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The BDO GovCon Week Ahead – January 2024

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Nondisplacement of Qualified Workers Under Service Contracts Final Rule Issued by the U.S. Department of Labor – Prepare Now

On December 14, 2023, the U.S. Department of Labor Wage and Hour Division (WHD) published a final rule implementing Executive Order 14055 “Nondisplacement of Qualified Workers Under Service Contracts.” This Executive Order (issued by President Joseph Biden on November 18, 2021) applies to contracts and subcontracts covered by the Service Contract Act (SCA) that succeed a contract for performance of the same or similar work and requires (with very limited exceptions) contractors and subcontractors to make job offers to the predecessor contractors and subcontractors SCA covered employees.

Executive Order 14055, and its implementing regulations, are similar to a President Obama requirement (Executive Order 13495) that was revoked by President Trump. There are some differences however, with the most notable that Executive Order 13495 covered successor contracts only when performed at the same location as the predecessor contract, but Executive Order 14055 does not have this limitation. In addition, contracting agencies must perform a pre-solicitation assessment as to whether the contract should be performed in the same location and, if so, include a same location requirement or preference in the solicitation.

Key Requirements Include:

- ▶ Covered successor contractors and subcontractors must offer employment on a “first right of refusal” basis to service employees employed under the predecessor contract/subcontracts whose employment would otherwise be terminated at the end of the contract.
- ▶ The offer of employment must be for positions for which the employees “are qualified.” Employers are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees’ past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors.
- ▶ Successor contractors are required to make a written offer of employment to all covered incumbent employees provided there is a position available, and the incumbent employees must have at least 10 business days to accept the offer.
- ▶ Predecessor contractors and subcontractors must provide a certified list of service employees, with their anniversary dates, to the contracting agency at least 30 business days prior to the contract completion date, and an updated list within 10 business days prior to the contract completion date (if there were any changes to the original list), and must also notify their employees in writing of the possible right to a job offer on the successor contract or subcontract.

Exclusions

The requirements do not apply to:

- ▶ Contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134 (currently

\$250,000); or

- ▶ Employees who were hired to work under a federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

In addition, under certain limited circumstances, agencies can apply for an exemption from the requirements for specific contracts.

Effective Date

The Final Rule is effective February 12, 2024, and the WHD has included implementation language as a provision in the Final Rule. However, for contracts covered by the Federal Acquisition Regulation (FAR) the requirements will apply to solicitations issued on or after the effective date of final regulations issued by the FAR Council.

Violations

Violations can result in:

- ▶ An order to hire the predecessor contractor/subcontractor's employees.
- ▶ Payment of lost wages and benefits.
- ▶ Debarment for up to three years for failure to comply with the DOL's orders for hiring and other relief or for willful violations of the Executive Order.

Prepare Now

- ▶ Be on the lookout for new solicitations with the requirements.
- ▶ Consider union successorship issues under which winning a successor contract or subcontract may result in hiring a union workforce.
- ▶ Engage in training and polices geared toward compliance with these new requirements.

Have questions or need further assistance? Contact [BDO's Government Contracting Consulting Team](#) for guidance on compliance with the final rule.