



## DOL Issues Final Rule on Right-of-First-Refusal of SCA Employees on Successor Contracts

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On August 26, 2011, the U.S. Department of Labor issued its final rule implementing President Obama's Executive Order 13495 entitled "Nondisplacement of Qualified Workers Under Service Contracts", which threatens to upset the normal evolution that occurs with follow-on service contracts. The rule requires contractors that take over as successors from other contractors under service contracts with the Federal Government to offer employment on a right-of-first-refusal basis to qualified employees of the predecessor contractor who otherwise would lose their jobs. The effective date of the rule will not be announced until the Federal Acquisition Regulatory Council issues implementing regulations.

The rule applies to contracts and subcontracts covered by the Service Contract Act and excludes managerial and supervisory employees. In addition, affected contracts must succeed contracts for performance of the same or similar services at the same location. The rule exempts contracts and subcontracts below the simplified acquisition threshold (currently \$150,000) as well as certain other narrowly-defined contracts and subcontracts. There also is authority for the head of the contracting department or agency to exempt its department or agency from the rule's requirements under limited circumstances.

Other provisions of importance to contractors and subcontractors include (a) contractors and subcontractors are entitled to reduce contract staffing below the staffing on the predecessor contract; (b) contractors and subcontractors are entitled to determine which of the employees of the predecessor contractor to hire, if staffing is reduced; (c) contractors and subcontractors are not required to offer employment to any employee of the predecessor contractor whom the contractor or subcontractor reasonably believes has failed to perform suitably on the job (application of this provision, however, requires "credible information provided by a knowledgeable source"); and (d) contractors are not required to offer employment to any employee of the predecessor contractor who will be retained by the predecessor contractor.

Responsibility for enforcement is assigned to the Department of Labor. The rule will be implemented by the inclusion of a clause containing the right-of-first-refusal provisions in applicable contracts and subcontracts. Disputes arising under the clause will not be resolved under the Contract Disputes Act but instead will be handled pursuant to Department of Labor regulations. To the extent practicable, such regulations will favor the resolution of disputes by "efficient and informal" alternative dispute resolution methods, with the right of appeal pursuant to the Administrative Procedure Act.

The Executive Order upon which the rule is based states that the Federal Government's "procurement interests in economy and efficiency are better served when a successor contractor hires the predecessor's employees. A carryover workforce reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements."

Despite the Government's statements about economy, efficiency and absence of disruption, the rule threatens to upset accepted contracting practices that have been the norm for many years. Unwary contractors may experience performance issues, and the accompanying increased costs, that they avoided in the past. Successor service contractors traditionally have hired 80-90% of incumbent workforces, but they were not required to do so. Various sources and methods were used to determine which incumbent employees were suitable and which were unsuitable for hire - a practice that resulted in its own economy and efficiency and the absence of disruption. The new rule theoretically addresses this issue, but the Government-approved sources of information for establishing unsuitability are unlikely to provide credible or useful information to contractors. Consequently, contractors may be forced to hire incumbent employees who prove to be poor performers.

Clearly, the new rule poses serious contract administration issues. Knowing how best to handle such issues will require strategic planning by all contractors.

*Williams Mullen will continue to follow the implementation of this new rule. For questions, please contact team member Walter Skinner, , or any other member of the Williams Mullen Government Contracts Group.*

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