

# Client Alert.

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## Proposed Rule Changes Dictate Hiring Incumbent Employees on Government Contracts

By Rick Vacura and Susan Borschel

Incumbent employees on federal government services contracts frequently are offered positions by successor contractors on follow-on contracts, but proposed rule changes would significantly limit the new contractor's discretion in making hiring decisions. On May 3, 2012, DoD, GSA and NASA finally issued a proposed rule for the implementation of a 2009 Executive Order protecting service employees from termination by successor contractors and subcontractors.<sup>1</sup> This proposed rule seeks public comments on new Federal Acquisition Regulation ("FAR") subpart 22.12 and its associated contract clause, which will serve to align the FAR with the Department of Labor ("DOL") Final Rule issued on August 29, 2011.<sup>2</sup> Subject to only a small number of exceptions and a strict waiver process, the DOL regulations and proposed FAR require that successor contractors and subcontractors offer service employees (as defined in the Service Contract Act of 1965 (the "SCA")) a right of first refusal of employment for positions for which they are qualified. Consistent with the remedies for other violations of the SCA, those that fail (or worse refuse) to comply with the requirements could face withholding of contract payments and even suspension and debarment. Accordingly, all services contractors *and* subcontractors should ensure that their compliance and contract administration policies and procedures take these new employment requirements into account.

The history, principal substantive changes and impact on contractors are discussed below.

### BRIEF HISTORY

The impetus for the proposed FAR rule dates back to January 30, 2009, when President Obama issued Executive Order 134905, Nondisplacement of Qualified Workers Under Service Contracts.<sup>3</sup> It establishes a policy requiring service contractors to make job offers to employees employed by the predecessor contractor for the same or similar services in the same locality, when the contract changes hands. The FAR Team responsible for drafting the implementing changes opened FAR Case 2009-001, but eventually opted to close the case while the DOL worked on its own implementing regulations at 29 CFR Part 9. More than a year after the Executive Order was issued, the DOL published its proposed rule on March 19, 2010, implementing the Executive Order for all contracts and subcontracts that exceed the simplified acquisition threshold.<sup>4</sup> The DOL received 21 comments, and spent 23 pages discussing them in the final rule published on August 29, 2011. The DOL's Final Rule is expressly not effective, however, until the FAR Council issues its own implementing regulations in the FAR. Even though there apparently is little flexibility in what ultimately will be published (to keep the FAR consistent with the DOL's implementing regulations), a proposed rather than a final rule was published on May 3, 2012, with the public invited to provide comments until July 2, 2012.

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<sup>1</sup> 77 FR 26232.

<sup>2</sup> 76 FR 53720.

<sup>3</sup> 74 FR 6103.

<sup>4</sup> 75 FR 13382.

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## PROPOSED CHANGES TO THE FAR

The following are the more significant changes being proposed to the FAR:<sup>5</sup>

- **Scope** – The new regulation covers *all service employees*, which are defined with reference to the SCA as “any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative or professional capacity, as those terms are defined in 29 CFR part 541.” Commercial item acquisitions that are subject to the SCA will be subject to the new regulations.
- **Exemptions** – There are a *very limited number of exemptions* from the regulations, including contracts under the simplified acquisition threshold (currently \$150,000), and certain contracts for the blind and severely disabled.
- **Waivers** – Justification for a waiver must be based on written analysis completed prior to the contract solicitation date. If a waiver is approved by the head of the contracting agency, the Contracting Officer will notify the DOL and will direct the outgoing contractor to notify all affected workers (and collective bargaining representatives, if applicable) of the Agency’s waiver not later than five business days after the solicitation issuance date. A failure to comply with each and every requirement relating to the waiver makes the waiver inoperative.
- **Certified employee lists** – The outgoing contractor must provide the Contracting Officer, not later than 30 days prior to completion of the predecessor contract, a certified list of all service employees (including those of any subcontractors). If the workforce changes, the outgoing contractor must deliver an updated certified list not later than 10 days prior to contract completion. The Contracting Officer must provide the list of employees to the successor contractor and, if requested, to the employees (note that there is no time line stated for this requirement).
- **Notification to contractors and employees** – The Contracting Officer must ensure the outgoing contractors provide written notice to service employees of their employment rights.
- **Right of First Offer** – No employment openings may be filled on the follow-on contract until all eligible employees have received bona fide good faith offers for employment for the same position or another one for which the employee is qualified. The offers must remain open for at least ten days. This requirement exists even if the successor contractor has no list or an incomplete list of the predecessor contractor’s employees. Even if employment screening processes (such as background investigations and drug screening tests) are routine for the successor contractor, they may be used only when such processes are conditions of the contract and are consistent with the Executive Order. Contractors are not required to hire poor performers; however, this determination requires a reasonable belief and must be based on written, credible information.

## CONTRACT ADMINISTRATION CONCERNS AND PRACTICAL TIPS

It is inevitable that the proposed FAR rule will become final at some point, and perhaps with no changes at all from its current form, which is consistent with the final rule for the DOL regulations. Since non-compliance can lead to payment holdbacks and even suspension and debarment, contractors providing services to the federal government should review existing policies and procedures, and implement best practices, if needed, that will help ensure compliance with the regulations (and proof of that compliance).

CONCERN # 1 – Performance records will be hard to obtain – DOL, in its analysis of the comments, disputed rather summarily the comments that outgoing contractors would “dump” poor performers onto expiring contracts. The DOL made no change to any of the provisions to address this concern or the corollary concern that it would be hard to find “credible evidence” of poor performance, making it necessary for the successor contractor to make offers to everyone, even those that would likely not survive long on the follow-on contract for performance reasons.

<sup>5</sup> All references to “contracts” also apply to “subcontracts.” In addition, the FAR does not repeat all of the provisions of 29 CFR Part 9. Service contractors must comply with *both* regulations.

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**CONCERN # 2 – Pricing problems** – If the list of employees is not available until 30 days prior to the end of the contract, and if there is no regulatory requirement to deliver the list to anyone other than the successor contractor, then there may be timing problems for pricing proposals. The successor may propose a different mix and number of employees, but even a changed workforce solution has to be priced, which is difficult without the list of incumbent employees.

**CONCERN # 3 – Hiring timing concern** – 29 CFR 9.24 provides little in the way of remedies if a predecessor fails to timely provide the complete list of employees. The contracting officer may withhold what little funding is left on the expiring contract, and the DOL could conceivably find the situation egregious enough to warrant suspension and debarment; however, this does little to help the successor contractor with compliance.

**CONCERN # 4 – Small business concern** – Small businesses may face the loss of valuable employees to their successors, which may leave the incumbent contractor insufficiently staffed and possibly unable to bid on and perform other contracts.

**TIP # 1 – Try to shape the solicitation** – Business development and program teams often know when a contract is due to expire. If additional screening and personnel requirements are appropriate for the type of work involved, the Program and Contracting Offices should be informed so the additional screening and personnel requirements can be added to the solicitation as contract requirements. If the contract requirements are not changed prior to the issuance of the solicitation, the only qualifications allowed will be those held by the existing workforce.

**TIP # 2 – Know the incumbent** – If there are key personnel or high performers, watch for cherry picking where the incumbent transfers those employees off the contract months prior to the end of the period of performance and avoids having to place them on the employee list provided to the successor contractor. Such cherry picking of incumbent employees violates the intent and purpose of the Executive Order and regulations, but this requires some hard decisions on when/if it is a good idea to involve the DOL or collective bargaining representatives, if applicable.

**TIP # 3 – Change Personnel Policies** – The mandatory rule is no offers can be made to anyone until those offered a right of first refusal have declined their offer. All offers contingent on award will need to be further contingent on the availability of the position. Contingent offers may be a double-edged sword because they provide a safety net in case the offers are refused, but also may later be used against the successor to allege it did not intend bona fide offers and sought to employ others instead.

**TIP # 4 – Document, Document, Document** – The entire offer process will need to be documented, from the date of first offer, all the way through to the hiring of incumbent employees or their rejection of offered positions. Offers should be carefully mapped based on qualifications to ensure that the offers are for the same or similar positions. Any change in terms and conditions should be justified so as to avoid even the appearance that the changes are not bona fide to cover eventual employment of other than incumbent employees. Especially document post-contract start terminations, as these will come under additional scrutiny.

Service contracts have been difficult to manage for a long time given all the reporting and wage requirements. The nondisplacement of qualified workers rules will not make it any easier. If you have any questions about implementation, please contact:

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