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A Broader Perspective

Alert

Government Contracts Team

To: Our Clients and Friends

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Department of Labor Issues Final Rule Requiring Follow-On Contractors to Hire Their Predecessor's Employees

Introduction

The Department of Labor ("DoL") issued a final rule the Monday before Labor Day that, in effect, will give certain employees now performing under Federal government service contracts employment for life or at least for as long as the government continues to contract for those services. 76 Fed. Reg. 53,720 (Aug. 29, 2011)(to be codified at 29 C.F.R pt. 9). It will also make fundamental changes in how contractors compete for and perform those contracts. Although the rule does not take effect until the Federal Acquisition Regulatory Council ("FAR Council") issues its complementary regulations and implementing contract clause, matters are sufficiently final that contractors should began planning for how they are going to comply with this rule and the contract clause that will be in future solicitations.[1/]

Under this rule, with limited exceptions, a contractor that will perform a contract for services that are the "same or similar at the same location" as services being performed by a contractor whose contract is expiring has to extend a "bona fide" offer of employment to all service employees who are employed

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1/ The regulation implements, in part, an Executive Order on "Nondisplacement of Qualified Workers under Service Contracts" issued by President Obama on January 30, 2009, shortly after he took office. Exec. Order No. 13,495, 74 Fed. Reg. 6102 (Feb. 4, 2009). That Executive Order directed the Secretary of Labor and the FAR Council to issue implementing regulations within 180 days. It has taken DoL almost two and a half years to issue its regulation. The FAR Council's implementation is expected soon.

The Executive Order asserted – without any known empirical evidence – that the Federal government's interest in "economy and efficiency are served when the successor contractor hires the predecessor's employees." 74 Fed. Reg 6103. It explained that a carry-over workforce would reduce disruption during the transition between contractors and provide the benefit of an experienced and trained workforce. Id.

by the predecessor contractor under the earlier contract and whose employment will be terminated as a result of the termination of that earlier contract.[2/] Indeed, the successor contractor is not allowed to make *any* offer of employment for work under the contract until it has satisfied this obligation or is able to invoke an exception.

Service employees of subcontractors under the earlier contract also are entitled to receive offers of employment, and this employment offer obligation is imposed not only on the prime contractor, but on its subcontractors as well. This is likely to require a new level of cooperation between the prime contractor and its subcontractors – and require appropriate terms and conditions in the subcontracts and/or any teaming agreements – to decide which employer will give an offer to which employee to ensure that all eligible employees receive a job offer.

Limited Exceptions Exist -- Maybe

There are limited exceptions to the obligation to make a job offer, although DoL has made most of the exceptions difficult to invoke:

- The successor contractor is allowed to determine the number of employees necessary to perform the contract and employ fewer employees than the predecessor (and offer different terms and conditions and pay and benefits).

- The successor contractor can offer employment under the contract to any of its employees who worked for the contractor for at least three months preceding the commencement of the new contract, but only if those employees would otherwise face a lay-off.

- The successor contractor is not required to offer employment to an employee if the contractor reasonably believes the employee has failed to perform suitably on the job. DoL, however, has stacked the deck in favor of the employee. The regulations say that the contractor "must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract." The only way to overcome the presumption is to have "written credible information provided by a knowledgeable source" to the contrary. Although DoL suggests that the predecessor contractor, the contracting agency, or the employee would be knowledgeable sources of such information, it seems unlikely that the predecessor contractor would open its employee evaluation files to its competitor or that the contracting agency would have useful, written information on individual employees of

2/ This rule generally will be applicable to contracts that exceed the simplified acquisition threshold (currently, $150,000 in most instances) and that are covered by the Service Contract Act, which applies to contracts that have as their principal purpose furnishing services in the United States through the use of service employees. Agencies can exempt certain contracts, but have to go through a rigorous exemption procedure in order to do so, which is clearly designed to make exemptions few and far between.

the contractor.[3/] The notion that the employee will provide "written credible information" about his or her own poor performance is just plain silly.

- The successor contractor is not required to make a job offer to an employee hired by the predecessor to work on the predecessor's Federal service contract and one or more nonfederal contracts as part of a single job. Again, the successor contractor must presume that no employee hired under the Federal service contract worked on nonfederal contracts as part of a single job.

- The successor contractor is not required to make job offers to those employed in "executive, administrative, or professional capacities," only to "service employees."[4/] DoL, however, imposes another presumption, this time that "all employees hired to work under a predecessor's Federal service contract are service employees." The presumption may be rebutted by a reasonable belief "based upon credible information provided by a knowledgeable source." This information, at least, does not have to be in writing.

When you combine these limited exceptions with the presumptions imposed by DoL, and add in DoL's requirement that the contractor presume that all the service employees of the predecessor contractor will be terminated (again, unless there is credible evidence to the contrary), the regulatory scheme anticipates that the successor contractor will offer employment to essentially all of the predecessor's employees working on the prior contract, unless the contractor can point to specific exceptions allowed by the regulations for specific employees – usually supported by credible evidence – why it need not.

Minimizing Disruption – or Not

Although one of the supposed purposes of the rule is to reduce disruption during the transition between contractors, the rule easily can result in more disruption, rather than less. Service contracts of this type typically run "nose-to-tail," with the successor contractor beginning performance the day after the predecessor ends performance. Although DoL has drafted a contract clause for agencies to use that requires the predecessor contractor to provide a list of service employees at least thirty days before its contract ends, that will have no effect on existing contracts. The only standard clause in existing contracts that requires a contractor to provide such a list is contained in the Service Contract Act clause, FAR 52.222-41(n), which requires the predecessor contractor to provide the contracting officer with a list of all service employees, but it is not due until ten days prior to completion of the

3/ In their comments on the proposed rule, two government labor advisors specifically disclaimed any government knowledge of contractor workforce capabilities or of having any desire to be the source of such information.

4/ Whether an employee is a bona fide executive, administrative, or professional employee will be determined using the standards set out at 29 CFR part 541 for the Fair Labor Standards Act. These regulations provide the standards to be applied to each employee to determine whether an employee is "exempt" from the requirement that the employee must be paid overtime for all hours worked in excess of 40 and at least the minimum wage. The employees who are not exempt from the overtime and minimum wage requirements are the service employees who must receive offers. The executive, administrative, or professional employees who are exempt from those requirements do not have to receive offers.

contract.[5/] DoL's new rule, however, requires that, in order for a job offer by the successor contractor to qualify as a "bona fide" offer, it must remain open for at least ten days.

Thus, even assuming the contractor receives the predecessor contractor's list on the same day the contracting officer receives it and makes offers that same day (which is probably impossible given the need to determine who is qualified for what position), the successor contractor will not know with any degree of certainty which of the predecessor's employees will accept a job position until the day before contract performance is to start! And, DoL makes it clear that the successor contractor is obligated to make job offers to the predecessor's employees *even if no such list is provided* or the list is inaccurate, creating the potential for an employee unknown to the successor coming out of the woodwork at a later date and insisting that he was entitled to a job offer. In order to avoid – or at least minimize – the chaos all this can cause, the successor contractor will need to take whatever steps it can to identify the predecessor's employees and determine who must receive job offers as soon as it learns that it won the competition.

Changing Competition Strategies

In addition to presenting challenges in the start-up of the contract, this rule will also result in changes to competition strategies to win the work. The incumbent contractor's proposal cannot tout its experienced workforce, because that workforce (other than executive, administrative, and professional employees) will be equally available to all competitors. Similarly, those trying to wrest the contract from the incumbent cannot promise a significantly higher-caliber workforce, because they will be obligated to use many of the same employees the incumbent has working on the contract during the last month of performance. The competition discriminators will have to emphasize offering superior management personnel or a different way of performing the work, consistent with the government's evaluation criteria for the competition.

Disputes Likely

A new series of disputes can be anticipated, with former employees making claims such as that they should have received job offers, but did not, or that their subsequent termination by the successor contractor meant that the job offer was not bona fide in the first place. These disputes are not subject to the normal disputes process governing government contracts. Instead, DoL will investigate such claims and, if it finds them to be valid, can order unpaid wages to be paid and that the contractor hire the employee. A failure to comply with such an order, or "willful or aggravated violations" of the new rules, can result in debarment of the contractor.

Conclusion

In these economically challenging times, many employees have worries about their job security. Those working on government services contracts, however, will sleep more soundly than many of their colleagues in the commercial sector. There probably also will be increased job security for

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5/ Given that the predecessor contractor likely lost the recompetition that led to there being a successor contractor, the predecessor would have little incentive to help its competitor by providing the list more than ten days before its contract ends.

contractors' human resources and contracting personnel (not to mention lawyers), as they struggle to implement these new requirements.

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