Contractor Resource: Non-Displacement of Qualified Workers Under Service Contracts

Companies that provide services to the Federal Government may find a new clause in solicitations and contracts issued after January 17, 2013: Federal Acquisition Regulation (FAR) clause 52.222-17, “Nondisplacement of Qualified Workers (JAN 2013) (E.O.13495).”

Intention: At its core, the clause seeks to protect incumbent workers performing the same or similar work at the same location by requiring prime contractors and their subcontractors’ to offer qualified, incumbent service employees a right of first refusal to employment on follow-on services contracts.  

Impact: All contractors should begin checking services solicitations for FAR 52.222-17 effective immediately, because the presence of the clause may impact a contractor’s staffing approach, at a minimum. The clause materially alters the transition requirements associated with covered contracts, creating new obligations for outgoing and incoming contractors.

Resource: The attached contractor process flowcharts summarize the obligations. To request a laminated legal-size copy of the flowcharts for office use, please send an email to either Craig Holman or Steffen Jacobsen.

Risks: The clause also creates enforcement rights for the contracting agency, the Department of Labor (DOL), and the protected employees. Incumbent employees who believe they were not offered jobs, but should have been according to the requirements of the new clause, may file a complaint with the DOL’s Wage and Hour Division within 120 days of the start of performance under the successor contract.

Successor contractors that fail to comply with these requirements risk the government withholding payments in the amount of the wages lost by incumbent employees that were not provided bona fide, express offers of employment on the successor contract. In addition, the DOL may suspend or debar any contractor that fails to comply.

1 Prime contractors must flow-down the terms of FAR 52.222-17 in all subcontracts over the simplified acquisition threshold for the performance of services.
2 The procurement agency’s senior procurement executive may waive (in writing and prior to the contract solicitation date) the application of the clause if it would impair the agency’s ability to procure services on an economical and efficient basis.
Incumbent contractors are also at risk, because contracting officers may suspend contract payments until the incumbent contractor provides a certified list of employees to the contracting officer in accordance with the clause. Additionally, contracting officers may document a contractor’s failure to comply with the requirements of the clause in the contractor’s past performance evaluation.

If you have any questions about the new FAR clause 52.222-17, or its application or implications discussed, please contact your Arnold & Porter attorney or any of the following attorneys:

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Nondispacement of Qualified Workers: Obligations Under FAR 52.222-17

Successor Contractor Checklist

Start Here

Does the Solicitation contain FAR 52.222-17?

Yes

No*  

Request removal of FAR 52.222-17 from the Solicitation as N/A.

Does the Solicitation anticipate a:  

- contract or subcontract  
- over $150,000  
- for services  
- performed in the United States (see definition at FAR 22.1201)  
- where there exists an incumbent contractor/subcontractor providing the same or similar services in the same location

Yes to All

No to Any

Does the Solicitation involve contracts/subcontracts for:  

- construction, alteration, and/or repair (including painting and decorating) of buildings or public works*  
- manufacturing (i.e., is covered by the Walsh-Healey Act)*  
- transporting freight or personnel where published tariff rates are in effect*  
- furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934*  
- public utility services (including electric light and power, water, steam, and gas)*  
- maintenance and repair of certain automated data processing, scientific, medical, and office and business equipment*  
- direct services to a Federal agency by an individual or individuals*  
- the operation of postal contract stations*  
- services awarded under certain disabled preference programs, such as the Javits-Wagner-O'Day Act (i.e., AbilityOne contracts), the Randolph- Sheppard Act, and contracts with sheltered workshops employing the "severely handicapped" as described in 40 U.S.C. 593.  
- * Describes contracts that are exempt from the Service Contract Act. See FAR 22.1003-3.

Were any predecessor/incumbent employees:

- tired to work on both federal and non-federal contracts as part of a single job  
- "executive" employees (i.e., primarily had management duties, including the authority to direct the work of at least two other employees and to hire and fire employees (or at least influence the hiring and firing of other employees))  
- "administrative" employees (i.e., performed office or non-manual work directly related to the management or business operations of the contractor or its customers, and exercised discretion and judgment with respect to "matters of significance")  
- "professional" employees (i.e., either (1) had knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course study; or (2) performed work that required invention, imagination, originality, or talent in a recognized field or artistic or creative endeavor)  
- Information technology employees, regardless of training or education  
- not performing suitably on the incumbent contract (such a determination must be supported by written credible information from a "knowledgeable source;" general poor performance by the incumbent contractor may not be attributed to a particular employee without specific, written evidence related to that employee)

For Employees in Any of These Categories

No obligations to predecessor/incumbent employees.

For All Other Service Employees

Maintain records pertaining to these requirements for a period of three years from the date the records were created.

For Employees in Any of These Categories

After 90 Days

For other vacancies that open during the first 90 days of contract performance, offer the right of first refusal to incumbent employees.

For all vacancies, extend a good-faith offer with a bona-fide, express right of first refusal to incumbent employees who would be terminated as a result of the award of the successor contract.

When extending offers:

1. Offer positions orally (with detailed contemporaneous records) or in writing.
2. Offer positions that are either the same or similar or different from the positions the incumbent employees previously held under the predecessor contract, so long as the employees are qualified for the positions.
3. Offer either the same or similar or different terms and conditions (including wages and benefits) that the incumbent employees received under the predecessor contract, so long as terms and conditions are not altered to encourage incumbent employees to refuse the offer (i.e., not "bona fide").
4. Give the incumbent employees a deadline by which to accept the offer, which must be at least 10 days from the offer date.
5. Make reasonable efforts to extend the offer in a language understood by the incumbent employees.

Are screening processes, including drug tests, background checks, and security background checks:

- required by the contracting agency?  
- incorporated into the prime contract?  
- consistent with Executive Order 13495?

Screening incumbent employees is prohibited.

Screen incumbent employees accordingly.

* If the Solicitation does not include FAR 52.222-17, but satisfies the elements for applicability of the clause (and does not meet one of the exceptions), then it is possible that an interested party could argue for incorporation of the clause as a matter of law under the Christian Doctrine.

This flowchart generally summarizes the law and does not constitute legal advice.
Nondisplacement of Qualified Workers: Obligations Under FAR 52.222-17

Incumbent Contractor Checklist

Do you have a: □ contract or subcontract over $150,000 □ service performed in the United States (see definition at FAR 22.1201)

If not, you are not subject to FAR 52.222-17.

Does the contract/subcontract involve:
□ construction, alteration, and/or repair (including painting and decorating) of buildings or public works*
□ manufacturing (i.e., is covered by the Walsh-Healey Act)*
□ transporting freight or personnel where published tariff rates are in effect*
□ furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934*
□ public utility services (including electric light and power, water, steam, and gas)*
□ maintenance and repair of certain automated data processing, scientific, medical, and office and business equipment*
□ direct services to a Federal agency by an individual or individuals*
□ the operation of postal contract stations*
□ services awarded under certain disabled preference programs, such as the Javits-Wagner-O’Day Act (i.e., AbilityOne contracts), the Randolph-Sheppard Act, and activities with sheltered workshops employing the “severely handicapped” as described in 40 U.S.C. 503.
*Describes contracts that are exempt from the Service Contract Act. See FAR 22.1003-3.

Expect the contracting officer to seek a bilateral modification adding the requirements of FAR 52.222-17 to the contract.

Was the contract awarded after January 18, 2013?

If no, then no obligations under FAR 52.222-17.

If yes, then:

Does the contract contain FAR 52.222-17?

If no, then no obligations under FAR 52.222-17.

If yes, then:

At least 30 days before contract completion, provide to the contracting officer a certified list identifying all service employees then working under the contract and any subcontracts. For each name, include the service employee’s anniversary date for employment under the current contract or subcontract and any predecessor contracts or subcontracts.

At least 10 days before contract completion, if there have been any changes in service employees working under the contract, provide to the contracting officer an updated certified list of the names of all service employees, and their anniversary dates, hired within the last month of contract performance.

Provide written notice to all service employees of their possible right to an offer of employment with the successor contractor. Provide the notice in English and any other language(s) in which a significant portion of service employees are more familiar.

Post the notice in a conspicuous place at the worksite.

OR

Deliver the notice to each service employee individually (if delivery is made by email, keep delivery receipts of all emails).

Maintain records pertaining to these requirements for a period of three years from the date the records were created.

1 If your contract includes FAR 52.222-17, but should not, you should request either removal or concurrence that you have no obligation under the clause.

2 If the contract does not include FAR 52.222-17, but satisfies the elements for applicability of the clause (and does not meet one of the exceptions), then it is possible that an interested party could argue for incorporation of the clause as a matter of law under the Christian Doctrine.

This flowchart generally summarizes the law and does not constitute legal advice.

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