

May 10, 2010

VIA ELECTRONIC SUBMISSION

The Honorable Hilda L. Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Michel Smyth
Chief, Regulatory Analysis Branch
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: <http://www.regulations.gov> (DOL Docket No. RIN 1235-AA02)

Re: Nondisplacement of Qualified Workers Under Service Contracts; Notice of Proposed Rulemaking, 75 Fed. Reg. 13382 (March 19, 2010).

Dear Secretary Solis and Mr. Smyth:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) is pleased to submit these comments to the U.S. Department of Labor, Wage and Hour Division (DOL) regarding its Notice of Proposed Rulemaking (NPRM) entitled, *Nondisplacement of Qualified Workers Under Service Contracts*.¹

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

¹ *Nondisplacement of Qualified Workers Under Service Contracts, Notice of Proposed Rulemaking, 75 Fed. Reg. 13382 (March 19, 2010).*

² 5 U.S.C. § 601 et seq.

³ *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (*SBREFA*).

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Background

On March 19, 2010, DOL proposed regulations to implement Executive Order 13495, *Nondisplacement of Qualified Workers Under Service Contracts*, signed by President Obama on January 30, 2009.⁶ Executive Order 13495 requires that any federal service contract and contract solicitations include a clause that requires winning contractors and their subcontractors ("successor contractors") to offer qualified employees of the losing contractor ("predecessor contractor") a right of first refusal of employment.

This regulation governs any contract or subcontract for federal services covered by the McNamara-O'Hara Service Contract Act of 1965 (SCA) above the simplified acquisition threshold of \$100,000. Successor contractors must offer employment to a predecessor contractor's employees doing the same or similar services at the same location under a contract, and are not required to offer employment to management or supervisory employees.⁷

Executive Order 13495 effectively reinstates Executive Order 12933, which was signed by President Clinton in 1994 (Clinton Order).⁸ The Clinton Order was rescinded by President Bush with Executive Order 13204 in 2001.⁹ Executive Order 13495 is broader than the Clinton Order, which was limited to building services contracts, only covered prime contracts and had multiple exemptions for contracts at the U.S. Postal Service, NASA, and military and Veterans Administration installations. Executive Order 13495 applies to all service contracts under the SCA and eliminates the exemptions.¹⁰ Executive Order 13495 states that the Federal Government's procurement interests in economy and efficiency are served when a successor contractor to a federal service contract hires the predecessor contractor's employees.¹¹

⁴ Exec. Order No. 13272 § 1, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

⁵ *Id.* at § 3(c).

⁶ Exec. Order No. 13495, 74 *Fed. Reg.* 6103 (Feb. 4, 2009).

⁷ 75 *Fed. Reg.* at 13382.

⁸ Exec. Order No. 12933, 59 *Fed. Reg.* 53559 (Oct. 20, 1994).

⁹ Exec. Order No. 13204, 66 *Fed. Reg.* 11228 (Feb. 17, 2001).

¹⁰ 75 *Fed. Reg.* at 13384.

¹¹ *Id.* at 13382.

Advocacy Recommends that DOL Clarify Provisions of this Regulation

Advocacy is pleased that DOL completed an Initial Regulatory Flexibility Analysis (IRFA) for this regulation and has analyzed the potential economic impact that this rule may have on the small business community.¹² Advocacy acknowledges the importance of having a stable and qualified workforce in the delivery of services to the government, because it provides experienced and trained employees familiar with the Federal Government's personnel, facilities and requirements.

However, Advocacy has spoken to small business stakeholders that are concerned there may be problems with the implementation of this Executive Order that may add to the compliance costs and regulatory burdens for small contractors and small subcontractors. Advocacy recommends that DOL consider alternatives that provide flexibilities for small businesses and produce a Small Business Compliance Guide to clarify regulatory provisions identified in this comment letter.

A) Small Businesses Seek Clarification on Required Timelines

The Professional Services Council (PSC), a trade association representing over 300 member companies of all sizes that provide federal services, recommends that DOL further define the roles and requirements of the contracting officers, the predecessor contractors and the successor contractors under this new regulation.¹³ PSC is concerned that the deadlines outlined in the proposal may negatively impact a successor contractor's ability to perform a follow-on contract.

Under this rule, not less than 10 days before the completion of a contract, a predecessor contractor provides the contracting officer at an agency a list of names of the service employees working during the last month of the contract. The contracting officer then provides the list to the successor contractor.¹⁴ The successor contractor must complete its due diligence within the short time span of 10 days before the contract begins. The successor contractor must notify the predecessor contractor's employees of the job offer, determine whether the individuals are qualified for employment, and, in some cases, interview these candidates. Assuming that a successor contractor is able to give an offer to a predecessor contractor's employee the very day they receive the employee list, this rule requires that successor contractors must give this predecessor contractor's employee at least 10 days to accept this offer.¹⁵ In practice, this means that the successor contractor would not know the status of their workforce until the day its service contract begins. If any of the predecessor contractor's employees decline this offer, the successor contractor will not have enough time to find qualified employees before the start of the contract.

¹² *Id.* at 13396.

¹³ Advocacy meeting with Alan Chvotkin, Esq., Executive Vice President and Counsel, and Roger Jordan, Director of Federal Affairs, Professional Services Council (Apr. 14, 2010). It is Advocacy's understanding the PSC will reiterate this point in their own comment letter.

¹⁴ 75 *Fed. Reg.* at 13383.

¹⁵ *Id.*

Successor contractors may take several months to mobilize or “ramp up” after winning a contract bid in anticipation of the contract start date; this may include interviewing and training prospective employees. This is particularly true of contractors that need employees with specialized skills or training. For example, TechAmerica, a trade association that represents 1,500 technology companies of all sizes, is concerned that members that perform work under the SCA may not be able to evaluate whether a predecessor contractor’s employees have the necessary specialized technical skills within 10 days before the contract starts.¹⁶ Advocacy also spoke to a small janitorial services contractor that stated that many of their SCA employees also require extra training. The winning bidder generally does not have information about the predecessor contractor’s employees, so they must be prepared with their own workforce to begin services on the first day of the contract.

TechAmerica recommends that the successor contractor receive a list of employees from the predecessor contractor before the mobilization period, which can be several months; this list should disclose how many of the employees the predecessor contractor will retain, and how many employees will be displaced. This is important because successor contractors will be able to anticipate how many extra workers they may have to interview and train for the contract, and will avoid wasting resources.

Small business representatives for janitorial and technology services were also concerned with the regulatory provision that states that the obligation to hire a predecessor contractor’s workforce ends 90 days after the contract start date, because this would add to the regulatory burden of tracking the predecessor contractor’s employees.¹⁷ These entities recommended that DOL consider removing this provision from the requirements of the rule, because this provision was not specifically required by the Executive Order.

B) Small Businesses Request Information on Poor Performing Employees

Stan Soloway, President and CEO of the PSC, commented that the proposed rule will “deny government contractors the right to select their own workforce, while still holding them accountable for performance.”¹⁸ Small business representatives are concerned that this proposal may bind a successor contractor to hire a poor performing workforce because they may not have enough information about the job performance of the predecessor contractor’s employees.

The proposed rule would require a company that wins a contract to hire the “qualified” employees of the predecessor contractor, but this regulation “presumes that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract.”¹⁹ A successor contractor does not have to hire an employee if the contractor reasonably believes that the employee failed to perform suitably on the job

¹⁶ Telephone interview with Trey Hodgkins, Vice President for National Security and Procurement Policy, TechAmerica, Arlington, VA (May 5, 2010).

¹⁷ 75 *Fed. Reg.* at 13390.

¹⁸ Stan Soloway, *Analysis: Hiring Rule Would Limit Contractors* (Apr. 26, 2010), Government Executive.com, available at: <http://www.govexec.com/dailyfed/0410/042610an1.htm>.

¹⁹ 75 *Fed. Reg.* at 13390.

based on past performance;²⁰ however this assumes that the successor contractor has access to this information.

According to an attorney that represents small businesses doing SCA work, many successor contractors do not receive the required seniority list of the predecessor contractor's employees before the start of the contract date, which hinders their ability to vet these employees. This seniority list only has the list of names and anniversary dates of these employees, and also does not have any information regarding an employee's performance under the contract. The proposed rule clarifies that this obligation of offering the right of first refusal exists even if the successor contractor was not provided this seniority list.²¹ Small contractors may incur compliance costs if they have to track down the predecessor contractor's employees and offer a first right of refusal without a seniority list. Advocacy recommends that DOL consider alternatives for small contractors that may minimize these costs. The attorney that represents small contractors also recommended that DOL enforce penalties written in this regulation for predecessor contractors that refuse to release this information,²² noting that similar penalties under the SCA for predecessor contractors withholding this information are rarely enforced.

PSC also stated that predecessor contractors often do not provide formal employee performance evaluations to successor contractors because of privacy reasons and liability concerns. A small contractor in the janitorial services field noted that a predecessor contractor that just lost a contract is unlikely to give proprietary information to its competitor. Additionally, it may be difficult to depend on the performance reviews of the predecessor contractor who may have lost a contract based on its ability to manage its personnel. This small business contractor stated that they may have to hire all the predecessor contractor's employees for liability reasons, because it may be difficult to prove or document poor employee performance under this regulation. DOL should address the successor contractor's information gap. PSC recommends that DOL provide safe-harbor language for predecessor contractors that provide employee performance information.

A representative from TechAmerica was also concerned that the predecessor contractor has an incentive to keep all of the best employees for other jobs and take them out of the contract 30 days before the contract ends.²³ The predecessor contractor may leave the successor contractor (and competitor) with a pool of poor performing employees to inherit. Small business representatives seek clarification on whether successor contractors can vet a predecessor contractor's employee (perform an interview, drug tests, security tests, etc.), and whether a successor contractor can fire a predecessor contractor's employee if they show poor performance.

²⁰ *Id.*

²¹ *Id.* at 13388.

²² *Id.* at 13392. "Proposed section 9.24(c)(2) provides for the suspension of payment of funds if the Contracting Officer or the Secretary finds that the predecessor contractor has failed to provide the required list of employees working under the contract as required by section 9.12(e)."

²³ See footnote 16.

Additionally, if a predecessor contractor provides a successor contractor with a scaled-down list of employees 30 days before the contract ends, this does not give a successor contractor an accurate estimation of the numbers of workers required to perform this job at peak work capacity. TechAmerica recommends that DOL obtain the predecessor contractor's seniority employee list during the time of the solicitation of the contract to capture the peak work capacity, and provide this information before a winning bidder's mobilization period.

Small Business Compliance Guides

Advocacy notes that small businesses seek clarification regarding the impact of this regulation with regard to current federal and state requirements. How will this rule work with federal contractors' requirements under DHS' Employment Eligibility Verification requirements? How does a state's employment-at-will status affect successor contractors? Will the extra compliance costs of this regulation create a barrier to the entry of new small service contractors?

Small business representatives also seek clarification on how this regulation may impact non-unionized successor contractors. Will a successor contractor who takes the predecessor contractor's employees be deemed a successor to the prior contractor's collective bargaining agreement under the National Labor Relations Act? Will a non-unionized successor contract have to become a union-shop if they inherit the predecessor contractor's employees? In light of these two questions, DOL should disclose in the contract bidding material whether or not a predecessor contractor has a collective bargaining agreement and whether it is a union shop.

Advocacy is willing to assist DOL in preparing the Small Business Compliance Guides that are required to accompany a final rule. SBREFA requires DOL to prepare one or more compliance guides to assist small entities in complying with this rule,²⁴ and to set up a response system to answer inquiries from small entities about the rule.²⁵ Advocacy recommends that DOL address the concerns listed in this comment letter and other issues raised by small businesses in the comment period.

Conclusion

Small businesses would agree that it is in their best interest to retain as many qualified workers as possible from a predecessor contractor, because it creates workforce continuity and efficiency. However, small business representatives that are concerned that the DOL's regulations implementing Executive Order 13495 may negatively impact a successor contractor's performance under the contract, because the regulation creates unrealistic timelines and a lack of information regarding the potential workforce.

²⁴ *SBREFA* at § 212.

²⁵ *Id.*

Advocacy recommends that DOL consider alternatives that provide flexibilities for small businesses and produce a Small Business Compliance Guide to clarify regulatory provisions identified in this comment letter. Please contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or would like additional information.

Sincerely,

/s/

Susan M. Walthall
Acting Chief Counsel for Advocacy

/s/

Janis C. Reyes
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget