

CHANGE REQUEST COVER SHEET

Change Request Number: 12-07

Date Received: 11/10/2011

Title: Walsh-Healey Public Contracts Act

Name: Eugene Scott

Phone: 202-493-4639

Policy OR Guidance: Guidance

Section/Text Location Affected: T3.6.2

Summary of Change: Changes the dollar threshold for applicability from \$10,000 to \$15,000

Reason for Change: To remain consistent with the Walsh-Healy Act

Development, Review, and/or Concurrence: Acquisition Policy

Target Audience: All users of AMS

Potential Links within FAST for the Change: none

Briefing Planned: No

ASAG Responsibilities: Approve

Potential Links within FAST for the Change: none

Links for New/Modified Forms (or) Documents (LINK 1) [null](#)

Links for New/Modified Forms (or) Documents (LINK 2) [null](#)

Links for New/Modified Forms (or) Documents (LINK 3) [null](#)

SECTIONS EDITED:

Procurement Guidance:

T3.6.2 - Labor Laws

Labor-Related Laws

Section 7 : Walsh-Healey Public Contracts Act [\[Old Content\]](#)[\[New Content\]](#) [\[RedLine Content\]](#)

SECTIONS EDITED:

Section 7 : Walsh-Healey Public Contracts Act

Old Content: Procurement Guidance:

T3.6.2 - Labor Laws

Labor-Related Laws

Section 7 : Walsh-Healey Public Contracts Act

a. The Walsh-Healey Public Contracts Act (41 U.S.C. 35-45) requires all contracts, that will be performed within the U.S., Puerto Rico, or the Virgin Islands and exceed \$10,000, for materials, supplies, articles, and equipment entered into by the U.S. or District of Columbia Government for the manufacture or furnishing of supplies must be with a regular dealer or manufacturer of those supplies and contracts must include requirements for representations, minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.

b. Contracts for the following are exempt from the Walsh-Healey Act:

(1) Items under express statutory authority to purchase "in the open market," such as commercial items;

(2) Items under emergency, single source circumstances;

(3) Perishable or agricultural products;

(4) Public utilities;

(5) Supplies manufactured outside of the U.S., Puerto Rico, or Virgin Islands;

(6) Purchases against the account of a defaulting contractor where the Walsh-Healey clauses were not included in the defaulted contract;

(7) Newspapers, magazines, or periodicals, contracted for with sales agents or publisher representatives, which are to be delivered by the publishers;

(8) Contract with certain coal dealers (partially exempt; see 41 CFR 50-201.604)

(9) Certain commodity exchange contracts (partially exempt; see 41 CFR 50-201.604)).

(10) Contracts with certain export merchants (partially exempt; see 41 CFR 50-201.604).

(11) Contracts with small business defense production pools and small business R&D pools (partially exempt; see 41 CFR 50-201.604); and

(12) Contracts with public utilities for certain uranium products (partially exempt; see 41 CFR 50-201.604).

c. *Request for Exemption.* Upon request, DOL may exempt specific contracts or classes of contracts from the inclusion or application of one or more of Walsh-Healey's stipulations.

(1) The CO may request partial or complete exemption. The request should state the reasons why the conduct of the FAA's business will be seriously impaired unless the exemption is granted.

(2) Requests for exemptions relating solely to safety and health standards should be transmitted to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC, 20210. All other requests will be transmitted to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington DC, 20210.

d. Rulings and interpretations of the Act are found at 41 CFR 50-206. The substance of certain rulings and interpretations is as follows:

(1) If a contract for \$10,000 or less is subsequently modified to exceed \$10,000, the contract becomes subject to Walsh-Healey for work performed after the date of the modification.

(2) If a contract for more than \$10,000 is subsequently modified by mutual agreement to \$10,000 or less, the contract is not subject to Walsh-Healey for work performed after the date of the modification.

(3) If a contract awarded to a prime contractor contains a provision whereby the prime contractor is made an agent of the FAA, the prime contractor is required to include Walsh Healey provisions in contracts in excess of \$10,000 awarded for and on behalf of the FAA for products that are to be used in the construction and equipment of FAA facilities.

(4) If a contract subject to Walsh-Healey is awarded to a contractor operating FAA-owned facilities, Walsh-Healey affects the employees of that contractor the same as employees of contractors operating privately owned facilities.

(5) Indefinite-delivery contracts, including basic ordering agreements and blanket purchase agreements, are subject to Walsh-Healey unless it can be determined in advance that the aggregate amount of all orders estimated to be placed against the contract/agreement for one year after the effective date of the agreement will not exceed \$10,000. A determination should be made annually thereafter if the contract or agreement is extended, and the contract or agreement modified if necessary.

e. *Eligibility as a Manufacturer or Regular Dealer.*

(1) *Manufacturer.* An offeror qualifies as a manufacturer if it shows before award that it is:

(a) *Established.* An offeror that is an established manufacturer of the particular products of the general character sought by the Government and has a plant, equipment, and personnel to manufacture on the premises the products called for under the contract.

(b) *Newly entering.* An offeror that is newly entering into a manufacturing activity and has made all necessary arrangements and commitments for manufacturing space, equipment, and personnel to perform on its own premises the manufacturing operations required for the fulfillment of the contract. To be eligible for this status, manufacturers must show that it:

(i) Has made written, legally binding arrangements or commitments before award to enter a manufacturing business. COs should not bar an offeror from receiving award because it has not yet done any manufacturing, even if the arrangements and commitments are contingent upon the award of the Government contract;

(ii) Has not set up solely to produce on a Government contract and that its operations will not terminate upon completion of that contract;

(c) Every offeror must qualify as a manufacturer in its own right. The use, rent, or sharing of the manufacturing or producing establishment of another legal entity; i.e., arrangements for equipment, personnel, or space on a time-and-material or "as needed" basis, does not meet this requirement. Arrangements or definite commitments must be in the name of the offeror.

(d) An offeror that performs assembly operations may be considered a manufacturer, if it performs more than minimal operations, such as packaging only, upon the end product. Offerors may also be considered a manufacturer if it has the facilities to produce a significant portion of the component parts needed for the end product even if it only performs assembly operations under a particular acquisition

(e) An offeror's prior eligibility status as a prime contractor or a subcontractor on other contracts subject to Walsh-Healey is not evidence of the offeror's present eligibility as a manufacturer.

(2) *Regular Dealer.*

(a) *Qualifications.* An offeror qualifies as a regular dealer if it shows before award that it deals in the particular products of the general character (products either

identical with those in stock or be products for which dealers in the same line of business would be an obvious source) offered to the Government. Regular dealers cannot qualify by showing that arrangements have been made to set up a business. Qualifying criteria include:

(i) *Space*. It has an establishment, or a leased or assigned space, where it regularly maintains a stock of products in which it claims to be a dealer. If the space is in a public warehouse, it must be maintained on a continuing and not on a demand basis.

(ii) *Inventory*. The stock maintained is a true inventory from which sales are made. This requirement is not satisfied by a stock of sample or display items, stock consisting of surplus items remaining from prior orders, stock unrelated to the supplies offered, or stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made.

(iii) *Sales*. Sales are made regularly from stock, are not occasional, or are an exception to usual operations. Sales are made to the public and not just Federal, State, or local Government agencies. This requirement is not satisfied if the contractor merely seeks to sell to the public but has not yet made the sales. The number and amount of sales that must be made to the public will necessarily vary with the amount of total sales and the nature of the business.

(b) *Alternative qualifications*. For certain specific products (lumber and timber products, machine tools, petroleum, agricultural liming materials, raw or unmanufactured cotton linters, certain uranium products, used automatic data processing equipment, specialty advertising products, and products provided by information systems integrators), there are alternate qualifications for where the dealer need not physically maintain a stock. The requirements under this alternative are set forth at 41 CFR 50-201.101(a)(2) and 50-201.604.

f. *Determination Of Eligibility*.

(1) The responsibility for applying the eligibility requirements begins with the CO.

(2) The CO should investigate and determine the eligibility of the offeror and not rely on the offeror's attestation that it is a manufacturer or regular dealer when:

(a) The CO doubts the validity of the attestation;

(b) A protest has been lodged;

(c) This would be the first award to the otherwise successful offeror subject to Walsh-Healey by the individual acquisition office; or

(d) The procurement team is conducting a pre-award survey to determine responsibility or to prequalify a vendor, the procurement team should, while on site, confirm the offeror's eligibility under Walsh-Healey.

(3) When the CO cannot accept the offeror's attestation, the CO will make a determination as to whether all of the applicable eligibility requirements have been met by obtaining/considering all available factual evidence including:

(a) Pre-award surveys;

(b) Experience of other acquisition offices;

(c) Information available from the cognizant contract administration office;

(d) Information provided directly by the offeror; and

(e) Other factual evidence that may be necessary to determine whether all of the applicable eligibility requirements have been met, including evidence obtained through an on site survey conducted specifically for that purpose.

(4) If the CO determines that an otherwise successful offeror is ineligible, the CO will follow the procedures listed below:

(a) The offeror will be notified in writing that:

(i) It does not meet the eligibility requirements and the specific reasons therefore; and it may protest the determination by submitting evidence concerning its eligibility to the CO within 10 working days.

(ii) If, after review of the offeror's evidence, the CO's position has not changed, the offeror's protest and all pertinent material will be forwarded to DOL, Administrator of the Wage and Hour Division, for a final determination.

(A) DOL does not conduct preaward investigations nor render final determinations of eligibility until the CO initially has determined whether the requirements have been met.

(B) If the CO forwards the case to DOL for review of eligibility, the award should normally be held in abeyance until the CO receives a final determination from DOL. However, award may be made pending a DOL decision if the CO determines the supplies are urgently needed or delay in award will result in substantial hardship to the Government (DOL, the protester, and any other concerned parties must be notified of the award decision).

(b) The CO will notify other offerors whose offers might become eligible for award when an award is being held in abeyance, and request them to extend their acceptance period, if necessary.

g. Pre-Award Protests Against Eligibility.

(1) When, before award, an unsuccessful offeror challenges the eligibility of the apparent successful offeror, the CO will:

(a) Promptly notify the apparent successful offeror of the protest;

(b) Notify both the protester and the apparent successful offeror in writing that eligibility evidence may be submitted to the CO within 10 working days;

(c) Notify offerors whose offers might become eligible for award that the award is to be held up because of a protest, and request them to extend their acceptance period, if necessary;

(d) Make a determination based on the evidence as provided in paragraph f.(4) above; and

(e) Notify the protester and the apparent successful offeror of the determination and the procedure to be followed if either party disagrees with the decision.

(2) If either party disagrees with the determination, the CO will forward the determination and entire record to DOL, Administrator of the Wage and Hour Division, for a final determination and notify the parties accordingly.

h. Award Pending Final Determination.

(1) Award may be made immediately if the CO certifies in writing that:

(a) The products to be acquired are an emergency requirement; or

(b) Delay of delivery or performance by failure to make the award promptly will result in substantial hardship to the Government.

(2) The CO will give prompt written notice of the decision to award to DOL, the protester, and other concerned parties.

i. Award. The CO will mail a copy of DOL Publication WH-1313, "Notice to Employees Working on Government Contracts," along with the executed contract. Copies of the poster may be obtained in writing to the DOL, 200 Constitution Avenue NW, Washington, DC 20210, ATTN: Wage and Hour-ESA, Room S3018.

j. Postaward.

FAST Version 01/2012

CR 12-07

p. 7

(1) *Protests.*

(a) If a protest is received after award, but before final contract completion, the CO will follow the procedures paragraph f. (4) above.

(b) If the contract has been completed before receipt of the protest, the CO will notify the protester that no action can be taken on the protest.

(2) *Award Made to an Ineligible Offeror.* If the CO discovers after an award that the offeror did not act in good faith in representing that it was a manufacturer or regular dealer of the supplies offered, the CO, immediately upon discovery, may exercise the right to:

(a) Terminate the contract;

(b) Make open market purchases or enter into other contracts for completing the original contract; and

(c) Charge any additional cost to the original contractor.

(3) *Breach of Stipulation.* If a contractor violates a stipulation under Walsh-Healey, the CO will submit a written notice to the appropriate regional office of DOL, Wage and Hour Division, listed in paragraph l. below, and furnish any available information.

k. *Regional Jurisdictions of DOL, Wage and Hour Division.* Geographic jurisdictions of the Regional Offices of DOL's, Wage and Hour Division, are to be contacted by COs, unless otherwise specified. The address and phone numbers for the DOL Regional Offices by geographic jurisdictions are attached.

l. *Definitions.*

(1) "Assembly," as used in this part, means the piecing or bringing together of various interdependent or interrelated parts or components to make an operable whole or unit.

(2) "Manufacturer," as used in this subpart, means a person that owns, operates, or maintains a factory or establishment that produces on the premises the materials, products, articles, or equipment required under the contract and of the general character described by the specifications.

(3) "Person," as used in this subpart, includes associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(4) "Regular dealer," as used in this subpart, means a person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, products, articles, or equipment of the general character described by the specifications and

required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

New Content: Procurement Guidance:

T3.6.2 - Labor Laws

Labor-Related Laws

Section 7 : Walsh-Healey Public Contracts Act

a. The Walsh-Healey Public Contracts Act (41 U.S.C. 35-45) requires all contracts, that will be performed within the U.S., Puerto Rico, or the Virgin Islands and exceed \$15,000, for materials, supplies, articles, and equipment entered into by the U.S. or District of Columbia Government for the manufacture or furnishing of supplies must be with a regular dealer or manufacturer of those supplies and contracts must include requirements for representations, minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.

b. Contracts for the following are exempt from the Walsh-Healey Act:

- (1) Items under express statutory authority to purchase "in the open market," such as commercial items;
- (2) Items under emergency, single source circumstances;
- (3) Perishable or agricultural products;
- (4) Public utilities;
- (5) Supplies manufactured outside of the U.S., Puerto Rico, or Virgin Islands;
- (6) Purchases against the account of a defaulting contractor where the Walsh-Healey clauses were not included in the defaulted contract;
- (7) Newspapers, magazines, or periodicals, contracted for with sales agents or publisher representatives, which are to be delivered by the publishers;
- (8) Contract with certain coal dealers (partially exempt; see 41 CFR 50-201.604)
- (9) Certain commodity exchange contracts (partially exempt; see 41 CFR 50-201.604)).
- (10) Contracts with certain export merchants (partially exempt; see 41 CFR 50-201.604).
- (11) Contracts with small business defense production pools and small business R&D pools (partially exempt; see 41 CFR 50-201.604); and
- (12) Contracts with public utilities for certain uranium products (partially exempt; see 41 CFR 50-201.604).

c. *Request for Exemption.* Upon request, DOL may exempt specific contracts or classes of contracts from the inclusion or application of one or more of Walsh-Healey's stipulations.

(1) The CO may request partial or complete exemption. The request should state the reasons why the conduct of the FAA's business will be seriously impaired unless the exemption is granted.

(2) Requests for exemptions relating solely to safety and health standards should be transmitted to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC, 20210. All other requests will be transmitted to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington DC, 20210.

d. Rulings and interpretations of the Act are found at 41 CFR 50-206. The substance of certain rulings and interpretations is as follows:

(1) If a contract for \$15,000 or less is subsequently modified to exceed \$15,000, the contract becomes subject to Walsh-Healey for work performed after the date of the modification.

(2) If a contract for more than \$15,000 is subsequently modified by mutual agreement to \$15,000 or less, the contract is not subject to Walsh-Healey for work performed after the date of the modification.

(3) If a contract awarded to a prime contractor contains a provision whereby the prime contractor is made an agent of the FAA, the prime contractor is required to include Walsh Healey provisions in contracts in excess of \$15,000 awarded for and on behalf of the FAA for products that are to be used in the construction and equipment of FAA facilities.

(4) If a contract subject to Walsh-Healey is awarded to a contractor operating FAA-owned facilities, Walsh-Healey affects the employees of that contractor the same as employees of contractors operating privately owned facilities.

(5) Indefinite-delivery contracts, including basic ordering agreements and blanket purchase agreements, are subject to Walsh-Healey unless it can be determined in advance that the aggregate amount of all orders estimated to be placed against the contract/agreement for one year after the effective date of the agreement will not exceed \$15,000. A determination should be made annually thereafter if the contract or agreement is extended, and the contract or agreement modified if necessary.

e. *Eligibility as a Manufacturer or Regular Dealer.*

(1) *Manufacturer.* An offeror qualifies as a manufacturer if it shows before award that it is:

(a) *Established*. An offeror that is an established manufacturer of the particular products of the general character sought by the Government and has a plant, equipment, and personnel to manufacture on the premises the products called for under the contract.

(b) *Newly entering*. An offeror that is newly entering into a manufacturing activity and has made all necessary arrangements and commitments for manufacturing space, equipment, and personnel to perform on its own premises the manufacturing operations required for the fulfillment of the contract. To be eligible for this status, manufacturers must show that it:

(i) Has made written, legally binding arrangements or commitments before award to enter a manufacturing business. COs should not bar an offeror from receiving award because it has not yet done any manufacturing, even if the arrangements and commitments are contingent upon the award of the Government contract;

(ii) Has not set up solely to produce on a Government contract and that its operations will not terminate upon completion of that contract;

(c) Every offeror must qualify as a manufacturer in its own right. The use, rent, or sharing of the manufacturing or producing establishment of another legal entity; i.e., arrangements for equipment, personnel, or space on a time-and-material or "as needed" basis, does not meet this requirement. Arrangements or definite commitments must be in the name of the offeror.

(d) An offeror that performs assembly operations may be considered a manufacturer, if it performs more than minimal operations, such as packaging only, upon the end product. Offerors may also be considered a manufacturer if it has the facilities to produce a significant portion of the component parts needed for the end product even if it only performs assembly operations under a particular acquisition

(e) An offeror's prior eligibility status as a prime contractor or a subcontractor on other contracts subject to Walsh-Healey is not evidence of the offeror's present eligibility as a manufacturer.

(2) *Regular Dealer*.

(a) *Qualifications*. An offeror qualifies as a regular dealer if it shows before award that it deals in the particular products of the general character (products either identical with those in stock or be products for which dealers in the same line of business would be an obvious source) offered to the Government. Regular dealers cannot qualify by showing that arrangements have been made to set up a business. Qualifying criteria include:

(i) *Space*. It has an establishment, or a leased or assigned space, where it regularly maintains a stock of products in which it claims to be a dealer. If the space is in a public warehouse, it must be maintained on a continuing and not on a demand basis.

(ii) *Inventory*. The stock maintained is a true inventory from which sales are made. This requirement is not satisfied by a stock of sample or display items, stock consisting of surplus items remaining from prior orders, stock unrelated to the supplies offered, or stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made.

(iii) *Sales*. Sales are made regularly from stock, are not occasional, or are an exception to usual operations. Sales are made to the public and not just Federal, State, or local Government agencies. This requirement is not satisfied if the contractor merely seeks to sell to the public but has not yet made the sales. The number and amount of sales that must be made to the public will necessarily vary with the amount of total sales and the nature of the business.

(b) *Alternative qualifications*. For certain specific products (lumber and timber products, machine tools, petroleum, agricultural liming materials, raw or unmanufactured cotton linters, certain uranium products, used automatic data processing equipment, specialty advertising products, and products provided by information systems integrators), there are alternate qualifications for where the dealer need not physically maintain a stock. The requirements under this alternative are set forth at 41 CFR 50-201.101(a)(2) and 50-201.604.

f. Determination Of Eligibility.

(1) The responsibility for applying the eligibility requirements begins with the CO.

(2) The CO should investigate and determine the eligibility of the offeror and not rely on the offeror's attestation that it is a manufacturer or regular dealer when:

(a) The CO doubts the validity of the attestation;

(b) A protest has been lodged;

(c) This would be the first award to the otherwise successful offeror subject to Walsh-Healey by the individual acquisition office; or

(d) The procurement team is conducting a pre-award survey to determine responsibility or to prequalify a vendor, the procurement team should, while on site, confirm the offeror's eligibility under Walsh-Healey.

(3) When the CO cannot accept the offeror's attestation, the CO will make a determination as to whether all of the applicable eligibility requirements have been met by obtaining/considering all available factual evidence including:

- (a) Pre-award surveys;
- (b) Experience of other acquisition offices;
- (c) Information available from the cognizant contract administration office;
- (d) Information provided directly by the offeror; and
- (e) Other factual evidence that may be necessary to determine whether all of the applicable eligibility requirements have been met, including evidence obtained through an on site survey conducted specifically for that purpose.

(4) If the CO determines that an otherwise successful offeror is ineligible, the CO will follow the procedures listed below:

- (a) The offeror will be notified in writing that:
 - (i) It does not meet the eligibility requirements and the specific reasons therefore; and it may protest the determination by submitting evidence concerning its eligibility to the CO within 10 working days.
 - (ii) If, after review of the offeror's evidence, the CO's position has not changed, the offeror's protest and all pertinent material will be forwarded to DOL, Administrator of the Wage and Hour Division, for a final determination.
 - (A) DOL does not conduct preaward investigations nor render final determinations of eligibility until the CO initially has determined whether the requirements have been met.
 - (B) If the CO forwards the case to DOL for review of eligibility, the award should normally be held in abeyance until the CO receives a final determination from DOL. However, award may be made pending a DOL decision if the CO determines the supplies are urgently needed or delay in award will result in substantial hardship to the Government (DOL, the protester, and any other concerned parties must be notified of the award decision).
- (b) The CO will notify other offerors whose offers might become eligible for award when an award is being held in abeyance, and request them to extend their acceptance period, if necessary.

g. Pre-Award Protests Against Eligibility.

(1) When, before award, an unsuccessful offeror challenges the eligibility of the apparent successful offeror, the CO will:

- (a) Promptly notify the apparent successful offeror of the protest;
- (b) Notify both the protester and the apparent successful offeror in writing that eligibility evidence may be submitted to the CO within 10 working days;
- (c) Notify offerors whose offers might become eligible for award that the award is to be held up because of a protest, and request them to extend their acceptance period, if necessary;
- (d) Make a determination based on the evidence as provided in paragraph f.(4) above; and
- (e) Notify the protester and the apparent successful offeror of the determination and the procedure to be followed if either party disagrees with the decision.

(2) If either party disagrees with the determination, the CO will forward the determination and entire record to DOL, Administrator of the Wage and Hour Division, for a final determination and notify the parties accordingly.

h. Award Pending Final Determination.

(1) Award may be made immediately if the CO certifies in writing that:

- (a) The products to be acquired are an emergency requirement; or
- (b) Delay of delivery or performance by failure to make the award promptly will result in substantial hardship to the Government.

(2) The CO will give prompt written notice of the decision to award to DOL, the protester, and other concerned parties.

i. Award. The CO will mail a copy of DOL Publication WH-1313, "Notice to Employees Working on Government Contracts," along with the executed contract. Copies of the poster may be obtained in writing to the DOL, 200 Constitution Avenue NW, Washington, DC 20210, ATTN: Wage and Hour-ESA, Room S3018.

j. Postaward.

(1) *Protests.*

(a) If a protest is received after award, but before final contract completion, the CO will follow the procedures paragraph f. (4) above.

(b) If the contract has been completed before receipt of the protest, the CO will notify the protester that no action can be taken on the protest.

(2) *Award Made to an Ineligible Offeror.* If the CO discovers after an award that the offeror did not act in good faith in representing that it was a manufacturer or regular dealer of the supplies offered, the CO, immediately upon discovery, may exercise the right to:

(a) Terminate the contract;

(b) Make open market purchases or enter into other contracts for completing the original contract; and

(c) Charge any additional cost to the original contractor.

(3) *Breach of Stipulation.* If a contractor violates a stipulation under Walsh-Healey, the CO will submit a written notice to the appropriate regional office of DOL, Wage and Hour Division, listed in paragraph l. below, and furnish any available information.

k. *Regional Jurisdictions of DOL, Wage and Hour Division.* Geographic jurisdictions of the Regional Offices of DOL's, Wage and Hour Division, are to be contacted by COs, unless otherwise specified. The address and phone numbers for the DOL Regional Offices by geographic jurisdictions are attached.

l. *Definitions.*

(1) "Assembly," as used in this part, means the piecing or bringing together of various interdependent or interrelated parts or components to make an operable whole or unit.

(2) "Manufacturer," as used in this subpart, means a person that owns, operates, or maintains a factory or establishment that produces on the premises the materials, products, articles, or equipment required under the contract and of the general character described by the specifications.

(3) "Person," as used in this subpart, includes associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(4) "Regular dealer," as used in this subpart, means a person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, products, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

Red Line Content: Procurement Guidance:

T3.6.2 - Labor Laws

Labor-Related Laws

Section 7 : Walsh-Healey Public Contracts Act

a. The Walsh-Healey Public Contracts Act (41 U.S.C. 35-45) requires all contracts, that will be performed within the U.S., Puerto Rico, or the Virgin Islands and exceed \$~~40~~15,000, for materials, supplies, articles, and equipment entered into by the U.S. or District of Columbia Government for the manufacture or furnishing of supplies must be with a regular dealer or manufacturer of those supplies and contracts must include requirements for representations, minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.

b. Contracts for the following are exempt from the Walsh-Healey Act:

- (1) Items under express statutory authority to purchase "in the open market," such as commercial items;
- (2) Items under emergency, single source circumstances;
- (3) Perishable or agricultural products;
- (4) Public utilities;
- (5) Supplies manufactured outside of the U.S., Puerto Rico, or Virgin Islands;
- (6) Purchases against the account of a defaulting contractor where the Walsh-Healey clauses were not included in the defaulted contract;
- (7) Newspapers, magazines, or periodicals, contracted for with sales agents or publisher representatives, which are to be delivered by the publishers;
- (8) Contract with certain coal dealers (partially exempt; see 41 CFR 50-201.604)
- (9) Certain commodity exchange contracts (partially exempt; see 41 CFR 50-201.604)).
- (10) Contracts with certain export merchants (partially exempt; see 41 CFR 50-201.604).
- (11) Contracts with small business defense production pools and small business R&D pools (partially exempt; see 41 CFR 50-201.604); and
- (12) Contracts with public utilities for certain uranium products (partially exempt; see 41 CFR 50-201.604).

c. *Request for Exemption.* Upon request, DOL may exempt specific contracts or classes of contracts from the inclusion or application of one or more of Walsh-Healey's stipulations.

(1) The CO may request partial or complete exemption. The request should state the reasons why the conduct of the FAA's business will be seriously impaired unless the exemption is granted.

(2) Requests for exemptions relating solely to safety and health standards should be transmitted to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC, 20210. All other requests will be transmitted to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington DC, 20210.

d. Rulings and interpretations of the Act are found at 41 CFR 50-206. The substance of certain rulings and interpretations is as follows:

(1) If a contract for \$~~40~~15,000 or less is subsequently modified to exceed \$~~40~~15,000, the contract becomes subject to Walsh-Healey for work performed after the date of the modification.

(2) If a contract for more than \$~~40~~15,000 is subsequently modified by mutual agreement to \$~~40~~15,000 or less, the contract is not subject to Walsh-Healey for work performed after the date of the modification.

(3) If a contract awarded to a prime contractor contains a provision whereby the prime contractor is made an agent of the FAA, the prime contractor is required to include Walsh Healey provisions in contracts in excess of \$~~40~~15,000 awarded for and on behalf of the FAA for products that are to be used in the construction and equipment of FAA facilities.

(4) If a contract subject to Walsh-Healey is awarded to a contractor operating FAA-owned facilities, Walsh-Healey affects the employees of that contractor the same as employees of contractors operating privately owned facilities.

(5) Indefinite-delivery contracts, including basic ordering agreements and blanket purchase agreements, are subject to Walsh-Healey unless it can be determined in advance that the aggregate amount of all orders estimated to be placed against the contract/agreement for one year after the effective date of the agreement will not exceed \$~~40~~15,000. A determination should be made annually thereafter if the contract or agreement is extended, and the contract or agreement modified if necessary.

e. *Eligibility as a Manufacturer or Regular Dealer.*

(1) *Manufacturer.* An offeror qualifies as a manufacturer if it shows before award that it is:

(a) *Established.* An offeror that is an established manufacturer of the particular products of the general character sought by the Government and has a plant, equipment, and personnel to manufacture on the premises the products called for under the contract.

(b) *Newly entering.* An offeror that is newly entering into a manufacturing activity and has made all necessary arrangements and commitments for manufacturing space, equipment, and personnel to perform on its own premises the manufacturing operations required for the fulfillment of the contract. To be eligible for this status, manufacturers must show that it:

(i) Has made written, legally binding arrangements or commitments before award to enter a manufacturing business. COs should not bar an offeror from receiving award because it has not yet done any manufacturing, even if the arrangements and commitments are contingent upon the award of the Government contract;

(ii) Has not set up solely to produce on a Government contract and that its operations will not terminate upon completion of that contract;

(c) Every offeror must qualify as a manufacturer in its own right. The use, rent, or sharing of the manufacturing or producing establishment of another legal entity; i.e., arrangements for equipment, personnel, or space on a time-and-material or "as needed" basis, does not meet this requirement. Arrangements or definite commitments must be in the name of the offeror.

(d) An offeror that performs assembly operations may be considered a manufacturer, if it performs more than minimal operations, such as packaging only, upon the end product. Offerors may also be considered a manufacturer if it has the facilities to produce a significant portion of the component parts needed for the end product even if it only performs assembly operations under a particular acquisition

(e) An offeror's prior eligibility status as a prime contractor or a subcontractor on other contracts subject to Walsh-Healey is not evidence of the offeror's present eligibility as a manufacturer.

(2) *Regular Dealer.*

(a) *Qualifications.* An offeror qualifies as a regular dealer if it shows before award that it deals in the particular products of the general character (products either identical with those in stock or be products for which dealers in the same line of business would be an obvious source) offered to the Government. Regular dealers cannot qualify by showing that arrangements have been made to set up a business. Qualifying criteria include:

(i) *Space.* It has an establishment, or a leased or assigned space, where it regularly maintains a stock of products in which it claims to be a dealer. If the space is in a public warehouse, it must be maintained on a continuing and not on a demand basis.

(ii) *Inventory*. The stock maintained is a true inventory from which sales are made. This requirement is not satisfied by a stock of sample or display items, stock consisting of surplus items remaining from prior orders, stock unrelated to the supplies offered, or stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made.

(iii) *Sales*. Sales are made regularly from stock, are not occasional, or are an exception to usual operations. Sales are made to the public and not just Federal, State, or local Government agencies. This requirement is not satisfied if the contractor merely seeks to sell to the public but has not yet made the sales. The number and amount of sales that must be made to the public will necessarily vary with the amount of total sales and the nature of the business.

(b) *Alternative qualifications*. For certain specific products (lumber and timber products, machine tools, petroleum, agricultural liming materials, raw or unmanufactured cotton linters, certain uranium products, used automatic data processing equipment, specialty advertising products, and products provided by information systems integrators), there are alternate qualifications for where the dealer need not physically maintain a stock. The requirements under this alternative are set forth at 41 CFR 50-201.101(a)(2) and 50-201.604.

f. *Determination Of Eligibility*.

(1) The responsibility for applying the eligibility requirements begins with the CO.

(2) The CO should investigate and determine the eligibility of the offeror and not rely on the offeror's attestation that it is a manufacturer or regular dealer when:

(a) The CO doubts the validity of the attestation;

(b) A protest has been lodged;

(c) This would be the first award to the otherwise successful offeror subject to Walsh-Healey by the individual acquisition office; or

(d) The procurement team is conducting a pre-award survey to determine responsibility or to prequalify a vendor, the procurement team should, while on site, confirm the offeror's eligibility under Walsh-Healey.

(3) When the CO cannot accept the offeror's attestation, the CO will make a determination as to whether all of the applicable eligibility requirements have been met by obtaining/considering all available factual evidence including:

(a) Pre-award surveys;

- (b) Experience of other acquisition offices;
- (c) Information available from the cognizant contract administration office;
- (d) Information provided directly by the offeror; and
- (e) Other factual evidence that may be necessary to determine whether all of the applicable eligibility requirements have been met, including evidence obtained through an on site survey conducted specifically for that purpose.

(4) If the CO determines that an otherwise successful offeror is ineligible, the CO will follow the procedures listed below:

- (a) The offeror will be notified in writing that:
 - (i) It does not meet the eligibility requirements and the specific reasons therefore; and it may protest the determination by submitting evidence concerning its eligibility to the CO within 10 working days.
 - (ii) If, after review of the offeror's evidence, the CO's position has not changed, the offeror's protest and all pertinent material will be forwarded to DOL, Administrator of the Wage and Hour Division, for a final determination.
 - (A) DOL does not conduct preaward investigations nor render final determinations of eligibility until the CO initially has determined whether the requirements have been met.
 - (B) If the CO forwards the case to DOL for review of eligibility, the award should normally be held in abeyance until the CO receives a final determination from DOL. However, award may be made pending a DOL decision if the CO determines the supplies are urgently needed or delay in award will result in substantial hardship to the Government (DOL, the protester, and any other concerned parties must be notified of the award decision).
- (b) The CO will notify other offerors whose offers might become eligible for award when an award is being held in abeyance, and request them to extend their acceptance period, if necessary.

g. Pre-Award Protests Against Eligibility.

(1) When, before award, an unsuccessful offeror challenges the eligibility of the apparent successful offeror, the CO will:

- (a) Promptly notify the apparent successful offeror of the protest;

(b) Notify both the protester and the apparent successful offeror in writing that eligibility evidence may be submitted to the CO within 10 working days;

(c) Notify offerors whose offers might become eligible for award that the award is to be held up because of a protest, and request them to extend their acceptance period, if necessary;

(d) Make a determination based on the evidence as provided in paragraph f.(4) above; and

(e) Notify the protester and the apparent successful offeror of the determination and the procedure to be followed if either party disagrees with the decision.

(2) If either party disagrees with the determination, the CO will forward the determination and entire record to DOL, Administrator of the Wage and Hour Division, for a final determination and notify the parties accordingly.

h. Award Pending Final Determination.

(1) Award may be made immediately if the CO certifies in writing that:

(a) The products to be acquired are an emergency requirement; or

(b) Delay of delivery or performance by failure to make the award promptly will result in substantial hardship to the Government.

(2) The CO will give prompt written notice of the decision to award to DOL, the protester, and other concerned parties.

i. Award. The CO will mail a copy of DOL Publication WH-1313, "Notice to Employees Working on Government Contracts," along with the executed contract. Copies of the poster may be obtained in writing to the DOL, 200 Constitution Avenue NW, Washington, DC 20210, ATTN: Wage and Hour-ESA, Room S3018.

j. Postaward.

(1) *Protests.*

(a) If a protest is received after award, but before final contract completion, the CO will follow the procedures paragraph f. (4) above.

(b) If the contract has been completed before receipt of the protest, the CO will notify the protester that no action can be taken on the protest.

(2) *Award Made to an Ineligible Offeror.* If the CO discovers after an award that the offeror did not act in good faith in representing that it was a manufacturer or regular

dealer of the supplies offered, the CO, immediately upon discovery, may exercise the right to:

- (a) Terminate the contract;
- (b) Make open market purchases or enter into other contracts for completing the original contract; and
- (c) Charge any additional cost to the original contractor.

(3) *Breach of Stipulation.* If a contractor violates a stipulation under Walsh-Healey, the CO will submit a written notice to the appropriate regional office of DOL, Wage and Hour Division, listed in paragraph l. below, and furnish any available information.

k. *Regional Jurisdictions of DOL, Wage and Hour Division.* Geographic jurisdictions of the Regional Offices of DOL's, Wage and Hour Division, are to be contacted by COs, unless otherwise specified. The address and phone numbers for the DOL Regional Offices by geographic jurisdictions are attached.

l. *Definitions.*

- (1) "Assembly," as used in this part, means the piecing or bringing together of various interdependent or interrelated parts or components to make an operable whole or unit.
 - (2) "Manufacturer," as used in this subpart, means a person that owns, operates, or maintains a factory or establishment that produces on the premises the materials, products, articles, or equipment required under the contract and of the general character described by the specifications.
 - (3) "Person," as used in this subpart, includes associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
 - (4) "Regular dealer," as used in this subpart, means a person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, products, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.
-