

E-ALERT | Government Contracts

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NEW OBLIGATIONS REGARDING NONDISPLACEMENT OF QUALIFIED WORKERS

Starting today, contractors performing work that is subject to the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. § 6701, *et seq.* will now face nondisplacement of qualified workers obligations.¹ These new obligations are contained in the Federal Acquisition Regulation ("FAR") and the Department of Labor ("DOL") regulations, and are the result of an Executive Order issued by President Obama in January 2009. In that Executive Order, the President explained that the Government's interests in procurement efficiency and economy are better served when, upon the expiration of a service contract and award of a follow-on contract to a new contractor for the same or similar services at the same location, the successor contractor hires the predecessor's employees.²

The final rule from the FAR Council—which largely tracks the substance of the 2009 Executive Order and DOL regulations issued in August 2011—creates a new FAR subpart 22.12 and introduces a new mandatory contract clause at FAR 52.222-17 (Nondisplacement of Qualified Workers). The new clause will be incorporated into all SCA-covered contracts over the simplified acquisition threshold (currently \$150,000) issued on or after the final rule's January 18, 2013 effective date. The FAR Council's final rule also directs contracting officers to work with existing service contractors to bilaterally modify contracts to add the new clause. DOL is responsible for enforcing these requirements.

BASIC REQUIREMENTS

Successor Contractor Obligations

The new rules require successor contractors and subcontractors to offer service employees whose employment will terminate as a result of the expiration of the predecessor contract a right of first refusal for employment under the new contract. However, successor contractors are not required to offer employment to any predecessor service employee who: (a) will be retained by the predecessor contractor, (b) failed to perform suitably on the job, or (c) was hired by the predecessor contractor to work on both Federal and nonfederal service contracts as part of a single job. Further, successor contractors may retain their own employees to work on the new contract in lieu of the predecessor contractor's employees if those employees have been employed by the successor contractor for at least three months and would otherwise face layoff or discharge. Successor contractors may also employ fewer service employees than their predecessor, and therefore need not offer employment on the new contract to all predecessor service employees.

Predecessor Contractor Obligations

When so directed by the contracting officer, predecessor contractors must provide written notice to their service employees of their right to possible employment with the successor contractor. The new rule also requires predecessor contractors to provide to the contracting officer a certified list of

¹ See [77 Fed. Reg. 75766](#) and [77 Fed. Reg. 75780](#) (Dec. 21, 2012).

² See [Executive Order 13495](#) (Jan. 30, 2009).

all service employees working under the contract or its subcontracts (including anniversary dates of each person's employment) at least 30 days prior to contract completion. Although the information on this list is the same as that on the seniority list already required by FAR 52.222-41(n), the new requirement moves up the deadline for submission from 10 to 30 days. Notably, contractors still must submit a FAR 52.222-41(n) seniority list if there are additional changes to the workforce after the 30-day filing.

Additional Provisions of Note

- *Continuing obligation.* When employment is not initially offered to all of the predecessor's employees, the successor contractor and its subcontractors must continue to provide displaced employees a right of first refusal for any additional work necessary for 90 days after the first date of performance.
- *Waiver.* The senior procurement executive of a procuring agency is empowered to waive some or all of the new requirements following a written determination that their application would not serve the purposes of the Executive Order or would impair the Government's ability to procure services on an economical and efficient basis.
- *Exempt employees.* The nondisplacement requirements apply only to employees covered by the SCA, and do not extend to service employees exempt from SCA-coverage because such employees are employed in a bona fide executive, administrative, or professional capacity.
- *Part-time employees.* The new rules also provide part-time employees of the predecessor contractor with a right of first refusal for positions on the follow-on contract. However, the successor contractor has the discretion to convert part-time to positions to full-time.
- *Employee qualifications.* Successor contractors are permitted to inquire about employee qualifications. However, decisions about those qualifications must be based on "credible information" provided by a knowledgeable source such as the predecessor contractor, local supervisor, the employee, or the contracting agency. (A predecessor contractor is not required to provide such information.) Where a successor contractor chooses to not offer a position to a predecessor employee based upon a determination of unsuitability, the credible information upon which that decision is based must be in writing.
- *Determining whether an employee is "qualified."* The FAR Council's final rule notes that when a successor contractor evaluates a predecessor employee's qualifications for a particular position, the appropriate consideration is not whether the employee is less or more qualified than an employee the contractor could otherwise supply, but simply whether the predecessor employee is qualified to perform the job. Further, contractors are required to presume that all employees working under the predecessor contract in the last month of performance performed suitable work. Rebutting this presumption could be difficult given then predecessor contractors are not required to provide performance information.
- *Penalties.* Potential penalties for violations of the nondisplacement requirements include payment of back wages, withholding of funds by the Government for unpaid wages due the displaced employee, and even debarment. Further, DOL may suspend contract payment if a predecessor contractor fails to provide the required certified list of employees to the contracting officer.

Potential Compliance Challenges

These new obligations are certain to present compliance burdens for all contractors performing service contracts for the Federal government. In addition to new policies and procedures to address the basic requirements set forth in the FAR and the DOL regulations, contractors are likely to face:

- *Offer period.* Predecessor employees must have at least 10 days to accept the offer made by the successor contractor or subcontractor. This may prove burdensome and time consuming if contractors must make multiple offers to fill a single position, or if contractors are left with a very short period of time between contract award and the start of performance.
- *Expanded recordkeeping obligations.* Successor contractors and subcontractors must maintain records of their compliance with the new requirements, including detailed records of employment offers and any exemptions claimed.
- *Non-solicitation of subcontractors.* The nondisplacement requirements have the potential to conflict with contractual non-solicitation agreements between contractors and subcontractors.
- *Compliance with other laws and Executive orders.* The FAR Council's final rule states that "all applicable laws and Executive Orders must be satisfied in tandem with, and if necessary prior to, the requirements of the Executive Order and the new subpart." For example, small businesses participating in the HUBZone Program must still comply with all requirements of that program. This may prove challenging if the successor contractor's employees meet the program's HUBZone Program's residency requirements, but the predecessor contractor's staff - from which the successor must hire - does not.

We are well positioned to advise clients on the impact of these new requirements. If you have any questions concerning the material discussed in this client alert, please contact the following members of our Government Contracts practice group:

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