

ALERT

FAR Council Issues Final Rule on Non-displacement of Qualified Workers Under Service Contracts

December 27, 2012

On December 21, 2012, the Federal Acquisition Regulatory Council (FAR Council) issued a final 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. § 6701, *et seq.* See 77 Fed. Reg. 75766 (Dec. 21, 2012). The FAR final rule adds FAR subpart 22.12, inserts a new clause at FAR 52.222-17, and overall largely mirrors the proposed rule published on May 3, 2012, 77 Fed. Reg. 26232 (May 3, 2012), and described here by Wiley Rein.

In general, the FAR non-displacement obligations require that successor contractors offer first rights of refusal for employment to eligible service employees performing under SCA-covered contracts exceeding the simplified acquisition threshold when a successor contractor replaces an outgoing predecessor contractor and the successor contractor will provide the same or similar services at the same location. The obligations require that the predecessor contractor provide the successor contractor a list of its employees performing services during the predecessor's final month of performance. The successor contractor must offer employment to eligible predecessor service employees, though the positions offered can be different than those the employees performed for the predecessor contractor. These non-displacement obligations are limited in certain circumstances by narrowly-defined exceptions and exclusions defined in the FAR Council's final rule. For example, successor contractors need not offer employment to employees who

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have failed to perform suitably on the predecessor contract (as long as the successor contractor has written evidence of such poor job performance by the predecessor employee). In addition, successor contractors need not offer employment to all eligible predecessor service employees if the successor contractor's method of performance requires fewer employees than did the predecessor contractor's method or offer employment to predecessor contractor employees who perform on both federal and non-federal contracts for the predecessor contractor.

The publication of the FAR final rule ends a nearly four-year process that began with the issuance of Executive Order (EO) 13495 on January 30, 2009. *See* 74 Fed. Reg. 6103 (Jan. 30, 2009). The Department of Labor (DoL) published a proposed rule on March 19, 2010, 75 Fed. Reg. 13382 (Mar. 19, 2010), and a final rule on August 29, 2011, to implement EO 13495. *See* 76 Fed. Reg. 53720 (Aug. 29, 2011) (final rule); *see also* Wiley Rein's coverage here. Notably, the DoL rule stated that its new regulations (found at 29 C.F.R. part 9) would not become effective until the FAR Council published its companion final rule. On May 3, 2012, the FAR Council issued a proposed rule that mirrored in most material respects the DoL final rule's requirements imposed upon many successor contractors and their subcontractors; the FAR Council also proposed to add a new subpart (22.12) to the FAR. *See* 77 Fed. Reg. 26232 (May 3, 2012); *see also* Wiley Rein's coverage here.

On December 21, 2012, the FAR Council published the final rule and included an effective date of January 18, 2013. On the same date, the DoL issued a final rule (77 Fed. Reg. 75780) announcing January 18, 2013 as the effective date of its August 29, 2011 final rule. The FAR final rule stated that contracting officers are expected to work with existing service contractors and bilaterally modify their contracts, to the extent feasible, to include the clause at FAR 52.22-17 or at the very least paragraph (c) of that new FAR clause. However, the FAR Council also made it clear that "[t]he rule will not be applied retroactively unless there is a bilateral modification to the contract with consideration."

The FAR Council received 27 sets of comments on the proposed rule and included responses in the final rule published on December 21, 2012. Based in part on those comments and input from the DoL, the FAR final rule contains the following changes to the FAR proposed rule:

- Revised FAR 22.1200, Scope of subpart, to make it clear that the DoL regulations (29 CFR part 9) implementing EO 13495 are applicable.
- Revised the policy, FAR 22.1202, to clarify the applicability of the subpart.
- Revised FAR 22.1203-3, Waiver, to require the approval of waivers by the agency Senior Procurement Executive, without power of redelegation.
- Added three subsections to FAR 22.1203 to address "Method of job offer," (which includes the elements required for a job offer to be considered "bona fide"), "Exceptions" (based on the requirements at 29 C.F.R. 9.12(c)), and "Reduced staffing" (to clarify that no waiver is required when the successor contractor employs fewer employees than the predecessor contractor due to efficiencies).
- Added cross-references throughout FAR subpart 22.12 to the applicable section of the DoL implementing regulations.

- Added a definition of "service employee" and the term "service employee" is used throughout the rule.

There is little doubt that the final implementation of the obligations imposed by this rule will pose challenges for predecessor contractors, successor contractors, and contracting officers. Wiley Rein has been closely monitoring the development of the non-displacement rules and working with service contractors to prepare for the final implementation of this rule.