PSC PROFESSIONAL SERVICES COUNCIL
The Voice of the Government Services Industry

July 2, 2012

BY ELECTRONIC SUBMISSION

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Hada Flowers
1275 First Street NE
7th Floor
Washington, DC 20417

Re: FAR Case 2011-028, the Notice of Proposed Rulemaking for Nondisplacement of Qualified Workers Under Service Contracts, 77 Fed. Reg. 26232 (May 3, 2012)

Dear Ms. Flowers:

On behalf of the Professional Services Council ("PSC"), I am pleased to submit the following comments on FAR Case 2011-028, the notice of proposed rulemaking from the Department of Defense, General Services Administration, and National Aeronautics and Space Administration regarding amendments to the Federal Acquisition Regulation ("FAR") concerning the Nondisplacement of Qualified Workers Under Service Contracts (77 Fed. Reg. 26232 (May 3, 2012) (the "proposed rule").

Founded 40 years ago, PSC is the voice of the government professional and technical services industry. PSC's more than 350 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

PSC has a unique and important perspective regarding the obligations imposed by the proposed rule and the manner in which it will be applied to services contractors. To start, PSC's membership includes the professional services contractors who will be subject to the proposed rule and whose voluntary practices have led, in part, to the proposed rule. Further, PSC has developed this perspective through our members' extensive first-hand experience of offering a right of first refusal to predecessor employees, when appropriate, on a voluntary basis. This proposed rule and the Department of Labor's ("DoL") final rule, published on August 29, 2011, *see* 76 Fed. Reg. 53720, and planned for promulgation at 29 CFR Part 9, are based on the same Executive Order 13495, which was issued in January 2009. *See* 74 Fed. Reg. 6103 (Feb. 4, 2009).

While it is certainly true that many successor contractors already voluntarily hire many of their predecessors' employees to promote certain efficiencies, these efficiencies will be greatly reduced by inflexibly mandating—under threat of penalties imposed by DoL—that nearly all successors must offer jobs to nearly all of their predecessor's employees regardless of skill, qualifications, and job

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performance. Successor contractors already exercise business judgment as to when efficiencies will result from offering jobs to their predecessors' employees—and exercise this judgment without the need for taxpayer dollars to be spent investigating and issuing rulings about who should have offered jobs to whom. Simply put, the proposed rule's attempt to mandate how contractors staff projects during turbulent economic times is unnecessary and counterproductive.

But perhaps more important than whether efficiencies will ever be achieved through this mandatory program are the significant challenges contractors will face when attempting to simultaneously comply with the proposed rule and DoL's rule. PSC and our members are concerned that the two rules' nondisplacement requirements do not overlap entirely. Specifically, DoL's rule imposes numerous requirements not found in the proposed rule. This lack of overlap should be expressly maintained in some provisions and eliminated in others, but in any event the proposed rule should explicitly state where DoL's rules are—and are not—being incorporated. For that reason, it is imperative that the proposed rule be modified to address the following concerns.

I. The proposed rule should expressly state that the FAR Council did not intend to incorporate many provisions in DoL's rule.

While the proposed rule's provisions noticeably differ from those in DoL's rule, the proposed rule fails to explain how the two rules should be read together to impose obligations on service contractors, in particular the extent to which contractors on FAR-covered contracts are subject to the requirements in DoL's rule where the proposed rule includes no corresponding requirement. The proposed rule, despite differing from DoL's rule in numerous ways, fails to provide clear guidance as to the extent to which both sets of rules may be applicable and how contractors can simultaneously comply with both sets of rules in situations where both do apply.[1]

Whether the proposed rule includes or does not include requirements from DoL's rule is expressed in three ways, the last of which PSC believes will lead to the greatest compliance challenges for our members:

- The proposed rule repeats a requirement, and in some instances the exact language, from a provision in DoL's rule. *E.g.*, § 22.1203-2 (repeating several exemptions from § 9.4 of DoL's rule).

- The proposed rule cross-references a requirement (or responsibility) in DoL's rule. *E.g.*, § 22.1206 (referring to DoL's responsibilities for investigating and adjudicating potential violations).

- The proposed rule neither repeats nor cross-references a particular requirement from DoL's rule but does not expressly reject the DoL requirement.

[1] The proposed rule provision that comes closest to providing such a direction is in the contract clause, 52.222-XX(b)(3), which requires contractors to generally satisfy all other applicable laws and regulations—including "29 CFR part 9," which will encompass but by no means be entirely composed of DoL's nondisplacement rule. This is an inadequate direction because it does not explain when and how DoL's rule may apply to contractors subject to the proposed rule's requirements.

For each provision in DoL's rule that is neither repeated nor cross-referenced, the proposed rule should expressly state that the proposed rule does not incorporate the relevant provision in DoL's rule so that contractors have clear guidance on their obligations under both rules. The proposed rule should be revised not only because doing so significantly reduces compliance challenges but also because not incorporating many provisions from DoL's rule will make the proposed rule less burdensome to comply with. To illustrate the point, below are two examples of the numerous provisions in the proposed rule that should expressly depart from, and do improve upon, corresponding provisions in DoL's rule.

Example 1: As written, both the proposed rule and DoL's rule are clear that successors need not offer employment to a predecessors' workers once the successor has filled all positions for which the relevant workers are qualified (as defined by the rules). *See* Proposed Rule § 52.222-XX(a); DoL's rule at § 9.12(d). Unlike § 9.12(d) of DoL's rule, however, the proposed rule does not require successors to offer employment to any remaining qualified predecessor employees should any job openings occur within 90 days of commencing performance.

Not imposing this requirement is prudent. Limiting, or eliminating, successors' obligation to offer employment to predecessors' workers after commencing performance minimizes the burden inherent in locating additional predecessor employees on short notice, determining if they remain at risk of losing employment because of the contract transition, determining if their skills match the new opening on the successor contract, and waiting 10 days for a response to an employment offer. Efficient operations after contract performance has commenced will be better provided to the government by allowing successors to assign or hire the best available service employees regardless of affiliation with the predecessor contractor.[2]

Example 2: The proposed rule does not restrict successors' reliance on generally applicable screening processes and does not incorporate § 9.4(b)(1) of DoL's rule, under which successor contractors may "utilize employment screening processes (*i.e.*, drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms) ***only*** when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive Order," (emphasis added). No other provision in the proposed rule bars reliance on generally applicable screening processes.

Employers should be permitted to rely on the same generally applicable employment-screening processes that they use for all other prospective employees, regardless of whether such screening processes are called for by a contracting agency. Contractors employ these processes because, in their seasoned judgment, their long-term performance for the government is more efficient when these screening processes are used to identify employees likely to provide substandard services or to disrupt the workplace. At a minimum, successors should be allowed to use screening processes unrelated to employees' education levels or job history, such as drug tests and background checks because those processes are most closely related to the potential for disruption in performance.

[2] At a minimum, any continuing obligation to offer new job openings should terminate within 90 days of a successor's commencing performance to ensure consistency with DoL's rule.

Recommendation: The proposed rule should make these and other departures from DoL's rule expressly.[3] Doing so will eliminate any ambiguities over a contractor's obligations under the proposed rule and DoL's rule and will confirm the improvements the proposed rule makes over DoL's rule.

II. The proposed rule should require successors to offer employment only to employees who have provided services under the predecessor contract for at least six months.

The proposed rule requires successors to offer jobs "to those employees (other than managerial and supervisory employees) that are employed under the predecessor contract . . . whose employment will be terminated as a result of the award of the successor contract." (Proposed Rule § 22.1202(a); *accord* Proposed Rule § 52.222-XX(a).)[4] This broad requirement makes virtually all of a predecessor's employees "qualified" for required job offers, regardless of how long such employees have served in their positions for the predecessor.

The proposed rule will not meet its stated efficiency objective when successors must offer employment to individuals added to a predecessor's contract mere days or weeks before performance ends on the predecessor's contract. Successor contractors should certainly have wider discretion in hiring—or not hiring—these employees who lack sufficient experience to make the transition to the successor more efficient and the imposition of the proposed rule's significant administrative burdens worthwhile.

Recommendation: The proposed rule should require offering employment only to workers who began performing the predecessor's contract at least six months before the predecessor's performance terminates. Without requiring this minimal experience on the predecessor contract, departments and agencies will not enjoy "reduce[d] disruption to the delivery of services" or a "trained workforce that is familiar with the federal government's personnel, facilities, and requirements," 76 Fed. Reg. at 53720 (DoL's rule).

DoL, in commenting on its final rule, shortsightedly found a month to be sufficient time to build experience:

> The Department also notes that where the predecessor contractor retains some, but not all, of the workforce employed on the contract during the last month of the contract, those remaining employees will likely have more experience with the contract and contracting agency than new hires recruited by the successor contractor for the purpose of filling the contract requirements. (76 Fed. Reg. at 53739)

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[3] If the FAR Council's intent is actually to incorporate DoL's rule whole-cloth, it should be done expressly, as has been done in the following examples of other DoL regulations incorporated into the FAR: FAR 52.222-10, expressly incorporating "the requirements of 29 CFR Part 3," the regulations relating to the Copeland (Anti-Kickback) Act; FAR 52.222-13, expressly incorporating "[a]ll rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5"; and FAR 52.222-41, subjecting contracts to listed provisions and "all other applicable provisions" of the Service Contract Act of 1965 and DoL's related regulations. No such similar language is found in this proposed rule.

[4] The proposed rule requires predecessors to provide, at least 30 days before performance ends, a list of employees performing the predecessor's contract. *See* proposed FAR rule 22.1204(a); accord proposed FAR rule 52.222-XX(c)(1). The proposed rule does not require offering employment just to individuals performing the predecessor contract at that time.

That statement is correct in the point it makes—that predecessor employees with a month's experience on a contract will have more experience than successor employees new to the contract. But DoL's explanation ignores the more fundamental and real-life concerns. Does a month's experience translate into measurable efficiencies during the transition? Does a month's experience merit forcing a successor to hire a predecessor employee without any real screening processes? Do any efficiencies gained from mandating hiring of employees with a month's experience outweigh the costs of investigating and adjudicating alleged violations of the proposed rule? Can a successor evaluate a predecessor employee's suitability after a month's performance? PSC's members—who will be both predecessors and successors under this rule—do not believe so. If any efficiencies can conceivably justify the proposed rule, they will come only from hiring employees with much more experience than a month on the predecessor contract.

Six months is a much more reasonable minimum given these concerns. The time period allows employees to develop significant, lasting experience on the predecessor contract. The time period is also long enough to allow the successor to determine which predecessor employees are subpar performers and therefore need not (and should not) be offered employment. This time period is also long enough to discourage last-minute shifting of unwanted predecessor employees onto the predecessor contract so that the successor will be required to offer jobs to those employees.

III. Appropriate limits should be placed on the bases for suspension or debarment.

Under § 22.1206(d) of the proposed rule, the secretary of Labor may "suspend or debar a contractor or subcontractor" for failing to comply with the nondisplacement requirements of the proposed rule. The rule does not limit when the secretary may exercise this power. We recognize that the secretary of Labor has independent authority to take suspension and debarment action based on labor law violations. However, as stated in the FAR, suspension and debarment are remedies made available to protect the government's interests by ensuring that contractors are presently responsible. These remedies are not intended to be available for punishing every failure to comply with laws, regulations, and contract provisions. As written, § 22.1206(d) does not make that critical distinction.

Recommendation: The proposed rule should provide for suspension or debarment only when such remedies are necessary to protect the government's interests. For consistency, the FAR rule should incorporate the limits in DoL's rule, which in § 9.24(d) permits suspension and debarment when "a contractor has failed to comply with any order of the secretary, or has committed willful or aggravated violations" of the nondisplacement rules.[5] These limits will ensure that the government's interests in contracting with responsible companies are protected, while ensuring that these severe remedies are employed consistently with the standards for suspension and debarment set forth in FAR Subpart 9.4.

IV. Department and agency heads should have the flexibility to waive the proposed rule in part.

The proposed rule's waiver provision, § 22.1203-3, permits waiver of the nondisplacement rule but does not permit waiving only individual provisions of these requirements. Without the option to

[5] Under § 9.24(a) of DoL's rule, the secretary of Labor has authority to issue orders remedying contractor's non-compliance with nondisplacement rules. Examples given of appropriate orders include orders to hire employees who were not offered employment and orders to pay back wages to them.

waive only some provisions, department and agency heads will have the choice of waiving the rule in its entirety or not waiving it at all—neither of which, in the judgment of the departments and agencies most familiar with particular contracts and classes of contracts, optimizes efficient transitions between contractors in certain scenarios.

Recommendation: Department and agency heads[6] should be permitted to waive the entire nondisplacement obligation or one or more individual provisions of the obligation, which they are permitted to do under § 9.4(d)(1) of DoL's rule. By doing so, the proposed rule affords flexibility to agencies to determine how best to efficiently transition services under particular contracts and classes of contracts.[7]

V. The proposed rule should expressly state how successors can satisfy their obligations under the rule and also their obligations under other rules, such as the HUBZone program.

The proposed rule lacks guidance on how to satisfy any rule in tandem with the nondisplacement requirements. In § 22.102(b), the rule states that nothing in the proposed rule "shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law," with examples of other executive orders and laws then given. Next, § 22.102(b) states, "those laws and Executive Orders must be satisfied in tandem with, and if necessary prior to, the requirements of Executive Order 13495 and this subpart."

DoL offered a model that should be incorporated into the proposed rule's text. In the comments accompanying its final nondisplacement rule, DoL offered a hypothetical situation in which a HUBZone contractor could satisfy its obligations under both the HUBZone and nondisplacement rules: hire all predecessor employees who are HUBZone residents, then hire enough HUBZone residents from other sources until the HUBZone threshold is met, then return to hiring the predecessor's non-HUBZone-residing employees. *See* 76 Fed. Reg. at 53273. Yet this guidance is found nowhere in DoL's rule, in part, we believe, because it is inconsistent with the mandate of the DoL rule to give the right of first refusal to <u>all</u> predecessor contract employees who are qualified. Instead, DoL's rule provides the same general admonition as the proposed rule: comply with nondisplacement requirements alongside other statutes and regulations.

Recommendation: The proposed rule would benefit from incorporating express guidance on complying with nondisplacement obligations alongside at least some potentially conflicting executive orders, statutes, and regulations. For example, the HUBZone guidance provided in DoL's comments should be incorporated (once edited as needed) into the proposed rule.

VI. The proposed rule's notification requirements are reasonable and far less burdensome to satisfy than are those in DoL's rule.

Under both the proposed rule and DoL's rule, an agency's waiver of the nondisplacement requirements are rendered inoperative if certain notice requirements are not met. But the two rules require different forms of notice. The proposed rule, § 22.1203-3(b)(1)-(2), requires the contracting

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[6] Department and agency heads should be permitted to delegate this and all other waiver authority. *See infra* § IX.

[7] Such partial waivers would not contravene E.O. 13495, which does not address waivers in its text.

officer "to direct the [incumbent] contractor to notify incumbent representatives and their collective bargaining representatives" as specified by the rule. In contrast, DoL's rule, §§ 9.4(d)(2)-(3), requires the contracting officer to "ensure that the [incumbent] contractor notifies" incumbent workers and their representatives. Thus, under the proposed rule, the contracting officer is not required, as under DoL's rule, to meet the vague standard of *ensuring* a contractor provides notice. Further, the FAR rule offers a bright-line test for compliance (*i.e.*, did the contracting officer provide direction?) rather than the fact-intensive inquiry required by DoL's rule (*i.e.*, did the contracting officer "ensure" compliance?).

Recommendation: The proposed rule should be maintained as written because it imposes a more reasonable burden, requiring the contracting officer only to provide direction and the written justification for the waiver.[8]

VII. In assessing a predecessor contractor's performance, a contracting officer should be able to consider whether the predecessor delivered its certified employee list at least 30 days before completing performance.

The proposed rule provides little motivation for predecessors to timely provide the certified list of their employees, which is due 30 days before contract end. *See* Proposed Rule § 22.1204(a). For non-compliant contractors, the FAR rule threatens as penalty the withholding of the last month's contract payment, a small share of the overall payments a contractor will have received.

Recommendation: To ensure predecessors timely comply with their 30-day obligation, potential sanctions must be strengthened. One possibility is allowing the contracting officer to consider non-compliance when reviewing the predecessor's performance. For example, knowing that a late-provided employee list might lead to negative reviews in the Federal Awardee Performance and Integrity Information System (FAPIIS) or Contractor Performance Assessment Reporting System (CPARS) might motivate some contractors to deliver the list on time when they otherwise would not. A subsection expressly permitting this consideration in performance reviews should accordingly be added to § 22.1206 of the proposed rule.

VIII. The predecessor and successor contractors should be required to provide the certified 30-day list to their respective employees (and those employees' representatives).

In §§ 52.222-XX(c)(2) and -XX(d)(2), the proposed rule states that the predecessor's certified list of employees "shall be provided on request to employees or their representatives." This use of the passive voice leaves unclear who employees and their representatives are authorized to ask for the list and who accordingly must provide the list when asked.

Recommendation: To increase the clarity of obligations, the clauses should be revised to direct predecessor employees (and their representatives) to request the list from the predecessor contractor and for successor employees (and representatives) to request the list from the successor contractor—the most efficient manner by which to distribute the list to interested employees and their representatives.

[8] E.O. 13495, again, does not address waivers in its text.

IX. In keeping with FAR practice, contracting agency heads should be permitted to delegate waiver decision-making to the same extent they delegate other decisions.

The FAR Council requested comments on whether to permit agency heads to delegate their waiver authority. Accordingly, the FAR Council noted: "By longstanding FAR convention, agencies would be able to delegate this authority pursuant to FAR 1.108(b). DoD, GSA, and NASA are evaluating the need for potential restrictions on the level to which the authority may be delegated." 77 Fed. Reg. 26234.

Recommendation: This waiver authority should be delegated to the contracting officer for individual solicitations, contracts, orders, or other procurements. Under FAR 1.108(b) and 1.102-4(b), except where otherwise stated, decision-making is delegated "to the lowest level within" the Federal Acquisition System. Here, decision-making should be delegated to the contracting officer, who is in the best position to evaluate the specific efficiency benefits, if any, from maintaining a particular predecessor's workforce as well as the other permissible factors that may be considered when deciding whether to waive the nondisplacement requirements in the proposed rule. If such delegation is not explicitly provided for, the contracting officer's findings will need to rise through several layers of bureaucracy so that the agency head can grant approval; this will not increase the efficiency of contracting.

X. Contracts existing when the proposed rule goes into effect should not be modified to incorporate nondisplacement requirements.

The FAR Council requested comments on the best way to smooth the transition when the proposed rule goes into effect—namely by ensuring contractors holding existing contracts are obligated to comply with predecessors' obligations under this rule. The FAR Council noted: "The FAR Council is considering possible steps that might be taken, as agencies transition to the new clause, to reduce instances where service employees of the predecessor and successor contractors do not receive notice of their rights and successors receive lists less than 30 days before the end of the contract." (77 Fed. Reg. 26234) One option proposed by the FAR Council is to encourage bilateral modifications of the predecessor contracts to insert the nondisplacement rule into these existing contracts.

Recommendation: The proposed rule imposes such significant changes in business practices for both predecessor and successor contractors that the proposed rule should be applied only to *new* contracts that are first solicited after the effective date of the proposed rule and DoL's rule, which will both go into effect on the same date. Although bilateral modifications are a tool that contracting officers may employ to modify contracts, use of them is not appropriate in this instance for at least two reasons. First, the proposed rule does not provide for agencies' waiving nondisplacement requirements for *existing* contracts.[9] Second, when the proposed rule goes into effect at an unknown future time, contractors will have been bidding on and staffing contracts without being subject to the nondisplacement requirements and they should not be required to prepare for the imposition of the requirements in the middle of contract performance at some unknown future date. Instead, agencies and contractors should bear the proposed rule's burdens only when all parties can account for those

[9] Under the proposed rule, waivers must be finalized before a solicitation is issued.

burdens—which can occur only if the proposed rule applies to solicitations first issued after the rule goes into effect.

XI. Conclusion

PSC has submitted these comments to assist the FAR Council in affording contractors the best opportunity to effectively and efficiently comply with the proposed rule and, to the extent necessary, DoL's rule. PSC and its members expect the burden and compliance costs associated with this proposed rule to outweigh any potential efficiencies, and that this one-size-fits-all mandate on all contracts will eliminate the flexibility contractors need to make real-time business decisions on how best to provide services to the government. PSC has nevertheless focused its comments on the proposed rule to address some of the unnecessary burdens imposed by the proposed rule, and reduce some of the confusion that will undoubtedly arise when attempting to simultaneously comply with the proposed rule and DoL's rule. PSC believes that the proposed rule, as modified by these comments, will do so.

Thank you for your attention to these comments. If you have any questions or need any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin, Esq.
Executive Vice President and Counsel