

Final Rule Issued for Government Contractors' Requirement to Hire Incumbent Contractor Service Employees

DECEMBER 27, 2023

The Department of Labor (DOL) recently announced a final rule that implements Executive Order 14055 "Nondisplacement of Qualified Workers Under Service Contracts" (the EO).^[1] The EO directed federal agencies to require contractors on contracts covered by the Service Contract Act (SCA) to "offer service employees (as defined in the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3)) employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which those employees are qualified." EO at Sec. 3.

The EO explained as its rationale: "[W]hen a service contract expires and a follow-on contract is awarded for the same or similar services, the federal government's procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor's employees, thus avoiding displacement of these employees." EO at Sec. 1. *In addition, the EO explained that "[u]sing a carryover work force reduces disruption in the delivery of services during the period of transition between contractors, maintains physical and information security, and provides the federal government with the benefits of an experienced and well-trained work force that is familiar with the federal government's personnel, facilities, and requirements."* *Id.*

The EO was not effective when issued; instead, it directed the DOL to issue, within 180 days, a final rule to implement the EO requirements, and subsequently for the FAR Council to amend the Federal Acquisition Regulation (FAR), within 60 days of the DOL rule, to include a mandatory clause for Nondisplacement of Qualified Workers.

The final rule, published by the DOL on December 14, 2023, closely tracks the EO, and will be included in 29 CFR Part 9. The final rule will apply to solicitations issued on or after the effective date of the final regulations issued by the FAR Council. The new regulations will apply to any SCA-covered service contract or solicitation for a contract with an agency issued or entered on or after the applicability date of 29 CFR Part 9, and that exceeds the Simplified Acquisition Threshold (\$250,000). Contracts and solicitations that satisfy the above requirements, and that succeed a contract for performance of the same or similar work, must contain the contract clause contained in Section 9.11, Appendix A. While the rule only requires incorporation into new contracts issued after the effective date, it is possible that contracting officers will amend existing contracts to incorporate this requirement.

In general, the new requirements imposed on the incoming contractor include the following:

- Cannot fill SCA-covered positions until offering a first right of refusal to incumbent service employees that will otherwise be terminated upon expiration of the incumbent contract
- Must provide job offers in writing to each covered employee—delivered in-person or by registered or certified mail to the individual’s last known address or email address, with a minimum of 10 business days to accept or decline
- Must accept a list of covered employees, or verified evidence from an employee that he or she is entitled to a job under this part (such as a paycheck stub verified by the agency)
- Must include these requirements in all covered subcontracts
- May offer employment to a different position, *provided that*, changes made to pay, benefits, or location are not made to discourage acceptance of the offer

The final rule also requires the incumbent contractor to provide a list of covered employees and contact information to the contracting officer not less than 30 days prior to completion of the services under the incumbent contract.

Importantly, the final rule sets forth several exceptions to applicability of the rule in general, or to specific employees. The final rule does not apply to:

- Contracts under the simplified acquisition threshold, which currently is \$250,000
- Employees who will be retained by the incumbent contractor
- Non-service employees of the incumbent contractor
- An employee, if the successor contractor or any of its subcontractors reasonably believes—based on reliable evidence of the particular employee’s past performance—there would be cause to discharge the employee if employed by the successor contractor or any subcontractor
- Any employee hired to work under a predecessor’s federal service contract *and* one or more non-federal service contracts as part of a single job
- If the successor contract will have reduced staffing—the contractor must comply with the final rule, but may elect to offer jobs to and employ fewer employees than were engaged on the incumbent contract
- Contracting agencies that waive the requirements by issuing a written determination

Contractors should be monitoring for the release of final regulations issued by the FAR Council, which are due 60 days from release of the final rule. Moreover, contractors should pay special attention to solicitations issued on or after the effective date of the final regulation to ensure that they are aware when these new requirements are included in solicitations.

Please contact the authors or your Winston & Strawn relationship attorney if you have any questions or need further information.

[1] This EO, and the final rule, are a resurrection of a similar 2009 rule promulgated by President Obama under [Executive Order 13495](#), which was later rescinded by President Trump in 2019 through EO 13897.

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