



Proposed Rule Could Dictate Service Contractor Hires

Insights

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Under regulations proposed by the Federal Acquisition Regulatory Council ("FARC"), a federal contractor taking on a new service contract would be required to offer jobs to the qualified employees of its predecessor in that work. The proposal would implement Executive Order 13495 on "Nondisplacement of Qualified Workers Under Service Contracts". This Executive Order mandates that, when a service contract expires and a follow-on contract is awarded for the same or similar services at the same location, *the newly-awarded contract must include a clause obligating the contractor to make these job offers to the predecessor's workers.*

The proposed regulations largely adopt the approaches taken by a provisional rule the U.S. Labor Department issued in August 2011 (which was not to take effect until FARC issues its final rule). Comments on, recommendations for changes in, or objections to the FARC proposals are due by **July 2, 2012**.

What is a Service Contract?

The affected service contracts would be those covered by the McNamara O'Hara Service Contract Act ("SCA"). The SCA typically covers those contracts entered into by federal agencies that have as their principal purpose the furnishing of services in the United States through "service employees". The SCA requires contractors and subcontractors performing services under prime contracts in excess of \$2,500 to pay service employees in various classes not less than the wage rates and fringe benefits found to be prevailing in the locality, or the rates and fringe benefits (including prospective increases) contained in a predecessor contractor's collective bargaining agreement.

What Offers Would Be Required?

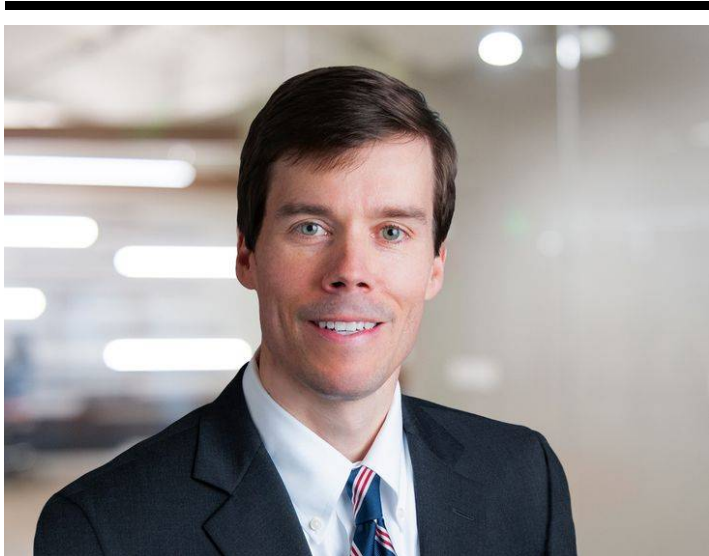
The predecessor contractor would have to provide a certified list of all service employees working under the expiring contract no later than 30 days before performance of that contract is scheduled to be completed. If the predecessor's workers are qualified for contract positions, they would be entitled to a "right of first refusal" as to those positions. The incoming contractor would have to offer employment to the qualified workers and would have to tell them how long they have to accept the offers (a period which could not be less than 10 days). The Labor Department would be empowered to remedy violations by, among other things, requiring that employment offers be made and ordering payments for lost wages and other monetary relief.

What Would Some Practical Effects Be?

One result of the proposed rule could be that the incoming contractor's workforce might abruptly incorporate a significant number of individuals with whom the employer is not familiar. It could also impede the incoming contractor's normal screening, hiring, and on-boarding processes where those individuals are concerned.

Another practical result could be that incoming contractors might inherit any pre-existing collective-bargaining obligations or union contracts. Under the National Labor Relations Act, once a union becomes the collective-bargaining representative of a group of employees, the union generally continues to hold this status as to a successor employer if that employer (1) hires a majority of the predecessor's workforce, and (2) performs the same or similar work. The proposed rule creates a real potential that an incoming service contractor will be deemed to be a successor under the NLRA.

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