

FAR Council Proposes Non-Displacement Amendments for Service Contract Act Covered Contracts

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On May 3, 2012, the Federal Acquisition Regulatory Council (FAR Council) issued a proposed rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13495 (dated Jan. 30, 2009) for non-displacement of qualified workers who work on contracts covered by the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 351 *et seq.* 77 Fed. Reg. 26232 (May 3, 2012). The proposed FAR rule requires many successor contractors and their subcontractors to offer employment to their predecessor's workforces.

The proposed rule largely adopts a companion final rule issued by the Department of Labor (DoL) on August 29, 2011, and implemented at 29 C.F.R. part 9. This attempt to model the proposed amendment on the final DoL non-displacement rule will likely have the effect of limiting the effectiveness of challenging certain provisions of the proposed FAR rule. We analyzed the DoL's rule, which does not take effect until the FAR Council issues its final rule, [here](#) and [here](#). The proposed FAR rule in many respects mirrors the DoL's rule, such as in the following instances:

- the same contract and subcontract exemptions found in FAR 22.1203-2;
- many of the same requirements for preparing waivers to the non-displacement rule (FAR 22.1203-3), delivering certified lists of predecessor employees (FAR 22.1204), and notifying employees of their rights (FAR 22.1205); and
- many of the same record keeping requirements (FAR 52.222-XX (e)).

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

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However, the proposed FAR rule makes clear that it does not repeat elements of the investigative methods, available reviews or enforcement mechanisms established in DoL's rule "except as necessary to ensure that contracting officers and contractors, including subcontractors, are aware of their requirements and responsibilities." Overall, many concerns that arose with the DoL non-displacement rule arise in the proposed FAR non-displacement rule. The proposed FAR rule imposes numerous administrative burdens on predecessors, successors and contracting agencies alike.

The FAR Council has requested comments in two specific areas: (1) the potential restrictions on the level to which waiver authority may be delegated under the rule; and (2) possible steps that might be taken as agencies transition to the new FAR clause to reduce instances where service employees of the predecessor contractor and successor contractors do not receive notice of their rights and successors receive lists less than 30 days before the end of the predecessor contract. Comments on the proposed FAR rule may be submitted by July 2, 2012.

If implemented, the proposed FAR rule would amend the FAR to add subpart 22.12, entitled Nondisplacement of Qualified Workers Under Service Contracts, and a new clause at FAR 52.222-XX, entitled Nondisplacement of Qualified Workers. In the end, the proposed rule is complex and contractors are well advised to work closely with counsel to analyze solicitations and contract provisions in order to determine how best to comply with these new obligations.