am Jur 2d, Public Works and Contracts §§ 200, 202, 203, 205, 216, 217, 223, 224, 231, 232.

14 Am Jur Trials, Representing the Government Contractor, p. 437.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 115, 141-143, 152-158, 160.

15A Am Jur Legal Forms 2d, Public Works and Contracts § 216:252.

20 Am Jur Legal Forms 2d, United States § 254:1 et seq.

20A Am Jur Pl & Pr Forms (Rev), Public Works and Contracts, Forms 112-117.

Law Review and Journal Commentaries

Debarment and suspension revisited: fewer eggs in the basket? Brian D. Shannon, 44 Cath.U.L.Rev. 363 (1995).

Interest groups, political freedom, and antitrust: A modern reassessment of the Noerr-Pennington doctrine. Gary Minda, 41 Hastings L.J. 905 (1990).

Sister sovereign states: Preemption and the Second Twentieth Century Revolution in the law of the American workplace. Henry H. Drummonds, 62 Fordham L.Rev. 469 (1993).

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889, 911.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

NOTES OF DECISIONS

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Sections 35 to 45 of this title are remedial wage and hour legislation and will be construed liberally to effectuate congressional policy that federal government should procure and use only goods produced under safe and fair working conditions. *U. S. v. Davison Fuel & Dock Co.*, C.A.4 (W.Va.) 1967, 371 F.2d 705.

3. Construction with other laws

The Fair Labor Standards Act of 1938, section 201 et seq. of Title 29, and sections 35 to 45 of this title are not mutually exclusive, but mutually supplementary, and applicability of sections 35 to 45 of this title to cost- plus-fixed-fee contracts does not preclude application of Fair Labor Standards Act to employees under such contracts. *Powell v. U.S. Cartridge Co.*, U.S.Mo.1950, 70 S.Ct. 755, 339 U.S. 497, 94 L.Ed. 1017.

Manufacturer which had purchase notice agreement with government but which failed to use procedure available for determining applicability of sections 35 to 45 of this title to the agreement could not rely on defense department's or its own interpretation of sections 35 to 45 of this title as a defense to action charging manufacturer with violations of overtime provisions of Portal- to-Portal Act of 1947, section 251 et seq. of Title 29. *United Biscuit Co. of America v. Wirtz*, C.A.D.C.1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

The restrictions of sections 35 to 45 of this title, relative to hours to be worked, applying to contracts between contractors and Government and providing its own penalties, have no application to an action by an employee under Fair Labor Standards Act, section 201 et seq. of Title 29. *Harrington v. Empire Const. Co.*, C.C.A.4 (Md.) 1948, 167 F.2d 389.

Contract Work Hours Standard Act, McNamara-O'Hara Service Contracts Act, and sections 35 to 45 of this title, incorporated into Air Force contracts did not provide exclusive remedies for any wage and hour violations committed with respect to defendant's contract with United States Air Force and did not exclude application of Fair Labor Standards Act of 1938, section 201 et seq. of Title 29. *Dowd v. Blackstone Cleaners, Inc.*, N.D.Tex.1969, 306 F.Supp. 1276.

The Portal-to-Portal Act, section 251 et seq. of Title 29, is not applicable to action by United States against public contractor to recover, as liquidated damages for violation of sections 35 to 45 of this title, the unpaid overtime wages which public contracts require contractor to pay employees. *U.S. y. Hudgins-Dize Co.*, E.D.Va.1949, 83 F.Supp. 593.

A work schedule under which employee had a different day off in each calendar week, was not violation of Fair Labor Standards Act, section 207 of Title 29, or this section, as construed by Labor Department, so that employee was not entitled to overtime compensation for last day of each period of seven consecutive days worked by him. *Barclay v. Magnolia Petroleum Co.*, Tex.Civ.App.-Beaumont 1947, 203 S.W.2d 626, ref. n.r.e..

Remand 24**Rules and regulations 5****Service contracts, contracts within section 13****1. Constitutionality**

The minimum wage provision of subsec. (b) of this section does not represent an exercise by Congress of regulatory power over private business or employment. *Perkins v. Lukens Steel Co.*, U.S.Dist.Col.1940, 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

2. Construction

4. Purpose

Sections 35 to 45 of this title are not of general applicability to industry, but only to contractors who voluntarily enter into competition to obtain Government business, and their purpose is to use the leverage of the Government's immense purchasing power to raise labor standards. *Endicott Johnson Corp. v. Perkins*, U.S.N.Y.1943, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424. See, also, *United Biscuit Co. of America v. Wirtz*, 1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682; *McGraw-Edison Co. v. U.S.*, 1962, 300 F.2d 453, 156 Ct.Cl. 590; *Ruth Elkhorn Coals, Inc. v. Mitchell*, 1957, 248 F.2d 635, 101 U.S.App.D.C. 313, certiorari denied 78 S.Ct. 539, 355 U.S. 953, 2 L.Ed.2d 530; *U.S. v. Westland Oil Co.*, D.C.N.D.1964, 228 F.Supp. 85.

The purpose of this section was to impose obligations upon those favored with Government business and to obviate the possibility that any part of the tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. *Perkins v. Lukens Steel Co.*, U.S.Dist.Col.1940, 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108. See, also, *United Biscuit Co. of America v. Wirtz*, 1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

Purpose of this section authorizing Secretary of Labor to determine prevailing minimum wages paid employees in industry so that such wages may be required by government in supply contracts within that industry is to avoid competitive advantages for firms which pay substandard labor wages. *Industrial Union Dept., AFL-CIO v. Barber-Colman Co.*, C.A.D.C.1965, 348 F.2d 787, 121 U.S.App.D.C. 175.

Purpose of sections 35 to 45 of this title is to make certain that United States, in contracting for materials for its own use, does not patronize firms which pay wages lower than those being generally paid in industry. *Wirtz v. Baldor Elec. Co.*, C.A.D.C.1963, 337 F.2d 518, 119 U.S.App.D.C. 122.

Purpose of sections 35 to 45 of this title was to prevent use of public funds to depress working conditions, and instead to use leverage of Government's immense purchasing power to raise labor standards. *U. S. v. New England Coal & Coke Co.*, C.A.1 (Mass.) 1963, 318 F.2d 138.

Sections 35 to 45 of this title represent a general public policy that the Federal Government should procure and use only goods produced under safe and fair working conditions, and the \$10,000 minimum was designed both to enable small manufacturers to obtain Government contracts and to avoid administrative burdens. *George v. Mitchell*, C.A.D.C.1960, 282 F.2d 486, 108 U.S.App.D.C. 324.

Sections 35 to 45 of this title are intended to regulate Governmental conduct in entering into contracts, and not to confer enforceable rights on private parties contracting under their aegis. *U S v. Warsaw Elevator Co*, C.A.2 (N.Y.) 1954, 213 F.2d 517.

Purpose of Congress in enacting requirement of Walsh-Healey Act that contractor be a regular manufacturer or dealer was to restrict bounty of government contracts to established manufacturers and dealers because they are most likely to effect the Act's goals of maintaining high labor standards in connection with wages and conditions. *Ulstein Maritime, Ltd. v. U.S.*, D.R.I.1986, 646 F.Supp. 720, affirmed 833 F.2d 1052.

This section providing that contract by instrumentality of United States for furnishing of supplies exceeding \$10,000 shall contain stipulation that all persons employed by contractor will be paid not less than minimum wages expresses congressional intent that employees of persons supplying United States are to be paid minimum wages prevailing for persons employed on similar work. *Jno. McCall Coal Co. v. U. S.*, D.C.Md.1965, 248 F.Supp. 253, affirmed 374 F.2d 689.

Purpose of sections 35 to 45 of this title was to insure that persons employed by Government contractors would be paid not less than minimum wages as determined by Secretary of Labor. *U. S. v. Continental Cas. Co.*, E.D.Pa.1949, 85 F.Supp. 573, affirmed 182 F.2d 941.

5. Rules and regulations

Regulations such as the armed services procurement regulations, including regulation governing exchange of purchase information, are deemed terms of contract between government and contractor even if not specifically set out therein. *SCM Corp. v. U. S.*, Ct.Cl.1981, 645 F.2d 893, 227 Ct.Cl. 12.

Under section 259(b) of Title 29, designating Secretary of Labor or any federal officer utilized by him as the agency of United States whose rulings can be relied upon by Government contractor, Administrator of Wage and Hour and Public Contracts Divisions, who had been designated by Secretary of Labor as person to administer this chapter, was the person who had authority to issue rulings and a field office supervisor had no authority to issue an authoritative ruling with respect to this chapter and was not an agency on which a contractor could rely. *U. S. v. Stocks Lincoln-Mercury, Inc.*, C.A.10 (Utah) 1962, 307 F.2d 266.

6. Generally

In enacting this section, Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government would permit goods to be sold to it. *Perkins v. Lukens Steel Co.*, U.S.Dist.Col.1940, 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

7. Mandatory nature of section

Subsec. (d) of this section is mandatory. *U.S. v. Smoler Bros.*, C.A.7 (Ill.) 1951, 187 F.2d 29.

8. Exclusiveness of section

The remedy provided by sections 35 to 45 of this title is exclusive except for fact that there is a right to assess damages on bonds issued in connection with injunction to restrain Secretary from enforcing order made pursuant to such sections. *Alabama Mills v. Mitchell*, D.C.D.C.1958, 159 F.Supp. 637.

9. Duty of Secretary

Congress submitted administration of sections 35 to 45 of this title to judgment of the Secretary of Labor, not the courts, and one of Secretary's principal functions is conclusive determination of questions of fact for guidance of procurement officers in withholding Government contracts from violators. *Endicott Johnson Corp. v. Perkins*, U.S.N.Y.1943, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

10. Persons or entities subject to section

This section setting forth representations and stipulations required of contractor for government contracts was enacted for benefit of government and is spent when contract is awarded. *U. S. v. Russell Elec. Co.*, S.D.N.Y.1965, 250 F.Supp. 2.

The Federal Reserve Banks are subject to the provisions of this chapter. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 211.

11. Contracts within section—Generally

Stipulations and representations required by sections 35 to 45 of this title and liability for their violation are applicable only to any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States. *U. S. v. Davison Fuel & Dock Co.*, C.A.4 (W.Va.) 1967, 371 F.2d 705.

In determining whether particular contract between government and supplier was subject to provisions of sections 35 to 45 of this title, court must start with presumption that Congress intended sections 35 to 45 of this title to cover all regular and institutionalized methods of purchase used by government resulting in large scale acquisitions of materials

and supplies from the private sector of our economy. *United Biscuit Co. of America v. Wirtz*, C.A.D.C.1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

12. ---- Public or private contracts

This section applies only to manufacturers of or regular dealers in materials, supplies, articles or equipment to be manufactured or used in the performance of a public contract. *Miller v. Lummus Co.*, Tex.Civ.App.-Beaumont 1948, 215 S.W.2d 227, ref. n.r.e..

13. ---- Service contracts

Government contract requiring both furnishing of materials, supplies and articles and the performance of services by Government contractor was not a "contract exclusively for services" nor was it a contract primarily for services and such contract was covered by sections 35 to 45 of this title concerning hours of labor and overtime. *U. S. v. Stocks Lincoln-Mercury, Inc.*, C.A.10 (Utah) 1962, 307 F.2d 266.

14. Amounts exceeding \$10,000

Purchase notice agreement under which manufacturer offered to sell specified items to government at prices listed, or any lower price that it might offer to any other purchaser, and under which government in return distributed list to all its commissaries and other military installations was a contract for furnishing of supplies to government within meaning of sections 35 to 45 of this title, and was a contract in amount exceeding \$10,000 under sections 35 to 45 of this title, although no single order under agreement had exceeded that amount. *United Biscuit Co. of America v. Wirtz*, C.A.D.C.1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

Where Atomic Energy Commission issued offer to purchase 50,000 tons of coal in one or more lots, minimum bid to be 1,800 tons, and in response corporation, with the intention of avoiding requirements of sections 35 to 45 of this title, submitted six bids for 1,800 tons each, each of which named different mine as source of coal to be supplied, and held out corporation as the prime contractor and as a regular dealer in coal, and the six bids totalled more than \$10,000, the six bids and agreement based thereon would be treated as one contract for more than \$10,000, which was within terms of sections 35 to 45 of this title, and corporation, its owner and president, and individual mine owners who supplied the coal might be properly blacklisted for violations of terms of this section. *George v. Mitchell*, C.A.D.C.1960, 282 F.2d 486, 108 U.S.App.D.C. 324.

Where defendant entered into contract with Department of the Army to supply lumber at total price exceeding \$10,000, but in order to conform with Office of Price Administration regulations a lower unit price was agreed upon by parties, making total price less than \$10,000, final amount agreed upon was controlling amount of contract, and sections 35 to 45 of this title, providing for federal regulation of wages and working conditions of employees of public contractor when amount of contract, exceeded \$10,000, were not applicable, notwithstanding provision in contract allowing for a ten percent overage or underage in loading and shipping. *U.S. v. Ozmer*, C.A.5 (Ga.) 1950, 181 F.2d 508.

15. Regular dealer or manufacturer--Generally

Where the Government terminated contract with company for failure of performance and relet it to another at higher price, company could not rely on alleged fact that contract was not relet to a "manufacturer" or "regular dealer" within sections 35 to 45 of this title to avoid liability under contract provision making company liable for excess costs in obtaining similar supplies or services elsewhere. *U S v. Warsaw Elevator Co*, C.A.2 (N.Y.) 1954, 213 F.2d 517.

Requirement of this section that government contractors qualify as "regular dealers" in materials to be used in performance of contract is intended to restrict bounty of government contracts to established dealers because they are most likely to effect Walsh-Healey goals of maintaining high labor standards in connection with wages and conditions. *Steuart Petroleum Co. v. U.S.*, D.C.D.C.1977, 438 F.Supp. 527.

Where contractor was eligible supplier of gyro motors at time contract for production of gyro motors was entered into, its failure to maintain manufacturing facility did not under this section relating to government contract requirements invalidate contract or require naval ordnance plant to terminate contract, and plant by its failure to immediately terminate contract accordingly was not precluded from recovery of full damages for default. *U. S. v. Russell Elec. Co.*, S.D.N.Y.1965, 250 F.Supp. 2.

Secretary of Labor acted reasonably and within delegated power necessary to carry out provisions of sections 35 to 45 of this title where Secretary adopted regulation defining the term "regular dealer" within this section as one having stock in trade and thereafter adopting regulation permitting coal dealer not qualified as regular dealer to become supplier to United States on condition of liability for observance of all labor standards under the Act in the mines. *Jno. McCall Coal Co. v. U. S.*, D.C.Md.1965, 248 F.Supp. 253, affirmed 374 F.2d 689.

16. --- Newly entering manufacturers

With regard to Walsh-Healey Act regulation requiring that bidder, in order to be considered "newly entering" into manufacturing activity, enter into written, legally binding arrangements and commitments to acquire for itself plant, equipment and personnel if awarded a government contract, regulation does not preclude arrangements contingent upon award but does require that bidder be a genuine manufacturer and not a mere subcontractor. *Ulstein Maritime, Ltd. v. U.S.*, D.R.I.1986, 646 F.Supp. 720, affirmed 833 F.2d 1052.

17. Minimum wages--Generally

This section commanding that employees of government suppliers in contracts exceeding \$10,000 be paid not less than the minimum wages as determined by Secretary of Labor does not permit the Secretary or courts to weigh equities in determining when to enforce the mandate. *Jno. McCall Coal Co. v. U. S.*, C.A.4 (Md.) 1967, 374 F.2d 689.

Under provision of this section that certain Government contracts should include stipulation that contractors pay employees not less than minimum wages as determined by Secretary of Labor, to be prevailing minimum wage for persons employed in the particular or similar industries or groups of industries currently operating in the locality, Secretary could determine minimum wage for textile workers on industry-wide basis. *Mitchell v. Covington Mills, Inc.*, C.A.D.C.1955, 229 F.2d 506, 97 U.S.App.D.C. 165, certiorari denied 76 S.Ct. 546, 350 U.S. 1002, 100 L.Ed. 865, rehearing denied 76 S.Ct. 787, 351 U.S. 934, 100 L.Ed. 1462.

Under contract requiring the furnishing of coal to TVA and compliance with this section, obligations of company furnishing coal did not cease with delivery of coal but included payment of minimum wages as determined by Department of Labor. *U.S. v. Glens Falls Ins. Co.*, E.D.Tenn.1967, 279 F.Supp. 236.

Secretary of Labor had no authority under this section to impose two different prevailing minimum wages, one for blueprint machine operators or craftsmen and other for employees engaged in other occupations for machine tool manufacturers. *Barber-Colman Co. v. Wirtz*, D.C.D.C.1963, 224 F.Supp. 137, remanded 348 F.2d 787, 121 U.S.App.D.C. 175.

18. --- Persons subject to limitation

Interpretation of Secretary that coal wholesaler which contracted to supply coal to United States on four different contracts but which was not a regular dealer within meaning of this section requiring payment of minimum wage and overtime compensation was under administrative regulations adopted pursuant to section 38 of this title the party responsible for failure to pay wages to miners who mined coal for wholesaler's supplier was both correct and reasonable. *Jno. McCall Coal Co. v. U. S.*, C.A.4 (Md.) 1967, 374 F.2d 689.

Coal dealer who agreed to supply coal to Government under this section, contracted with representation as to wage rates of his employees, and who supplied coal from stockpile produced in part by his own employees and in part by suppliers, was not liable for labor standards of his suppliers. *U. S. v. New England Coal & Coke Co.*,

D.C.Mass.1962, 228 F.Supp. 414, affirmed 318 F.2d 138.

19. --- Employees of contractor

Term "employed by the contractor," as used in sections 35 to 45 of this title should be construed so that persons who are employed by prime contractor may be, in certain carefully defined situations, persons other than those on prime contractor's payroll. U. S. v. Davison Fuel & Dock Co., C.A.4 (W.Va.) 1967, 371 F.2d 705.

20. --- Locality

Under minimum wage provision of this section, that the Secretary of Labor is charged with an erroneous interpretation of the term "locality" as an element in her wage determination is not sufficient to entitle prospective bidders on Government purchasing contracts to maintain action to restrain Government officials from applying the Secretary's wage determination in awarding contracts. Perkins v. Lukens Steel Co., U.S.Dist.Col.1940, 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

Under this section, authorizing Secretary of Labor to determine prevailing minimum wages for (1) persons employed in similar work, or (2) persons employed in particular or similar industry, or (3) persons employed in groups of industries "currently operating in locality" in which materials, supplies, articles or equipment are to be manufactured or furnished under Government contract, quoted phrase relates back to all three preceding groups and not merely to persons employed in group of industries in locality. Covington Mills v. Mitchell, D.C.D.C.1955, 129 F.Supp. 740.

21. Convict labor

This section, requiring the insertion of a provision in certain Government contracts that no convict labor shall be employed by the contractor, was inapplicable to contracts for war materials because such contracts were exempted under an order of the Secretary of Labor dated May 26, 1942. 1942, 40 Op.Atty.Gen. 207.

22. Incorporation by reference

Government contracts' incorporation by reference of provisions of sections 35 to 45 of this title, is reasonable and not inconsistent with terms of those sections. U. S. v. Davison Fuel & Dock Co., C.A.4 (W.Va.) 1967, 371 F.2d 705.

23. Issues reviewable

Where employees' action for overtime compensation was predicated squarely on Fair Labor Standards Act, section 201 et seq. of Title 29, and after adoption of Portal-to-Portal Act, section 251 et seq. of Title 29, on section 252 of the same title, and was tried and disposed of on theory that court was without jurisdiction under section 252 of Title 29, appellate court need not consider contention advanced by defendant for the first time on appeal that employees' rights were governed by sections 35 to 45 of this title rather than Fair Labor Standards Act. Adkins v. E. I. Du Pont De Nemours & Co., C.A.10 (Okla.) 1949, 176 F.2d 661, certiorari denied 70 S.Ct. 234, 338 U.S. 895, 94 L.Ed. 550, certiorari denied 70 S.Ct. 661, 339 U.S. 935, 94 L.Ed. 1353.

24. Remand

Where it appeared possible that in further proceedings under this section before Secretary of Labor or court only one minimum wage would be established for machine tool industry, for which Secretary had established two minimum wages, and that single wage would most likely be calculated at some figure different from either of two wages previously determined, Secretary's determination of one wage could not be affirmed and case could not be remanded merely for consideration of the other wage. Industrial Union Dept., AFL-CIO v. Barber-Colman Co., C.A.D.C.1965, 348 F.2d 787, 121 U.S.App.D.C. 175.

41 USCA s 35

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**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 36. Liability for contract breach; cancellation; completion by Government agency; employee's wages

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of \$10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 2, 49 Stat. 2037.)

< General Materials (GM) - References, Annotations, or Tables >

CROSS REFERENCES

Conduct and argument of cases by Attorney General, see 28 USCA § 518.

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

Power of Solicitor General to assist Attorney General, see 28 USCA § 505.

Statute of limitations, action to enforce any cause of action under § 35 et seq. of this title, see 29 USCA § 255.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Employment of minors and convicts, see West's Federal Practice Manual § 1457.44.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Penalties for contract violation, see West's Federal Practice Manual § 1457.46.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

American Digest System

Actions for wages, damages or penalties under wages and hours regulations, see Labor Relations ☞ 1472, 1479.

Right of action for wages under wages and hours regulations, see Labor Relations ☞ 1471.

Rights and remedies of United States on contracts, see United States ☞ 75(1, 2).

Encyclopedias

Actions for wages, damages or penalties under wages and hours regulations, in general, see C.J.S. Labor Relations § 1256 to 1264.

Provision for liability for liquidated damages for violation of stipulations to pay prevailing wages, see C.J.S. Labor Relations § 1291.

Withholding amounts due or recovery of liquidated damages under Walsh-Healey Act, see C.J.S. United States § 103.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 202, 216, 231.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 117, 134, 141-143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889, 931, 932, 934.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

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stipulation, one condition being that no female between ages of 16 and 18 years could be employed for more than 8 hours in any one day, and record of plant, which was located in city other than city in which contractor's home office was located, clearly showed violation of conditional exemption for 630 days, contractor could not avoid liability for such violation by asserting that officials at contractor's home office had no personal knowledge of violation. *U.S. v. Smoler Bros.*, C.A.7 (Ill.) 1951, 187 F.2d 29.

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1. Knowledge of violation

Where navy contract for supplies contained stipulation that no female person under age of 18 years would be employed by contractor, and Secretary of Labor granted conditional exemption as to such

of Labor granted conditional exemption as to such stipulation, one condition being that no female between ages of 16 and 18 years could be employed for more than 8 hours in any one day, and record of plant, which was located in city other than city in which contractor's home office was located, clearly showed violation of conditional exemption for 630 days, contractor could not avoid liability for such violation by asserting that officials at contractor's home office had no personal knowledge of violation. *U.S. v. Smoler Bros.*, C.A.7 (Ill.) 1951, 187 F.2d 29.

In action by United States under sections 35 to 45 of this title, to recover liquidated damages for breach of contract for knowingly employing minors, evidence that contractor who had contracted to furnish shoes to federal Government in an amount exceeding \$10,000 did not knowingly employ minors, and that on several occasions, after receiving information that employees were in fact under age, he investigated such cases and discharged employee, sustained judgment for contractor. *U.S. v. Craddock-Terry Shoe Corp.*, C.A.4 (Va.) 1949, 178 F.2d 760.

Employer which knowingly employed five minors, or should have known he was doing so, under 18 years of age, in the performance of certain contracts subject to sections 35 to 45 of this title was liable therefor to pay sums of money to United States in accordance with sections 35 to 45 of this title. *U. S. v. Southland Mfg. Corp.*, D.C.Puerto Rico 1967, 264 F.Supp. 174.

A person has "reason to know," within meaning of term "knowingly", when he has such information as would lead person exercising reasonable care to acquire knowledge of fact or infer its existence. *U.S. v. Sweet Briar, Inc.*, W.D.S.C.1950, 92 F.Supp. 777.

"Knowingly" with reference to employment of minors, under this section, means intentionally or with actual knowledge, including evil intent or bad purpose. *U.S. v. Loveknit Mfg. Co.*, N.D.Tex.1950, 90 F.Supp. 679.

2. Parties responsible or liable--Generally

Fact that fuel and dock company and its subsidiaries were separate legal entities would not preclude consideration of them as an integrated production structure for purpose of enforcing sections 35 to 45 of this title since, in applying regulatory statutes such as sections 35 to 45 of this title, separate corporate entities are not inviolate. *U. S. v. Davison Fuel & Dock Co.*, C.A.4 (W.Va.) 1967, 371 F.2d 705.

Coal wholesaler which did not qualify as regular dealer within section 35 of this title nevertheless rendered itself liable for payment of minimum wages in mine of its supplier of coal it sold to United States under four contracts and

became "party responsible therefor" within this section that breach or violation of contract stipulation required by sections 35 to 45 of this title shall render party responsible therefor liable to the United States. *Jno. McCall Coal Co. v. U. S.*, D.C.Md.1965, 248 F.Supp. 253, affirmed 374 F.2d 689.

In action by the Government under this section for damages for underpayment of wages on a Government contract against the corporate contracting party and the president of the corporation who was not a signatory thereon but whose liability was predicated upon the finding that he was in effect a "party responsible" for breach of the contract, where in reality, corporation was the individual defendant's alter ego or agent, he could be held liable as the "party responsible" by disregarding the corporate fiction and considering him the actual party to the contract. *U.S. v. Islip Mach. Works, Inc.*, E.D.N.Y.1959, 179 F.Supp. 585.

The word "party" in this section, providing that breach of stipulation in public contract shall render liable the "party" responsible therefor, is a word of art and refers only to a promisor or covenantor of the contract. *U.S. v. Hudgins-Dize Co.*, E.D.Va.1949, 83 F.Supp. 593.

3. --- Sureties

Where court, temporarily enjoining Secretary of Labor from enforcing minimum wage determination, had ordered that any plaintiff who entered into a contract otherwise covered by determination should post bond to make good overpayments of wages, up to amount of bond, in case Secretary's minimum wage determination were ultimately upheld, liability of sureties was limited to amount of bonds that had been posted, but plaintiffs were liable for entire amount of their underpayments, that is, for the difference between the wages they had paid while the injunction against the Secretary was in effect and the minimum wages which he had fixed. *Mitchell v. Riegel Textile, Inc.*, C.A.D.C.1958, 259 F.2d 954, 104 U.S.App.D.C. 139.

Surety on coal company's performance bond, conditioned on company's compliance with contract which required company to furnish coal to TVA and to comply with federal minimum wage and overtime compensation statute, was obligated not only to TVA but also to the United States which sought to recover minimum wages and overtime compensation due company's employees. *U.S. v. Glens Falls Ins. Co.*, E.D.Tenn.1967, 279 F.Supp. 236.

Where surety bond of contractor engaged in work for United States provided that employees of contractor would be paid an amount not less than minimum wages as determined by Secretary of Labor, surety would be liable for contractor's failure to pay that amount and could not deny liability on ground that provision in bond meant that contractor would agree in good faith to endeavor to maintain minimum wages as determined by Secretary of Labor. *U. S. v. Continental Cas. Co.*, E.D.Pa.1949, 85 F.Supp. 573, affirmed 182 F.2d 941.

4. Joint and several liability

Where corporation was small, closely held family corporation, and complete control over all affairs including hiring and firing of help and establishing wage scales, time schedules and working conditions was exercised by president and by her husband as general manager, and work was done in performance of government contract, they were charged with obligation of carrying out working conditions set forth in this section, and failure to perform statutory public duty was not only corporate liability but also personal liability of each officer, and president and general manager were jointly liable with corporation for failure to pay overtime. *U.S. v. Sancelmar Industries, Inc.*, E.D.N.Y.1972, 347 F.Supp. 404.

Coal producing company, which supplied coal under government contract, and coal selling company, which, as exclusive sales agents of producing company, contracted with government agency and was under nondelegable duty to assure compliance with sections 35 to 45 of this title establishing minimum wage requirements applicable to contracts with United States, were jointly and severally liable to United States for producing company's failure to pay its employees minimum wage scale specified by such sections. *Southern Coal & Coke Co. v. Beech Grove Min. Co.*, Tenn.App.1963, 381 S.W.2d 299, 53 Tenn.App. 108.

5. Indemnification

Coal selling company, which, as exclusive sales agent of coal producing company, contracted with government agency to supply coal for atomic energy plant, and which therefore was under nondelegable duty to assure compliance with sections 35 to 45 of this title establishing minimum wage requirements applicable to contracts with United States, was entitled to indemnification from producing corporation for payment made to government for failure of producing company to comply with minimum wage requirements. *Southern Coal & Coke Co. v. Beech Grove Min. Co.*, Tenn.App.1963, 381 S.W.2d 299, 53 Tenn.App. 108.

6. Liquidated damages

Liquidated damages, imposed by this section on Government contractors, for knowingly employing under-age minors, are not penalties or forfeitures. *U.S. v. Sweet Briar, Inc.*, W.D.S.C.1950, 92 F.Supp. 777.

7. Withholding of money due

Since the withholding provision of this section would be pure surplusage if the usual power to set off mutual debts were intended to be left intact, Congress would be deemed to have intended that only withholding to be permitted was that provided therein, and even though Secretary of Labor had determined that contractor had violated sections 35 to 45 of this title and that contractor should pay to Government amount fixed by Secretary, pursuant to provisions of said sections, Government could not pay itself by withholding money otherwise due contractor on contracts not covered by said sections. *Unexcelled Chemical Corp. v. U. S.*, Ct.Cl.1957, 149 F.Supp. 383, 137 Ct.Cl. 681.

The provision of this section, that sums due United States because of violation of representations and stipulations in contracts named therein may be withheld from amounts due from United States on such contracts, gave Government right to withhold amount owing by it under its contract to purchase crushed stone and gravel for Navy installation because of corporate seller's failure to pay overtime wages required by sections 35 to 45 of this title in performance of all of 17 contracts with Government to furnish stone products to Army and Navy. *Ready-Mix Concrete Co. v. U. S.*, Ct.Cl.1955, 130 F.Supp. 390, 131 Ct.Cl. 204.

Where certain amounts were withheld from plaintiff on account of an alleged underpayment by plaintiff of its employees, it was incumbent on plaintiff to prove that it had complied with the provisions of the contract as to the rate of wages paid and that in the absence of such proof plaintiff was not entitled to recover. *Continental Contracting Co. v. U.S.*, Ct.Cl.1941, 94 Ct.Cl. 244.

Where plaintiff leased plant to defendants for manufacture of coats for which defendants held a Government contract for one-half defendants' profits thereunder upon payment by the Government, and defendants admitted contract with the Government had been performed and that defendants had received final payment thereunder, for a net profit of a specified sum, plaintiff was entitled to one-half of such profits, as against contention that defendants had been orally informed the Department of Labor would make an assessment for alleged violations of section 35 et seq. of this title and that defendants would be entitled to hold plaintiff's share as reimbursement for such assessment. *Kingsley Clothing Mfg. Co. v. Jacobs*, Pa.1942, 26 A.2d 315, 344 Pa. 551.

This section does not purport to make employer liable to employee for a failure to pay overtime rates for overtime work, since it only prescribes administrative procedure whereby funds may be withheld by the United States from sums due employer to employee if claim therefor is timely made. *Greenstein v. Pan Am. Airways*, N.Y.Sup.1945, 57 N.Y.S.2d 178, 185 Misc. 429.

8. Interest

As soon as underpayments of wages were made, unjust enrichment of employer was completed, and interest could be allowed from dates of underpayments. *Mitchell v. Riegel Textile, Inc.*, C.A.D.C.1958, 259 F.2d 954, 104 U.S.App.D.C. 139.

Under this section, directing that sums recovered by the United States from contractors as underpayment of wages be paid directly to the employees, Congress intended to give employees what they would have been entitled to get had

they been able to sue their employer in their own right, including interest. *Philadelphia Joint Bd. Amalgamated Clothing Workers of America v. U. S.*, E.D.Pa.1952, 106 F.Supp. 534.

9. Tax deductibility of damages

Damages provided for in a Government contract for knowingly employing underaged persons were in fact penalties designed to insure that child labor would not be used in performance of the Government contract, and as such are not a deductible expense for income tax purposes. *McGraw-Edison Co. v. U.S.*, Ct.Cl.1962, 300 F.2d 453, 156 Ct.Cl. 590.

10. Nature of action

Action by United States under sections 35 to 45 of this title, for liquidated damages for failure of employer to pay overtime compensation and knowingly employing child labor is action for penalty or forfeiture for violation of law, since it is not sovereign who has been damaged, but employee. *In re Thrift Packing Co.*, N.D.Tex.1951, 100 F.Supp. 907.

11. Exhaustion of administrative remedies

Institution of an action for recovery of liquidated damages under this section for unpaid overtime compensation is not conditioned upon the making of findings by the Secretary of Labor, and the making of administrative findings of that kind is not a prerequisite to the right of United States to maintain and institute the action. *U S v. Winegar*, C.A.10 (Utah) 1958, 254 F.2d 693.

Administrative hearings and findings under this section are not a prerequisite to a suit under this section by the United States. *U.S. v. Lovkmit Mfg. Co.*, C.A.5 (Tex.) 1951, 189 F.2d 454, certiorari denied 72 S.Ct. 229, 342 U.S. 896, 96 L.Ed. 671, rehearing denied 72 S.Ct. 287, 342 U.S. 915, 96 L.Ed. 684. See, also, *U.S. v. W.H. Kistler Stationery Co.*, C.A.Colo.1952, 200 F.2d 805.

The remedy at law afforded by sections 35 to 45 of this title to public contractors charged by the Secretary of Labor with overtime, child labor and record-keeping violations, is adequate, and action to enjoin administrative proceedings under said sections would not lie where plaintiffs had not exhausted their administrative remedies. *Anderson v. Schwellenbach*, N.D.Cal.1947, 70 F.Supp. 14.

12. Stay pending administrative proceeding

Where federal district court which had original jurisdiction of suit by United States Attorney General Under sections 35 to 45 of this title to recover alleged underpayment of wages by government contractor waited two years for the Department of Labor to complete administrative proceedings with respect to same matter, failure of district court to continue to stay the lawsuit and to determine same could not be termed an abuse of discretion. *U.S. v. Gulf States Asphalt Co., Inc.*, C.A.5 (Tex.) 1973, 472 F.2d 933.

Under circumstances Government would be granted a stay of its judicial proceedings to recover sum of money which might be found to be due Government by reason of breach of contract involved in its previously instituted administrative proceedings in which findings of fact had not been made. *U. S. v. Pine Tp. Coal Co.*, W.D.Pa.1962, 201 F.Supp. 441.

When action is instituted during pendency of administrative proceeding but before findings of fact therein, whether judicial action should be stayed for reasonable time to await completion of administrative proceeding is question addressed to sound judicial discretion of court. *U. S. v. Pine Tp. Coal Co.*, W.D.Pa.1962, 201 F.Supp. 441. See, also, *U.S. v. Winegar*, C.A.Utah 1958, 254 F.2d 693.

13. Jurisdiction

District court, in which suit was instituted by United States Attorney General to recover alleged underpayment of wages by government contractor, had original jurisdiction of suit and was not required to wait for an administrative determination to be made by the Secretary of Labor with respect to the same matter. *U.S. v. Gulf States Asphalt Co., Inc.*, C.A.5 (Tex.) 1973, 472 F.2d 933.

Under Fulbright Amendment to sections 35 to 45 of this title, District Court for the District of Columbia had jurisdiction over action by corporation and individuals against Secretary of Labor and Comptroller General for declaratory judgment that contracts to sell coal to Atomic Energy Commission were not within provisions of sections 35 to 45 of this title, and for injunction to restrain Secretary and Comptroller General from placing plaintiffs' names on list of persons ineligible, because of violation of such sections 35 to 45, to be awarded Government contracts, and plaintiffs had standing to bring such suit. *George v. Mitchell*, C.A.D.C.1960, 282 F.2d 486, 108 U.S.App.D.C. 324.

The district court had jurisdiction of action by United States to recover liquidated damages for employment of girls under 16 years of age and girls between ages of 16 and 18 for more than eight hours per day on work under Government contracts in violation of sections 35 to 45 of this title. *U.S. v. Harp*, W.D.Okla.1948, 80 F.Supp. 236, affirmed 173 F.2d 761, certiorari denied 70 S.Ct. 56, 338 U.S. 816, 94 L.Ed. 494.

14. Service of process

In action by the Government for breach of contract arising out of underpayment of wages on a Government contract, where defendants were a corporation which was the contracting party and president of corporation who was not a signatory on the contract and whose liability was predicated upon a finding that he was the "party responsible" as used in this section for the breach of contract, where, in addition to the prior service by mail of the administrative complaint and notice, there was personal service of the complaint on both defendants followed by service by registered mail of a supplemental notice of the date of the administrative hearing, requirements of due process were sufficiently complied with. *U.S. v. Islip Mach. Works, Inc.*, E.D.N.Y.1959, 179 F.Supp. 585.

15. Persons entitled to maintain action

Under minimum wage provision of section 35 of this title, the responsibility of the Secretary of Labor is to superior executive and legislative authority, and prospective bidders on Government purchasing contracts have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with section 35 of this title. *Perkins v. Lukens Steel Co.*, U.S.Dist.Col.1940, 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

Sections 35 to 45 of this title relate only to Government business, and the right of action granted under such sections belongs to Government alone. *U. S. v. W. H. Kistler Stationery Co.*, C.A.10 (Colo.) 1952, 200 F.2d 805.

No one may sue for breach of contracts under this section except the United States through the Attorney General, since the contracts are public contracts to which only United States and the contractors are parties. *U.S. v. Lovknit Mfg. Co.*, C.A.5 (Tex.) 1951, 189 F.2d 454, certiorari denied 72 S.Ct. 229, 342 U.S. 896, 96 L.Ed. 671, rehearing denied 72 S.Ct. 287, 342 U.S. 915, 96 L.Ed. 684.

Under contract requiring the furnishing of coal to TVA and compliance with federal minimum wage and overtime provisions of section 35 of this title, TVA was empowered to sue in its own name or withhold payment upon matters of particular concern to it, but Attorney General, representing other branches of federal government, was empowered to bring suit in name of the United States on matters of concern to them. *U.S. v. Glens Falls Ins. Co.*, E.D.Tenn.1967, 279 F.Supp. 236.

An action on a contract of employment to perform services in Brazil for a contractor engaged in a project for the United States Government, brought by an employee of the contractor, would not lie under this section which only prescribes administrative procedure whereby funds may be withheld by the Government from sums due the employer and which gives no right to an employee to bring suit against the employer under this section. *Greenstein v. Pan Am. Airways*, N.Y.Sup.1945, 57 N.Y.S.2d 178, 185 Misc. 429.

Sections 35 to 45 of this title gave no right of action to employees, but expressly limited the action to be brought in the name of the United States by the Attorney General for damages to the United States plus unpaid wages to be held and paid out by Secretary of Labor to those making claim against him within one year, and hence such sections were not applicable to suit by former employee of a prime contractor with the United States to recover overtime compensation. *Todd v. Roane-Anderson Co.*, Tenn.App.1952, 251 S.W.2d 132, 35 Tenn.App. 687.

16. Necessary parties

The United States was a necessary party defendant to suit for declaratory judgment that Government's right, under sections 35 to 45 of this title, to sue plaintiff for liquidated damages for breach of contract with Government or deny future contracts to plaintiff was barred by limitations, and suit could not be maintained against officials of Labor Department in their individual capacity. *Reynolds Corp. v. Morse*, D.C.D.C.1948, 81 F.Supp. 137, affirmed 174 F.2d 159, 84 U.S.App.D.C. 420.

17. Defenses--Generally

Liability of government contractor as party responsible for payment of minimum wages to workers of contractor's supplier attached whether employees went unpaid because of bankruptcy of supplier or from any other cause beyond direct control of contractor, or whether they went unpaid because of inadvertence or because of a willful act. *Jno. McCall Coal Co. v. U. S.*, C.A.4 (Md.) 1967, 374 F.2d 689.

Oil refinery, which had contracted with Government for delivery of semi- processed and processed petroleum, was entitled to combine for purposes of asserting stock pile defense to action by United States for recovery of damages for alleged violation of section 35 et seq. of this title stocks of crude petroleum with stocks of semi-processed or processed petroleum. *U. S. v. Westland Oil Co.*, D.C.N.D.1964, 228 F.Supp. 85.

18. --- Limitations

Initiation of administrative proceedings with the Secretary of Labor under sections 35 to 45 of this title to recover from government contractor for underpayment of wages does not toll two-year statute of limitations so far as bringing of judicial proceedings for the same type of relief by United States Attorney General. *U.S. v. Gulf States Asphalt Co., Inc.*, C.A.5 (Tex.) 1973, 472 F.2d 933.

Government's cause of action for liquidated damages for unpaid overtime wages, under this section, accrues upon failure of contractor who has entered into a contract with the Government to pay applicable rates of compensation for overtime work on performance of the contracts, and the Government has the right at any time thereafter within the applicable period of limitations to institute and maintain the action. *U S v. Winegar*, C.A.10 (Utah) 1958, 254 F.2d 693.

Where defendant violated section 35 et seq. of this title by knowingly employing underage minors in 1945, action, instituted in 1949 by United States for liquidated damages determined to be due by Secretary of Labor, was barred by section 255 of Title 29. *Lance, Inc. v. U. S.*, C.A.4 (N.C.) 1951, 190 F.2d 204, certiorari denied 72 S.Ct. 229, 342 U.S. 896, 96 L.Ed. 671, rehearing denied 72 S.Ct. 287, 342 U.S. 915, 96 L.Ed. 684.

The limitation provisions of the Portal-to-Portal Act, section 255 of Title 29, are applicable to an action by the United States under this section. *U.S. v. Lovknit Mfg. Co.*, C.A.5 (Tex.) 1951, 189 F.2d 454, certiorari denied 72 S.Ct. 229, 342 U.S. 896, 96 L.Ed. 671, rehearing denied 72 S.Ct. 287, 342 U.S. 915, 96 L.Ed. 684. See, also, *U.S. v. W.H. Kistler Stationery Co.*, C.A.Colo.1952, 200 F.2d 805.

Provision of the Portal-to-Portal Act, section 255 of Title 29, stating that a cause of action which has accrued prior to date of enactment of that Act shall not be barred by two-year time limit if commenced within 120 days after date of enactment unless barred at commencement by applicable state statute of limitations, did not make previously inapplicable Oklahoma statute of limitations apply so as to bar suit instituted by the United States within required 120 days for recovery of liquidated damages for breach of contract made with Oklahoma poultry packer under section 35

et seq. of this title. *Harp v. U.S.*, C.A.10 (Okla.) 1949, 173 F.2d 761, certiorari denied 70 S.Ct. 56, 338 U.S. 816, 94 L.Ed. 494.

The provision of this section, authorizing United States to withhold sums due it because of violation of representations and stipulations in contracts named therein from amounts due from it on any such contracts, extends common-law withholding right beyond particular contract to other contracts of same species, so that limitations of Portal-to-Portal Act, section 251 et seq. of Title 29, as to times for commencement of actions for overtime compensation do not apply to withholding or recoupment authorized by sections 35 to 45 of this title, as such withholding is not an action to enforce a cause of action. *Ready-Mix Concrete Co. v. U. S.*, Ct.Cl.1955, 130 F.Supp. 390, 131 Ct.Cl. 204.

The two-year limitation period prescribed by section 255 of Title 29, began to run at time of alleged violation of section 35 of this title and not from time of completion of administrative proceedings by Labor Department, and therefore action for damages instituted by United States over two years after defendant had allegedly employed minors in violation of section 35(d) of this title was barred, though such action was brought within two years after Administrator of Wage and Hour and Public Contract Division of the Department of Labor had found that defendant had employed such minors and was liable in a certain sum as liquidated damages. *U. S. v. W. H. Kistler Stationery Co.*, D.C.Colo.1952, 104 F.Supp. 16, affirmed 200 F.2d 805.

An action by United States, under this section, to recover damages from Government contractors for breach of contracts by employment of minor females under prescribed minimum ages for more than permitted maximum number of hours a day, was not barred by statute of limitations, where it was filed within two years after date of decision of Secretary of Labor, in administrative proceeding, that defendants were subject to sections 35 to 45 of this title and indebted to United States for liquidated damages in specified amounts. *U.S. v. Sweet Briar, Inc.*, W.D.S.C.1950, 92 F.Supp. 777.

Limitation of Portal-to-Portal Act, section 255 of Title 29, began to run against action under this section by United States against contractor for liquidated damages for breach of contract by knowingly employing minors in manufacture and production of articles contracted for, when Secretary of Labor determined occurrence of violations and adjudged liability against contractor, and not when the minors allegedly were knowingly employed. *U.S. v. Craddock- Terry Shoe Corp.*, W.D.Va.1949, 84 F.Supp. 842, affirmed 178 F.2d 760.

An action by United States against public contractor to recover as liquidated damages for violation of section 35 et seq. of this title the unpaid overtime wages which public contracts require contractor to pay employees was not barred by two year limitations prescribed by Portal-to-Portal Act, section 255 of Title 29, if Act was applicable where action was instituted within one year of termination of Department of Labor proceedings determining that overtime wages were due and unpaid. *U.S. v. Hudgins-Dize Co.*, E.D.Va.1949, 83 F.Supp. 593.

19. Burden of proof

Administrative findings were presumptively correct, and burden was on defendant employer to show that such findings were not supported by preponderance of evidence, in action under sections 35 to 45 of this title to recover sums of money due United States by reason of underpayment of wages and the employment of female minors under 18 years of age. *U. S. v. Southland Mfg. Corp.*, D.C.Puerto Rico 1967, 264 F.Supp. 174.

Corporation and its officers and directors sued by United States for liquidated damages for failure to pay minimum wages and overtime rates while fulfilling Government coal contracts had burden of establishing perishability of lignite coal to come within exception in section 43 of this title, and to show that all hours were not worked in manufacturing or furnishing materials used in performing contracts to rebut presumption that all employees engaged in performing contracts. *U. S. v. Sawyer Fuels, Inc.*, D.C.N.D.1961, 199 F.Supp. 876, appeal dismissed 313 F.2d 637.

Fact findings of Secretary of Labor in administrative proceeding under sections 35 to 45 of this title to determine Government contractors' liability for liquidated damages for employment of under-age minors are presumptively correct, and burden is on contractors in action by United States for such damages to show that findings were not

supported by evidence. U.S. v. Sweet Briar, Inc., W.D.S.C.1950, 92 F.Supp. 777.

20. Trial de novo

Defendant employers in action under sections 35 to 45 of this title to recover sums of money due United States were not entitled to a trial de novo, but were entitled to a determination as to whether findings of fact, conclusions of law, and decision of hearing examiner, as affirmed by administrator of Wage and Hour and Public Contracts Divisions, were supported by the preponderance of the evidence. U. S. v. Southland Mfg. Corp., D.C.Puerto Rico 1967, 264 F.Supp. 174.

Employer against which Under Secretary of Labor had initiated administrative proceeding for failure to pay minimum wages and overtime rates under sections 35 to 45 of this title was not entitled to trial de novo before federal district court in suit by United States to recover liquidated damages for failure to pay such wages and rates. U. S. v. Sawyer Fuels, Inc., D.C.N.D.1961, 199 F.Supp. 876, appeal dismissed 313 F.2d 637.

21. Standard of review

In determining the preponderance of the evidence, only that evidence presented to hearing examiner and reviewed by administrator of Wage and Hour and Public Contracts Divisions was to be considered by court in action under sections 35 to 45 of this title to recover sums of money due United States, particularly where court had by exercise of its judicial discretion stayed the judicial proceeding pending completion of the administrative proceedings. U. S. v. Southland Mfg. Corp., D.C.Puerto Rico 1967, 264 F.Supp. 174.

41 U.S.C.A. § 36

41 USCA § 36

END OF DOCUMENT

**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 37. Distribution of list of persons breaching contract; future contracts prohibited

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35 to 45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 3, 49 Stat. 2037.)

< General Materials (GM) - References, Annotations, or Tables >

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipment of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

American Digest System

Violations of minimum wage and hour provisions and liability therefor, see Labor Relations ☞ 1295.

Encyclopedias

Blacklisting for violation of wage and hour provisions, see C.J.S. Labor Relations § 1166.

Propriety of regulation providing sanction of ineligibility to contract with government for specified period after violation of specifications as to wages and hours, see C.J.S. Labor Relations § 1213.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts.

65 Am Jur 2d, Public Works and Contracts §§ 202, 203, 216, 231.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 117, 141-143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

NOTES OF DECISIONS

Injunction 3

Rules and regulations 1

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1. Rules and regulations

Secretary of Labor's regulation providing that any government contractor or subcontractor found to have willfully violated overtime pay provisions of certain acts relating to federally financed or assisted construction would be ineligible for three-year period from doing business with government was not a penal measure but was regulation for effecting compliance with and furthering public policy represented by labor acts and was valid under Reorganization Plan No. 14 F.2d206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

3. Injunction

Where plaintiffs were parties in proceeding in Labor Department and as result of findings and decisions therein plaintiffs had been subjected to payment of liquidated damages pursuant to section 36 of this title, which it was alleged was not applicable to their contracts, and pursuant to this section the plaintiffs' names had been submitted to Comptroller General for inclusion on list of those ineligible to contract with agencies of the Government, plaintiffs were entitled to maintain action to restrain Government officials from taking any further action to cause the publication of ineligibility pending the determination. Capitol Coal Sales v. Mitchell, D.C.D.C.1958, 164 F.Supp. 161, affirmed 282 F.2d 486, 108 U.S.App.D.C. 324.

Period of ineligibility 2

of 1950, set out in the Appendix to Title 5, Government Organization and Employees. Copper Plumbing & Heating Co. v. Campbell, C.A.D.C.1961, 290 F.2d 368, 110 U.S.App.D.C. 177.

2. Period of ineligibility

Violations of representations and stipulations in government contracts by government suppliers and manufacturers renders contracting party liable for damages and, possibly, for black-listing from government contracts for three- year period. United Biscuit Co. of America v. Wirtz, C.A.D.C.1965, 359

4. Stay of proceedings

In future situations where dispute arises over applicability of sections 35 to 45 of this title and blacklisting of contractors for violation of such sections, courts should be careful to guard against a multiplicity of litigation, and ordinarily the district court having jurisdiction over suit for declaratory relief should stay its proceedings until United States has had opportunity to institute and complete enforcement proceedings, although temporary restraining order to prevent blacklisting pending outcome of enforcement action may be appropriate, but where district court with jurisdiction over enforcement proceedings had stayed its proceedings to permit completion of declaratory judgment suit, and district court had already considered administrative record and issues raised in declaratory judgment suit, court of appeals would, rather than staying its proceedings pending enforcement proceedings, rule on legal questions presented by the appeal. *George v. Mitchell*, C.A.D.C. 1960, 282 F.2d 486, 108 U.S.App.D.C. 324.

41 U.S.C.A. § 37

41 USCA § 37

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**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 38. Administration of Walsh-Healey provisions; officers and employees; appointment; investigations; rules and regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35 to 45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, subject to chapter 51 and subchapter III of chapter 53 of Title 5, an administrative officer, and such attorneys and experts, and other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35 to 45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35 to 45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35 to 45 of this title.

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(June 30, 1936, c. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Codifications

Provisions of second sentence of this section that authorized the Secretary to appoint an administrative officer and such attorneys and experts "without regard to the provisions of the civil service laws" were omitted as obsolete. Such appointments are subject to the civil service laws unless specifically excepted by such laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, c. 919, Title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

"Chapter 51 and subchapter III of chapter 53 of Title 5" were substituted in text for "the Classification Act of 1949, as amended" on authority of Pub.L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Amendments

1949 Amendment. Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

Transfer of Functions

For transfer of functions of all other officers, employees, and agencies of the Department of Labor, with certain

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exceptions, to the Secretary of Labor, with power to delegate, see Reorg. Plan No. 6 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

Repeals

Act Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972, cited as a credit to this section, was repealed (subject to a savings clause) by Pub.L. 89-554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

This section as governing Secretary's authority to enforce Service Contract Act of 1965, see 41 USCA § 353.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Investigations and inspections by State agencies, see 29 CFR § 515.1 et seq.

Labor standards for federal service contracts, see 29 CFR § 4.1 et seq.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Procedural rules for modification, etc., of occupational safety or health standards, see 29 CFR § 1911.1 et seq.

Procedure in wage determinations, see West's Federal Practice Manual § 1457.40.

Public Contracts, generally, see 41 CFR § 50-201.1 et seq.

Scope of coverage, see West's Federal Practice Manual § 1457.28.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

American Digest System

Administrative investigations under wages and hours regulations, see Labor Relations ⚙ 1426.

Administrative powers as to rules and regulations of wage and hour matters, see Labor Relations ⚙ 1425.

Powers and duties of boards and officers in administration of wages and hours regulations, see Labor Relations ⚙

1423.

Encyclopedias

Duty of Secretary of Labor to administer Walsh-Healey Act, see C.J.S. Labor Relations § 1240.

Investigations by Secretary of Labor under Walsh-Healey Act, see C.J.S. Labor Relations § 1217.

Power of administrators to promulgate rules and regulations as to wage and hour laws, see C.J.S. Labor Relations § 1213.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts §§ 3, 18.

65 Am Jur 2d, Public Works and Contracts §§ 203, 216.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 141- 143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889, 998.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

NOTES OF DECISIONS

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Duty or authority of Secretary - Exemptions 3

Duty or authority of Secretary - Rules and regulations 4

1. Constitutionality

Authority given Secretary of Labor to make, amend, and rescind rules and regulations which are to have force and effect of law and are necessary to carry out provisions of sections 35 to 45 of this title was not unconstitutional delegation of legislative power. U. S.

3. --- Exemptions

The Secretary of Labor had authority under this section to grant exemptions from operation of sections 35 to 45 of this title upon such conditions as may be reasonable, include the terms of such sections in contracts by reference or practice and require employers securing Government contracts to keep a separate record of the time for work performed under Government contract, or, in the alternative, sustain the burden of proof that employees were working on other than Government contracts, and such regulations have the force of law. U.S. v. Harp, W.D.Okla.1948, 80 F.Supp. 236, affirmed 173 F.2d 761, certiorari denied 70 S.Ct. 56, 338 U.S. 816, 94 L.Ed. 494.

Constitutionality 1

v. Sawyer Fuels, Inc., D.C.N.D.1961, 199 F.Supp. 876, appeal dismissed 313 F.2d 637.

2. Duty or authority of Secretary--Generally

Determination of whether sections 35 to 45 of this title and contracts for manufacture of shoes for the United States covered separate plants wherein parts only of the shoes were manufactured was primarily duty of the Secretary of Labor, not of courts. Endicott Johnson Corp. v. Perkins, U.S.N.Y.1943, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

4. --- Rules and regulations

Interpretation of Secretary that coal wholesaler which contracted to supply coal to United States on four different contracts but which was not a regular dealer within meaning of section 35 of this title requiring payment of minimum wage and overtime compensation was under administrative regulations adopted pursuant to this section the party responsible for failure to pay wages to miners who mined coal for wholesaler's supplier was both correct and reasonable. *Ino. McCall Coal Co. v. U. S.*, C.A.4 (Md.) 1967, 374 F.2d 689.

Administrative rulings under sections 35 to 45 of this title which impose joint liability on one with a government contract for the manufacture of materials for failure of another manufacturer to which work has been shifted to comply with the standards of sections 35 to 45 of this title represent reasonable interpretation of statutory policy and are well within authority of Secretary of Labor to make such rules and regulations as are necessary to carry out provisions of said sections. *U. S. v. Davison Fuel & Dock Co.*, C.A.4 (W.Va.) 1967, 371 F.2d 705.

Regulation which was issued by Secretary of Labor for purpose of directing contracting officers as to what to incorporate into Government contracts so far as sections 35 to 45 of this title were concerned and which were incorporated into contract for purpose of notifying contractor that any violation of such sections in performance of contract would result in contractor's pay under contract being reduced by amount necessary to compensate for violation did not affect the Government's right under such sections to withhold amounts owed by contractor for violations committed in performance of other contracts. *Ready- Mix Concrete Co. v. U.S.*, Ct.Cl.1958, 158 F.Supp. 571, 141 Ct.Cl. 168.

5. Action against Secretary

An action for injunctive relief based on assertion that Secretary of Labor exceeded his authority under this section in determining that contracts might be grouped for purpose of meeting jurisdictional minimum limitation of \$10,000 when entered into in response to a single invitation to bid did not constitute a suit against the United States so as to preclude maintenance of the action because United States had not consented to be sued since if court should determine, when case was heard on merits, that section 35 et seq. of this title did not contemplate the grouping of such contracts it would not then be declaring the rights of the United States, but rather it would declare that the Secretary of Labor had acted in violation of section 35 et seq. of this title and that such action was void. *Capitol Coal Sales v. Mitchell*, D.C.D.C.1958, 164 F.Supp. 161, affirmed 282 F.2d 486, 108 U.S.App.D.C. 324.

41 U.S.C.A. § 38

41 USCA § 38

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Current through P.L. 105-394, approved 11-13-1998

§ 39. Hearings on Walsh-Healey provisions by Secretary of Labor; witness fees; failure to obey order; punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35 to 45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35 to 45 of this title.

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(June 30, 1936, c. 881, § 5, 49 Stat. 2038; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139 § 127, 63 Stat. 107.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Codifications

As originally enacted, the words ", or the district court of the United States for the District of Columbia," were set out following "Territory or possession". Act June 25, 1948, as amended by Act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia". The words "United States District Court for the District of Columbia" have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district", and section 88 of Title 28 which states that "the District of Columbia constitutes one judicial district".

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

Criminal contempt, see 18 USCA §§ 401, 402, 3285, and 3691; Fed.Rules Cr.Proc. Rule 42, 18 USCA.

Findings by court, Fed.Rules Civ.Proc. Rule 52, 28 USCA.

Per diem and mileage of witnesses, see 28 USCA § 1821.

Subpoena, Fed.Rules Civ.Proc. Rule 45, 28 USCA and Fed.Rules Cr.Proc. Rule 17, 18 USCA.

This section as governing Secretary's authority to enforce Service Contract Act of 1965, see 41 USCA § 353.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Rules of practice, see 41 CFR § 50-203.1 et seq.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

American Digest System

Administrative hearings under wage and hour regulations, see Labor Relations ☞ 1437.

Administrative subpoenas under wage and hour regulations and their enforcement, see Labor Relations ☞ 1427 to 1434.

Conclusiveness of administrative decision, see Labor Relations ☞ 1453.

Encyclopedias

Administrative subpoenas under Walsh-Healey Act and their enforcement, see C.J.S. Labor Relations §§ 1218, 1219.

Conclusiveness of findings of fact of Secretary of Labor, see C.J.S. Labor Relations § 1250.

Hearings by Secretary of Labor under Walsh-Healey Act, see C.J.S. Labor Relations § 1217.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 203, 216.

Forms

Administrative subpoenas, enforcement of, see West's Federal Forms § 6004 et seq.

Civil subpoena for attendance of witnesses, see West's Federal Forms § 3981 et seq.

Contempt proceedings, see West's Federal Forms § 5651 et seq.

Depositions, matters pertaining to, see West's Federal Forms § 3271 et seq.

Jurisdiction and venue in district courts, matters pertaining to, see West's Federal Forms § 1003 et seq.

Proceedings to compel discovery and enforcement of penalties for refusal to make discovery, see West's Federal Forms § 3681 et seq.

Production of documents, motions and orders pertaining to, see West's Federal Forms § 3551 et seq.

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 116, 141-143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

20A Am Jur Pl & Pr Forms (Rev ed), Public Works and Contracts, Forms 112-117.

Texts and Treatises

11 Fed Proc L Ed, Employees' Compensation Acts § 29:299.

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889, 904, 910, 913, 929, 998, 999 17 Fed Proc L Ed, Health, Education, and Welfare § 42:1059, 1072.

22 Fed Proc, L Ed, Labor and Labor Relations, § 52:6.

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Where action was brought by Government against employer for breach of contract on violations of sections 35 to 45 of this title, and subpoena duces tecum was served on employer with respect to records of employment, no cause of action was available to Government prior to two years preceding start of administrative hearings by Department of Labor on violations of those sections; however, subpoena would not be quashed in its entirety but modified to comply with regulations requiring employer to maintain records for period of four years. *Billera v. Mitchell*, E.D.Pa.1958, 166 F.Supp. 701.

1. Issuance of subpoenas

The power to issue subpoenas delegated to Secretary of Labor by this section is within limits of Congressional authority. *Endicott Johnson Corp. v. Perkins*, U.S.N.Y.1943, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

2. Quashing of subpoenas

3. Enforcement of subpoenas

The Secretary of Labor was entitled to enforcement of subpoena seeking evidence that manufacturer having Government contract underpaid employees in plants where parts only were made, without having first determined that such plants were covered by sections 35 to 45 of this title and the contracts in question. *Endicott Johnson Corp. v. Perkins*, U.S.N.Y.1943, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

4. Preliminary injunction

Paper manufacturer and union were entitled to preliminary injunction against Secretary of Labor enjoining him from directly or indirectly debarring manufacturer from further business with the government by means of formal debarment, temporary suspension, or otherwise, and from interfering with manufacturer's collective bargaining agreement with union, prior to administrative hearing in which question of whether manufacturer was in compliance with Executive Order relating to equal employment opportunity clauses in government contracts and subcontracts could be resolved. *Crown Zellerbach Corp. v. Wirtz*, D.C.D.C.1968, 281 F.Supp. 337.

5. Judicial review--Generally

Scope of review of administrative decision holding that government contractor violated minimum wage and fringe benefits provisions of Service Contract Act, section 351 et seq. of this title, is limited to legal question whether the administrative law judge applied and satisfied the standard of proof required to find a violation and the Administrative law judge's findings are conclusive in any court of the United States if supported by a preponderance of the evidence. *American Waste Removal Co. v. Donovan*, C.A.10 (N.M.) 1984, 748 F.2d 1406.

Scope of judicial review in action under sections 35 to 45 of this title was that provided by sections 35 to 45 of this title, i.e., findings if supported by preponderance of evidence were conclusive in any court of the United States. *U.S. v. Sancelmar Industries, Inc.*, E.D.N.Y.1972, 347 F.Supp. 404.

Credibility of witnesses relied upon by hearing examiner in arriving at his findings in proceeding under sections 35 to 45 of this title arising out of alleged underpayment of wages to employees and alleged employment of female minors under 18 years of age was function of hearing examiner, and his findings could be overruled only where, on basis of record, they were clearly incorrect. *U. S. v. Southland Mfg. Corp.*, D.C.Puerto Rico 1967, 264 F.Supp. 174.

6. --- Evidence considered

In determining the preponderance of the evidence, only that evidence presented to hearing examiner and reviewed by administrator of Wage and Hour and Public Contracts Divisions was to be considered by court in action under sections 35 to 45 of this title to recover sums of money due United States, particularly where court had by exercise of its judicial discretion stayed the judicial proceeding pending completion of the administrative proceedings. *U. S. v. Southland Mfg. Corp.*, D.C.Puerto Rico 1967, 264 F.Supp. 174.

In an action by the United States under this section based upon findings and conclusions of a hearing examiner of the Department of Labor for underpayment of wages on a contract, only evidence that the court could consider was the evidence submitted to the hearing examiner and the "preponderance of the evidence" described in this section referred to that evidence and no other. *U.S. v. Islip Mach. Works, Inc.*, E.D.N.Y.1959, 179 F.Supp. 585.

7. --- Burden of proof

Findings made by the Department of Labor in a proceeding under sections 35 to 45 of this title that particular employees were underpaid by determined amounts were not deficient for failure to contain supporting evidence in as much as party taking an exception to such findings had burden of showing wherein administrative determination was wrong. *Ready-Mix Concrete Co. v. U.S.*, Ct.Cl.1958, 158 F.Supp. 571, 141 Ct.Cl. 168.

Fact findings of Secretary of Labor in administrative proceeding under this section to determine Government contractors' liability for liquidated damages for employment of under-age minors are presumptively correct, and burden is on contractors in action by United States for such damages to show that findings were not supported by evidence. *U.S. v. Sweet Briar, Inc.*, W.D.S.C.1950, 92 F.Supp. 777.

Findings made in Department of Labor administrative proceedings charging violations of section 35 et seq. of this title in that public contractor had not paid employees engaged in performance of contracts the overtime compensation required by the contracts and such sections were presumptively correct, and burden was on contractor and its sureties sued by United States for recovery, as liquidated damages, of amount of overtime wages which Department found had not been paid, to show that such findings were not supported by the evidence. *U.S. v. Hudgins-Dize Co.*, E.D.Va.1949, 83 F.Supp. 593.

8. --- Weight and conclusiveness of administrative findings

Hearing examiner's findings of facts supported by preponderance of evidence are conclusive. *U. S. v. Sawyer Fuels, Inc.*, D.C.N.D.1961, 199 F.Supp. 876, appeal dismissed 313 F.2d 637.

In action by the Government to recover damages for breach of contract for underpayment of wages by defendants who were the corporate contracting party and the president of the corporation whose liability was predicated upon a finding that he was a "party responsible" for breach of the contract, where the individual defendant made no point of the jurisdictional question, he must be deemed to have consented to the binding effect of the findings in the administrative hearing if supported by a preponderance of the evidence. *U.S. v. Islip Mach. Works, Inc.*, E.D.N.Y.1959, 179 F.Supp. 585.

Where section 40 of this title authorized Secretary of Labor to set rate of pay for overtime in the event the Secretary should permit increase in maximum hours of labor stipulated in public contract, and public contract contained overtime stipulation, such stipulation was an undertaking within condition of contractor's bond for faithful performance of contract, the Secretary could make finding with respect to overtime in administrative proceeding charging violation of such section, and such finding was enforceable against the bond. *U.S. v. Hudgins-Dize Co.*, E.D.Va.1949, 83 F.Supp. 593.

9. --- Remand

There was no impropriety in district court's remanding of case to Secretary of Labor for further findings on question of whether funds used in connection with purchase notice agreement between government and manufacturer were appropriated funds since manufacturer, claiming that agreement was not subject to sections 35 to 45 of this title, had not argued applicability of open market exception of sections 35 to 45 of this title before the administrative agency. *United Biscuit Co. of America v. Wirtz*, C.A.D.C.1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

41 U.S.C.A. § 39

41 USCA § 39

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**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 40. Exceptions from Walsh-Healey provisions; modification of contracts; variations; overtime; suspension of representations and stipulations

Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of sections 35 to 45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: Provided, That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 35 of this title.

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 6, 49 Stat. 2038; June 28, 1940, c. 440, Title I. § 13, 54 Stat. 681.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Amendments

1940 Amendment. Act June 28, 1940, added the proviso.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

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LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Contract provisions, see 41 CFR § 50-201.1 et seq.

Enforcement of safety and health standards by state officers and employees, see 41 CFR § 50-205.1 et seq.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Public contracts law, overview and applicability of, see West's Federal Practice Manual § 1457.28 et seq.

Rules of practice, see 41 CFR § 50-203.13 et seq.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

Encyclopedias

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts §§ 3, 18.

65 Am Jur 2d, Public Works and Contracts §§ 203, 216, 223, 231, 232.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 141- 143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889, 890.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

NOTES OF DECISIONS

Compliance with conditions of exemption order 1

Overtime 3

1. Compliance with conditions of exemption order

Stockpile exemption 2

A Government contractor's full compliance with conditions of exemption order, issued by Secretary of Labor, permitting employment of sixteen and seventeen year old girls in performance of contract, is condition of such employment, not a mere privilege to be exercised in employer's discretion. U.S. v. Sweet Briar, Inc., W.D.S.C.1950, 92 F.Supp. 777.

2. Stockpile exemption

Where government contract for supply of asphalt products in steel drums was an indefinite amount requirements

contract reciting 300,000 as the general estimate of the number of drums needed and contract contained a specified delivery requirement on drums for the first 45-day period, contractor which had on hand a sufficient number of drums in stock during duration of contract to meet the specified delivery schedule but not the general estimate of 300,000 drums, was entitled to exemption from the overtime provisions of sections 35 to 45 of this title under the stockpile exemption with respect to work of its employees in making delivery to stockpile of different drums which were commingled with those on hand. U.S. v. Gulf States Asphalt Co., Inc., C.A.5 (Tex.) 1973, 472 F.2d 933.

3. Overtime

Where this section authorized Secretary of Labor to set rate of pay for overtime in the event the Secretary should permit increase in maximum hours of labor stipulated in public contract, and public contract contained overtime stipulation, such stipulation was an undertaking within condition of contractor's bond for faithful performance of contract, and Secretary could make finding with respect to overtime in administrative proceeding charging violation of this section, and such finding was enforceable against the bond. U.S. v. Hudgins-Dize Co., E.D.Va.1949, 83 F.Supp. 593.

41 U.S.C.A. § 40

41 USCA § 40

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**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 41. "Person" defined in Walsh-Healey provisions

Whenever used in sections 35 to 45 of this title, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 7, 49 Stat. 2039; Nov. 6, 1978, Pub.L. 95-598, Title III § 326, 92 Stat. 2679.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1978 Act. House Report No. 95-595 and Senate Report No. 95-589, see 1978 U.S.Code Cong. and Adm.News, p. 5787.

Amendments

1978 Amendment. Pub.L. 95-598 substituted "trustees in cases under Title 11" for "trustees in bankruptcy".

Effective Dates

1978 Act. Amendment by Pub.L. 95-598 effective Oct. 1, 1979, see section 402(a) of Pub.L. 95-598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

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Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Wage and hour law, see West's Federal Practice Manual § 1451.75 et seq.

Encyclopedias

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts §§ 18, 53.

65 Am Jur 2d, Public Works and Contracts §§ 203, 216, 221.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 141- 143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889.

17 Fed Proc L Ed, Health, Education, and Welfare.

42:1059, 1072.

41 U.S.C.A. § 41

41 USCA § 41

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**UNITED STATES CODE ANNOTATED
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CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 42. Effect of Walsh-Healey provisions on other laws

The provisions of sections 35 to 45 of this title shall not be construed to modify or amend Title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time [40 U.S.C.A. § 276a et seq.], nor the labor provisions of Title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend chapter 307 and section 4162 of Title 18.

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 8, 49 Stat. 2039.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

References in Text

Title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), referred to in text, is Act Mar. 3, 1933, c. 212, Title III, 47 Stat. 1520, as amended, popularly known as the Buy American Act, which enacted sections 10a to 10c of this title and enacted provisions set out as notes under section 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

The Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), referred to in text, probably means Act Mar. 3, 1931, c. 411, 46 Stat. 1494, as amended, popularly known as the Davis-Bacon Act, which is classified generally to sections 276a to 276a-5 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 276a of Title 40 and Tables.

The National Industrial Recovery Act, referred to in text, is Act June 16, 1933, c. 90, 48 Stat. 195. Title II of the National Industrial Recovery Act was classified principally to subchapter I (section 401 et seq.) of chapter 8 of Title 40, Public Buildings, Property, and Works, and was terminated June 30, 1943, by Act June 27, 1942, c. 450, § 1, 56 Stat. 410. For complete classification of this Act to the Code, see Tables.

Section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935, referred to in text, is Act Apr. 8,

1935, c. 48, § 7, 49 Stat. 115, which is not classified to the Code.

Codifications

"Chapter 307 and section 4162 of Title 18" was substituted for "the Act entitled An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934" on authority of Act June 25, 1948, c. 645, 62 Stat. 683, the first section of which enacted Title 18, Crimes and Criminal Procedure. Prior to the enactment of Title 18, the Act of May 27, 1930, as amended, had been classified to sections 744a to 744n of Title 18.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Tort liability for nonmedical radiological harm. 73 ALR4th 582.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Wage and hour law, see West's Federal Practice Manual § 1451.75 et seq.

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48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 203, 216.

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10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 141- 143, 152-158, 160.

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15A Fed Proc L Ed, Government Contracts §§ 39:412, 889.

41 USCA s 42

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17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

41 U.S.C.A. § 42

41 USCA § 42

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**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 43. Walsh-Healey provisions not applicable to certain contracts

Sections 35 to 45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934 [47 U.S.C.A. § 151 et seq.].

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 9, 49 Stat. 2039.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

References in Text

The Communications Act of 1934, referred to in text, is Act June 19, 1934, c. 652, 48 Stat. 1064, as amended, which is classified principally to chapter 5 (section 151 et seq.) of Title 47, Telegraphs, Telephones, and Radiotelegraphs. For complete classification of this Act to the Code see section 609 of Title 47 and Tables.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Construction and application of Truth in Negotiations Act (10 USCA § 2306(f)), requiring prime contractors and subcontractors to submit cost or pricing data, certified to be accurate, complete, and current, respecting certain government contracts. 24 ALR Fed 317.

What contracts are subject to wage and hour requirements of Walsh-Healey Act (41 USC § 35). 2 ALR Fed 637.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Validity, construction, and application of OSHA general industry standard regulating exposure to occupational noise (29 CFR § 1910.95). 43 ALR Fed 159.

LIBRARY REFERENCES

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Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Public contracts law, overview and applicability of, see West's Federal Practice Manual § 1457.28 et seq.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

American Digest System

Work under public contracts, see Labor Relations ¶1132.

Encyclopedias

Open market exception to Walsh-Healey Act, see C.J.S. Labor Relations § 1042.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 202, 203, 216, 217, 231.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 141- 143, 152-158, 160.

20 Am Jur Legal Forms 2d, United States § 254:1.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

NOTES OF DECISIONS

Open market purchases 1

Perishables 2

1. Open market purchases

Act of 1947, section 2301 et seq. of Title 10, took agreement out of the ambit of exception of sections 35 to 45 of this title provision relating to purchases of supplies as may usually be bought in the open market. *United Biscuit Co. of America v. Wirtz*, C.A.D.C. 1965, 359 F.2d 206, 123 U.S.App.D.C. 222, certiorari denied 86 S.Ct. 1861, 384 U.S. 971, 16 L.Ed.2d 682.

Fact that purchase notice agreement entered into between manufacturer and government had been entered into pursuant to Armed Services Procurement

Provision of this section that sections 35 to 45 of this title "shall not apply to purchases of such materials, supplies, articles or equipment as may usually be bought in the open market" did not exempt bituminous coal from sections 35 to 45 of this title even though it could be purchased in the open market, such exemption excluding from coverage of sections 35 to 45 of this title only purchases the Government itself was authorized to make in the open market. *Ruth*

Elkhorn Coals, Inc. v. Mitchell, C.A.D.C.1957, 248 F.2d 635, 101 U.S.App.D.C. 313, certiorari denied 78 S.Ct. 539, 355 U.S. 953, 2 L.Ed.2d 530.

2. Perishables

Corporation and its officers and directors sued by United States for liquidated damages for failure to pay minimum wages and overtime rates while fulfilling Government coal contracts had burden of establishing perishability of lignite coal to come within exception in this section, and to show that all hours were not worked in manufacturing or furnishing materials used in performing contracts to rebut presumption that all employees engaged in performing contracts. U. S. v. Sawyer Fuels, Inc., D.C.N.D.1961, 199 F.Supp. 876, appeal dismissed 313 F.2d 637.

41 U.S.C.A. § 43

41 USCA § 43

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CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 43a. Administrative procedure provisions

(a) Applicability

Notwithstanding any provision of section 553 of Title 5, subchapter II of chapter 5, and chapter 7, of Title 5 shall be applicable in the administration of sections 35 to 39 and 41 to 43 of this title.

(b) Wage determination; administrative review

All wage determinations under section 35(a) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in chapter 7 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any supplier of materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

(c) Judicial review

Notwithstanding the inclusion of any stipulations required by any provision of sections 35 to 45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms "locality" and "open market".

CREDIT(S)

1987 Main Volume

(June 30, 1936, c. 881, § 10, as added June 30, 1952, c. 530, Title III. § 301, 66 Stat. 308.)

1999 Pocket Part

(As amended Oct. 13, 1994, Pub.L. 103-355, Title VII. § 7201(2), (3), 108 Stat. 3378; Feb. 10, 1996, Pub.L. 104-106, Div. D, Title XLIII. § 4321(f)(2), 110 Stat. 675.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1952 Act. Subsection (a) of section 10 makes the provisions of the Administrative Procedure Act applicable to sections 1 to 5 and 7 to 9 of the Walsh-Healey Act. Section 4 of the Administrative Procedure Act now excepts matters relating to public contracts from the requirements of the act pertaining to rule making. The effect of the amendment made by subsection (a) is to make rules (as defined in the Administrative Procedure Act) which are promulgated by the Secretary of Labor in the administration of sections 1 to 5 and 7 to 9 of the Walsh-Healey Act

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subject to certain minimum procedural requirements applicable to agencies generally in exercising rule making powers. Such requirements include (1) adequate notice of the proposed rule making with a clear statement of the terms or substance of the proposed rule, (2) opportunity for interested persons to participate in the proposed rule making by submission of views or arguments, and (3) the right of interested persons to petition for the issuance, amendment, or repeal of a rule. It is to be noted that compliance with the procedural requirements of the Administrative Procedure Act is not required in the case of rules promulgated under section 6 of the Walsh-Healey Act. Section 6 provides statutory authority for the Secretary of Labor to make exceptions under certain conditions with respect to contracts which would otherwise be subject to the provisions of the act.

Subsection (b) of section 10 provides that all wage determinations by the Secretary of Labor under section 1(b) of the Walsh-Healey Act shall be made on the record after opportunity for an agency hearing. The effect of this language is to compel compliance by the Secretary of Labor with the requirements of sections 7 and 8 of the Administrative Procedure Act (relating to hearings and decisions) as a prerequisite to the making of a determination of the prevailing minimum wages in an industry. The full force of the procedural safeguards contained in the Administrative Procedure Act is thereby brought into play insofar as these controversial determinations are concerned. The subsection further assures the right to obtain judicial review of these determinations in the manner provided in section 10 of the Administrative Procedure Act by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles, or equipment purchased or to be purchased by the Government from any source, who is in any industry to which the wage determination is applicable. The language assuring judicial review makes it clear that the court may consider the applicability of the wage determination to any person as well as the amount arrived at by the Secretary of Labor. Any such review may be sought, however, only by a proceeding instituted within 90 days after the determination is made.

Subsection (c) of section 10 is designed to permit any Government contractor whose contract contains stipulations required by the Walsh-Healey Act to obtain a judicial determination in any appropriate proceeding of any legal question (including the applicability of the act) to the same extent as any such question could be raised if the stipulations were not contained in the contract. Without the language contained in subsection (c) there would be some doubt as to whether any Government contractor who had signed a contract containing "Walsh-Healey stipulations" could later in any legal proceeding raise questions concerning (1) the applicability of the act to his particular contract, or (2) the legality of any such stipulation. Under subsection (c) the court and not the Secretary of Labor may ultimately decide whether, in respect to any particular Government contract, the Walsh-Healey Act is being properly applied. The House amendment did not contain a similar provision. The conference substitute contains the provisions of the Senate bill. Conference Report No. 2352.

1994 Acts. Senate Report Nos. 103-258 and 103-259, and House Conference Report No. 103-712, see U.S. Code Cong. and Adm. News, p. 2561.

1996 Acts. House Conference Report No. 104-450, see 1996 U.S. Code Cong. and Adm. News, p. 238.

Codifications

"Section 553 of Title 5", "subchapter II of chapter 5, and chapter 7, of Title 5", and "chapter 7 of Title 5" were substituted for "section 1003 of Title 5", "such Act [meaning the Administrative Procedure Act]", and "section 1009 of Title 5", respectively, on authority of Pub.L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Amendments

1996 Amendments. Subsec. (b). Pub.L. 104-106, § 4321(f)(2)(A), substituted "section 35(a)" for "section 35(b)".

1994 Amendments. Subsec. (b). Pub.L. 103-355, § 7201(2), substituted "supplier of materials" for "manufacturer of, or regular dealer in, materials".

Subsec. (c). Pub.L. 103-355, § 7201(3), struck out from the enumeration of reviewable legal questions references to

interpretation of the terms regular dealer and manufacturer.

Effective Dates

1996 Acts. Amendment by Pub.L. 104-106 effective Feb. 10, 1996, except as otherwise provided, see section 4401 of Pub.L. 104-106, set out as a note under section 251 of this title.

1994 Acts. Amendment by section 7201(2) and (3) of Pub.L. 103-355 effective Oct. 13, 1994, except as otherwise provided, see section 10001 of Pub.L. 103-355, set out as a note under section 251 of this title.

Prior Provisions

A prior section 10 of act June 30, 1936, was renumbered section 12, and is classified to section 44 of this title.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Waiver of competitive bidding requirements for state and local public building and construction contracts. 40 ALR4th 968.

Availability of private right of action under § 503 of Rehabilitation Act of 1973 (29 USCA § 793), providing that certain federal contracts must contain provision requiring affirmative action to employ qualified handicapped individuals. 60 ALR Fed 329.

Judicial review under § 10(c) of Walsh-Healey Act (41 USCA § 43a(c)) of legal questions involved in award of government contracts under such act. 16 ALR Fed 982.

Requirement of Buy American Act (41 USCA §§ 10a-10d) that American made articles be preferred in government contracts. 58 ALR Fed 312.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

Obligations of successor contractor under § 4(c) of Service Contract Act of 1965 (41 USCA § 353(c)). 63 ALR Fed 794.

Standing of disappointed bidder on public contract to seek damages under 42 USCA § 1983 for public authorities' alleged violation of bidding procedures. 86 ALR Fed 904.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Minimum wage determinations, see 41 CFR § 50-202.1 et seq.

Procedure in wage determinations, see West's Federal Practice Manual § 1457.40.

Wage and hour law, see West's Federal Practice Manual § 1451 et seq.

American Digest System

Judicial review of administrative action, see Administrative Law and Procedure ¶651 to 900.

Judicial supervision of administrative action under wages and hours regulations, in general, see Labor Relations ¶1451.

Encyclopedias

Application of Federal Administrative Procedure Act to proceedings for determination of prevailing minimum wage under Walsh-Healey Act, see C.J.S. Labor Relations § 1241.

Judicial review of administrative proceedings in general, see C.J.S. Public Administrative Law and Procedure §§ 174 to 269.

Right of review under Walsh-Healey Act, see C.J.S. Labor Relations § 1248 et seq.

2 Am Jur 2d, Administrative Law (1994) § 177.

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 203, 205, 216, 217, 231.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 102, 111, 131, 132, 133, 141-143, 152-158, 160, 252.

2 Fed Procedural Forms L Ed, Appeal, Certiorari, and Review §§ 3:2, 382.

15A Am Jur Legal Forms 2d, Public Works and Contracts § 216:252.

20 Am Jur Legal Forms 2d, United States § 254:1.

20A Am Jur Pl & Pr Forms (Rev), Public Works and Contracts, Forms 113-115.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 419, 889, 892, 916-919, 925-930.

2 Fed Proc L Ed, Administrative Procedure § 2:73.

2 Fed Proc L Ed, Administrative Procedure (1994) § 2:102.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

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2. Wage determinations

While Secretary of Labor could conduct proceedings to determine present prevailing minimum wage if he abandoned old determination which had not been supported by sufficient evidence, he could not keep the old determination in effect until he superseded it. *Wirtz v. Baldor Elec. Co.*, C.A.D.C.1963, 337 F.2d 518, 119 U.S.App.D.C. 122.

3. Inspection records, disclosure of

Documents, which were prepared by inspectors employed by Secretary of Labor and other officials in connection with their inspection of plants subject to sections 35 to 45 of this title, were subject to disclosure under the Freedom of Information Act, section 552 of Title 5. *Wecksler v. Shultz*, D.C.D.C.1971, 324 F.Supp. 1084.

4. Right to administrative review

The fact that judicial review of a wage determination under sections 35 to 45 of this title is available in an appropriate case, under subsec. (c) of this section, does not preempt the right of review available under subsec. (b) of this section. *Ruth Elkhorn Coals, Inc. v. Mitchell*, C.A.D.C.1957, 248 F.2d 635, 101 U.S.App.D.C. 313, certiorari denied 78 S.Ct. 539, 355 U.S. 953, 2 L.Ed.2d 530.

5. Conditions for administrative review

An administrative body should not begin proceeding to determine whether sections 35 to 45 of this title have been violated unless the body has made at least a tacit tentative determination that the data already before it is sufficient to justify the institution of such an inquiry. *Perkins v. Endicott Johnson Corp.*, C.C.A.2 (N.Y.) 1942, 128 F.2d 208, certiorari granted 63 S.Ct. 35, 317 U.S. 607, 87 L.Ed. 492, affirmed 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

6. Supplementation of administrative record

Proposals of Secretary of Labor to supplement record of wage determination hearing under sections 35 to 45 of this title in order to correct noted deficiencies were properly rejected as neither strengthening evidence nor affording any semblance of required procedures, as information on 1964 wages could not reflect wages paid in 1960 or support determinations based solely on summary tabulations of 1960 wages. *Wirtz v. Baldor Elec. Co.*, C.A.D.C.1963, 337 F.2d 518, 119 U.S.App.D.C. 122.

7. Conditions for judicial review

Electric companies which alleged that they paid minimum wages less than those found by Secretary of Labor to be prevailing minimums in motors and generators industry, but who did not submit any affidavits or other facts in support of allegations, could not maintain actions for review of minimum wage determination by Secretary of Labor. *Baldor Elec. Co. v. Wirtz*, D.C.D.C.1964, 228 F.Supp. 210.

8. Exhaustion of administrative remedies

Issue of whether bid for Army procurement contract was unresponsive because bidder did not qualify as "manufacturer" under Walsh-Healey Act could not be considered by courts before Army made final determination as to whether the corporation met Act's requirements. *Honeywell, Inc. v. U.S.*, C.A.Fed.1989, 870 F.2d 644.

Paper manufacturer and union had adequate administrative remedy under procedures contemplated by executive order relating to equal employment opportunity clauses in government contracts and subcontracts, so that manufacturer and union were not entitled to an injunction restraining defendant Secretary of Labor from instituting administrative proceedings to debar manufacturer from eligibility for government contracts. *Crown Zellerbach Corp. v. Wirtz*, D.C.D.C.1968, 281 F.Supp. 337.

Where pursuant to section 36 of this title the Government had instituted an action for recovery of liquidated damages determined in administrative proceedings to be due, defendants in such action proclaimed that Secretary of Labor exceeded his authority in determining that contracts might be grouped for purpose of meeting jurisdictional minimum limitation of \$10,000 when entered into in response to a single invitation to bid, did not have an adequate remedy as respects their liability on the contracts and hence they were entitled to review provided by the Administrative Procedure Act [repealed], former section 1009 of Title 5 [now covered by sections 701 to 706 of Title 5], unless dismissal of their action was required because of other reasons. *Capitol Coal Sales v. Mitchell*, D.C.D.C.1958, 164 F.Supp. 161, affirmed 282 F.2d 486, 108 U.S.App.D.C. 324.

9. Persons entitled to judicial review--Generally

Plaintiffs alleging that they were paying wages equal to or greater than those set by Secretary of Labor as prevailing wage determination under sections 35-45 of this title had no standing to seek review of determination as their interests were not adversely affected, but plaintiffs alleging they paid wages less than the amount determined by Secretary prima facie had standing to review determination. *Wirtz v. Baldor Elec. Co.*, C.A.D.C.1963, 337 F.2d 518, 119 U.S.App.D.C. 122.

Question of whether open market exemption provision of section 43 of this title put the bituminous coal industry as such entirely out of the operation of sections 35 to 45 of this title could be judicially reviewed in proceedings under subsec. (b) of this section, seeking invalidation of a determination by the Secretary of Labor made under section 35(b) of this title of prevailing minimum wages in the industry, by plaintiffs, who were regular dealers in supplies of the bituminous coal industry, even though they had not entered into a contract with the Government to supply the bituminous coal. *Ruth Elkhorn Coals, Inc. v. Mitchell*, C.A.D.C.1957, 248 F.2d 635, 101 U.S.App.D.C. 313, certiorari denied 78 S.Ct. 539, 355 U.S. 953, 2 L.Ed.2d 530.

That some complaining Government contractors had standing, under Fulbright Amendment to subsec. (b) of this section, to seek review of Secretary of Labor's determination of minimum wages conferred no standing on other contractors, and district court must decide which contractors have standing to complain. *Mitchell v. Covington Mills, Inc.*, C.A.D.C.1955, 229 F.2d 506, 97 U.S.App.D.C. 165, certiorari denied 76 S.Ct. 546, 350 U.S. 1002, 100 L.Ed. 865, rehearing denied 76 S.Ct. 787, 351 U.S. 934, 100 L.Ed. 1462.

Electric companies, which paid minimum wages equal to or greater than those prescribed by Secretary of Labor in his minimum wage determination for motors and generators industry, and whose only allegation of injury was that general level of wages in industry would rise as result of minimum wage determination and that they would be forced to compete for labor in higher cost market, were not adversely affected or aggrieved by minimum wage determination and had no standing to bring actions for review of determination. *Baldor Elec. Co. v. Wirtz*, D.C.D.C.1964, 228 F.Supp. 210.

10. ---- Interested persons

Under Fulbright Amendment to this section, providing that any interested person has right of judicial review of any legal question which might otherwise be raised, the standard by which persons are entitled to sue is changed from the "legal wrong" criterion to the "any interested person" criterion and the right to judicial review of any legal question is established once a dispute arises under a Government contract covered or alleged to be covered by sections 35 to 45

of this title. *George v. Mitchell*, C.A.D.C.1960, 282 F.2d 486, 108 U.S.App.D.C. 324.

Losing bidder was "interested person" entitled to contest award of government contract. *City Chemical Corp. v. Shreffler*, S.D.N.Y.1971, 333 F.Supp. 46.

11. Intervention

Fact that amendment to section 35 et seq. of this title requiring seller to agree to pay employees engaged in producing goods sold to United States not less than minimum wage determined by Secretary of Labor, which grants persons aggrieved by such determinations judicial review, makes no reference to intervention in judicial proceeding does not preclude intervention by persons who would be aggrieved if the determinations were set aside, but amendment only creates right of action which brings case into court and once there case is governed by principles which control all litigation. *Textile Workers Union of America, CIO v. Allendale Co.*, C.A.D.C.1955, 226 F.2d 765, 96 U.S.App.D.C. 401.

12. Issues reviewable

Where challenge to decisions made by government procurement officers is leveled against administrative action peculiarly within competence of procurement authorities, judicial review is unavailable. *Steuart Petroleum Co. v. U.S.*, D.C.D.C.1977, 438 F.Supp. 527.

13. Admissibility of evidence

Under this section making applicable to wage determinations under sections 35 to 45 of this title, the Administrative Procedure Act [repealed], former section 1001 et seq. of Title 5 [now covered by sections 701 to 706 of Title 5], admission of wage tables compiled by Secretary of Labor from confidential replies without production of underlying data to protesting industry members failed to accord right of rebuttal and cross-examination prescribed by Congress. *Wirtz v. Baldor Elec. Co.*, C.A.D.C.1963, 337 F.2d 518, 119 U.S.App.D.C. 122.

41 U.S.C.A. § 43a

41 USCA § 43a

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**UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS**

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Current through P.L. 105-394, approved 11-13-1998

§ 44. Separability of Walsh-Healey provisions

If any provision of sections 35 to 45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

CREDIT(S)

1999 Pocket Part

(June 30, 1936, c. 881, § 12, formerly § 10, 49 Stat. 2039; renumbered § 11, June 30, 1952, c. 530, Title III § 301, 66 Stat. 308; renumbered § 12, Feb. 10, 1996, Pub.L. 104-106, Div. D, Title XLIII § 4321(f)(1)(B), 110 Stat. 675.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Conference Report No. 104-450, see 1996 U.S. Code Cong. and Adm. News, p. 238.

Prior Provisions

A prior section 12 of act June 30, 1936, was renumbered section 13, and is classified to section 45 of this title.

Another prior section 12 of act June 30, 1936, was renumbered section 14, and is set out as a Short Title note under section 35 of this title.

CROSS REFERENCES

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act. 80 ALR Fed 246.

LIBRARY REFERENCES

Administrative Law

Complaint to collect moneys found due through administrative hearing, see West's Federal Practice Manual § 1451.88.

Laws applicable, see West's Federal Practice Manual § 1530.5.

Wage and hour law, see West's Federal Practice Manual § 1451.75 et seq.

Encyclopedias

48A Am Jur 2d, Labor and Labor Relations § 2452.

61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 203, 216.

Forms

10 Fed Procedural Forms L Ed, Government Contracts §§ 34:1, 10, 101, 111, 141- 143, 152-158, 160.

Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

41 U.S.C.A. § 44

41 USCA § 44

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Current through P.L. 105-394, approved 11-13-1998

§ 45. Effective date of Walsh-Healey provisions; exception as to representations with respect to minimum wages

Sections 35 to 45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: Provided, however, That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

CREDIT(S)

1999 Pocket Part

(June 30, 1936, c. 881, § 13, formerly § 11, 49 Stat. 2039; renumbered § 12, June 30, 1952, c. 530, Title III § 301, 66 Stat. 308; renumbered § 13, Feb. 10, 1996, Pub.L. 104-106, Div. D, Title XLIII § 4321(f)(1)(B), 110 Stat. 675.)

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HISTORICAL AND STATUTORY NOTES

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CROSS REFERENCES

Applicability to Postal Service, see 39 USCA § 410.

Construction, repair, alteration, furnishing and equipping of Naval vessels, see 10 USCA § 7299.

AMERICAN LAW REPORTS

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61 Am Jur 2d, Plant and Job Safety-OSHA and State Laws §§ 24, 39, 46, 48.

64 Am Jur 2d, Public Works and Contracts § 18.

65 Am Jur 2d, Public Works and Contracts §§ 200, 202, 203, 205, 216, 217, 223, 224, 231.

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Texts and Treatises

15A Fed Proc L Ed, Government Contracts §§ 39:412, 889.

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1059, 1072.

41 U.S.C.A. § 45

41 USCA § 45

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