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I Have to Do What? Hire My Competitor's Employees?

By Antonio Franco and Nichole DeVries

Contractors are beginning to realize the complexities of implementing a new regulation that will require them to offer jobs to an incumbent contractor's employees. While the new regulation does not apply to all contracts, it will have a substantial impact on both successor and predecessor contractors in cases where the regulation does apply.

The new regulation implements an executive order issued by President Obama shortly after he took office. Although the new rule provides some clarity for contractors, it is complex and imposes some head-scratching requirements. The following examples highlight select provisions that may take contractors by surprise as they begin to prepare for implementation of the rule.

The president's Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, establishes that where a service contract expires and a follow-on contract is awarded for the same or similar services at the same location, a successor contractor must grant a right of first refusal to the predecessor contractor's employees. The Department of Labor issued a final rule on August 29 implementing the order. However, until the Federal Acquisition Regulation is amended to incorporate the contract clause that will implement the regulation, the effective date is uncertain. The FAR amendment is expected soon.

One of the more befuddling concepts contractors face is determining when a right of first refusal must be offered to the incumbent's employees. There will likely be situations where government agencies and contractors inadvertently omit the FAR clause from a contract or subcontract subject to the Order. The Labor Department has made clear that a contractor is not excused if non-displacement provisions are omitted from the FAR clause in the contract. If the error is discovered subsequent to the award, the department will use alternative dispute resolution to remedy the situation and may require the retroactive application of the non-displacement requirements.

Another troubling aspect of the rule is the contractor's obligation to hire displaced workers when it terminates a subcontractor and decides to execute the subcontractor's duties itself. In that situation, the

contractor should be mindful of its obligations to offer employment to eligible subcontractor employees. This poses a quandary for contractors bound by non-solicitation agreements which if violated could quickly entangle the company in contentious litigation.

Similarly troubling, Labor has declined to address concerns about the interplay between the National Labor Relations Act, which governs union activity, and the requirements of the executive order. The National Labor Relations Board has not yet determined whether a successor contractor subject to the order would also be a successor in interest for NLRA purposes. In the event that the NLRB makes this determination, successor contractors may well be required to recognize the predecessor's union as the bargaining representative for the employees performing under the follow-on contract. This would require the successor contractor either to accept the predecessor's negotiated collective bargaining agreement or engage in good-faith bargaining with the union regarding the terms and conditions of employment.

Under Labor's new rule, once a successor contract is awarded, several obligations are imposed on the predecessor and successor contractors. Thirty days before performance is complete on a transitioning contract, the predecessor contractor is required to provide a "certified list of all service employees" to the contracting officer. However, the successor's obligation to offer employment does not change even if the list is not provided. The successor contractor must rely on any available credible evidence, such as government verification or an employee-produced pay stub, to determine if a predecessor contractor's employees are entitled to an offer.

Planning for the number of employees a contractor will need to perform on a contract can be tricky and the rule certainly does not make it easier. If the number of vacancies is less than the number of displaced employees, a successor contractor may use its own discretion to determine which displaced workers it will offer employment. Contractors should bear in mind that the obligation to extend an offer continues for 90 days after contract performance begins if a vacancy becomes available.

However, successor contractors are not required to offer the same position to a displaced worker. The position simply must have like characteristics and the employee must be qualified for the job. The contractor also does not have to offer the same terms of employment, including wages and benefits, that the displaced worker received under the predecessor contract.

For employers that screen employees before hiring through the use of drug testing, background checks and/or security clearances, the rule will require changes in hiring protocols. A successor contractor may not conduct such screening unless it is provided for by the contracting agency, is among the conditions of the service contract, and is consistent with the president's order. In the same vein, a successor contractor may not impose its own hiring standards, such as college degree requirements, in determining which employees are qualified. The offer must focus on an employee's past performance and that employee's ability to perform the duties required.

While a successor contractor is not required to offer employment to poorly performing displaced workers, it must have written credible evidence from a knowledgeable source to support its decision. The extent of evidence required to sustain a challenge to such decisions remains to be seen, but the obligation should give contractors pause to substantiate hiring decisions in order to best avoid Labor Department investigations. If a contractor finds itself subject to an investigation, be aware that the new regulation imposes an affirmative obligation to comply or face debarment for up to three years.

The new regulation's full impact is not yet known, but these examples emphasize its complexity. Contractors need not commit every provision of the rule to memory, but they should be aware of the

breadth of the rule and recognize the many situations where the rule may impact hiring and termination decisions.

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