

Management Alert



Final Rules Regarding the Nondisplacement of Qualified Workers Under Service Contracts Go Into Effect on January 18, 2013

On January 30, 2009, President Obama issued Executive Order 13495 requiring contractors and subcontractors who are awarded a federal service contract to provide the same or similar services at the same location to, in most circumstances, offer employment to the predecessor contractor's employees in positions for which they are qualified. The Executive Order directed the Secretary of Labor and the Federal Acquisition Regulatory (FAR) Council to issue regulations within 180 days of the Order and conditioned the effective date of the Executive Order itself on the FAR Council's issuance of regulations.

On March 19, 2010, the Department of Labor's Wage & Hour Division (WHD) published a proposed rule implementing the Executive Order. On August 29, 2011, WHD published a final rule, which was itself effective only when the FAR Council published its own final regulations. On May 3, 2012, the FAR Council published a proposed rule, largely implementing WHD's final rule and permitting the regulated community until July 2, 2012, to provide comments.

Last month, the FAR Council issued a final regulation, stating that it will be applicable to solicitations issued on or after the effective date of January 18, 2013. WHD followed suit, making its regulations effective on January 18, 2013.

The critical regulatory requirements are:

- only contracts and subcontracts that exceed the simplified acquisition threshold (currently set at \$150,000) are covered, with the following coverage exclusions:
 - contracts with sheltered workshops, contracts for vending services pursuant to the Randolph Sheppard Act, and contracts awarded pursuant to the Committee for Purchase from People Who Are Blind or Severely Disabled are also excluded
 - employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job are excluded from the obligations of the Executive Order.
- at least 30 days prior to contract completion, outgoing contractors must provide the contracting agency with a certified list of all employees who have performed services on the predecessor contract during the contract's final month
- within 5 days of the solicitation date, incumbent contractors must inform their employees if the contracting agency has exercised its authority to exempt a contract from the nondisplacement rule (which the contracting agency must have done by the contract solicitation date)
- upon receiving the employee list from the contracting agency, successor contractors must offer jobs to the predecessor's employees who worked on the contract during its final month, who have skills to perform a job under the new contract, and who will lose their jobs with the predecessor contractor because it did not win the new contract
 - employees who will be retained by the predecessor contractor need not be offered employment by the successor
- the successor contractor must provide an express, bona fide offer of employment on the contract, with a stated time limit for acceptance of not less than 10 days
 - subject to limited exceptions, the successor contractor may not offer employment on the contract to any other person

prior to the expiration of the 10-day period

- successor contractors, however, may employ its current service employees who have worked for at least three months and who would otherwise face lay-off or discharge, even at the expense of predecessor employees
- an offer can be bona fide even if it is not for a position similar to the one previously held, and even if subject to different terms and conditions (including pay), provided that the employee is qualified for the job
- the successor contractor can choose to perform the contract with fewer employees than did the predecessor
- where the successor does not initially offer employment to all predecessor employees, the obligation to offer employment shall continue for 90 days after the date of the successor's first performance
- if the successor contractor receives written, "credible" information showing that an employee had not "performed suitable work" on the incumbent contract, that employee need not be offered a job by the successor contractor
- successor contractors may use employment screening processes, such as background checks and drug tests, "only when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive Order"
- "managerial and supervisory employees," who are defined as those employees similarly exempt under the Fair Labor Standards Act and the Service Contract Act, are exempted from the nondisplacement rule
- the predecessor contractor must post a written notice (or deliver such a notice to each employee individually, including electronically, if a receipt or other confirmation is used) advising employees of their possible right to an offer of employment with the successor contractor
- penalties for violating the Executive Order include back pay, mandated offers of employment to the predecessor employees, and possible debarment (for willful or aggravated violations or for failure to comply with an order of the Secretary).

As WHD and the Federal contracting agencies begin to further consider the issues related to implementation of these regulations, and particularly during the "contracting season" preceding the start of the new fiscal year in October 2013, there undoubtedly will be additional questions from and guidance to the contracting community on the regulations.

One thing that is certain, however, is that non-union successor contractors will have a very difficult time not inheriting a unionized predecessor's union bargaining obligation under the National Labor Relations Act's ("NLRA") "successor" doctrine. Any successor contractor under this regulation that has a workforce on the contract comprised of more than 50% of the predecessor's employees will almost certainly be a NLRA successor and have to bargain with the predecessor's union as its employee's bargaining representative. Suffice it to say, lawfully avoiding a workforce comprised of more than 50% of the predecessor's employees will be extremely difficult given the Nondisplacement rule. Accordingly, non-union incoming contractors should know they are getting themselves into when taking over for a unionized contractor, and be prepared to deal with a unionized workforce on that contract.

We will continue to keep you apprised of developments in this area through additional alerts as well as a webinar discussing these obligations.

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