



VIA ELECTRONIC SUBMISSION

August 15, 2022

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave, NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking on Nondisplacement of Qualified Workers Under Service Contracts; RIN 1235-AA42

Dear Ms. DeBisschop:

Associated Builders and Contractors submits the following comments to the Department of Labor's Wage and Hour Division, in response to the above-referenced notice of proposed rulemaking published in the Federal Register on July 15, 2022, at 87 Fed. Reg. 42552.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for private and government customers. Moreover, the vast majority of ABC's contractor members are classified as small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)¹ and industry workforce employment (more than 82% of the construction

¹ U.S. Census Bureau 2019 County Business Patterns:
<https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

industry is employed by small businesses).² In fact, construction companies that employ fewer than 100 construction professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.³

In addition to small businesses that build private and public works projects, ABC's membership includes large member companies that contract directly with federal, state and local governments to successfully build projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals.⁴

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Background

On Nov. 18, 2021, President Biden issued Executive Order 14055, Nondisplacement of Qualified Workers Under Service Contracts, which states that "when a service contract expires and a follow-on contract is awarded for the same or similar services, the Federal Government's procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor's employees, thus avoiding displacement of these employees."⁵

The EO requires that federal agencies include a clause about nondisplacement of workers in solicitations and contracts for projects covered by the McNamara-O'Hara Service Contract Act of 1965. The required clause states that successor contractors and subcontractors who win a bid for covered work must offer qualified employees

² 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Pg. 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

³ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, Available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁴ For example, ABC members won 57% of the \$128.73 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2021. Source: USASpending.gov (accessed 2/22/22) cross-referenced with ABC membership as of 12/202.

⁵ 86 Fed. Reg. 66397.

employed under the predecessor contract a right of first refusal of employment under the successor contract.⁶

EO 14055 also revokes EO 13897, Improving Federal Contractor Operations, which was issued by President Trump and designed to ease the constraints on successor contractors to federal service contracts.⁷

Prior to EO 13897, President Obama issued EO 13495, Nondisplacement of Qualified Workers Under Service Contracts.⁸ In 2010, the Obama-era Department of Labor issued a proposed rule⁹ to implement EO 13495. ABC submitted comments on the proposal and urged the agency to withdraw the rule in its entirety.¹⁰ In 2011, after engaging in notice-and-comment, the DOL issued a final rule¹¹ to implement EO 13495. In 2020, the final rule was rescinded by the Trump EO.

While the SCA does not cover contracts for construction, alteration and/or repair (including painting and decorating of public buildings or public works), some maintenance jobs and other post-construction responsibilities (including operating engineers) performed by ABC members are covered by the SCA.

ABC's Comments in Response to the DOL's Proposed Rule

The DOL is now issuing a NPRM to implement the requirements of EO 14055. Within the rule, the DOL discusses notable differences between the Biden and Obama-era EOs.¹²

Unfortunately, the new proposal fails to address any of the concerns that ABC expressed in its 2010 comment letter regarding the original Obama EO and proposed rule. In fact, some of the requirements proposed are even more burdensome than under EO 13495, and will have a substantial negative impact on our members that perform SCA work, particularly our small businesses members. According to the NPRM, the total number of potentially affected small firms ranges from 74,097 to 329,470.¹³

As with the Obama rule and EO, ABC has identified a number of concerns regarding EO 14055 and the new NPRM, which are detailed below, and we urge the DOL to withdraw the rule in its entirety.

⁶ Id.

⁷ 84 Fed. Reg. 59709.

⁸ 74 Fed. Reg. 6103.

⁹ 75 Fed. Reg. 13382.

¹⁰ [See ABC comment letter dated May 18, 2010.](#)

¹¹ 76 Fed. Reg. 53720.

¹² 87 Fed. Reg. 42554-42555.

¹³ Id. at 42582-42583.

At the outset, ABC is concerned that, as written, the NPRM conflicts with the plain language of the SCA, which does not authorize the DOL, or the president, to require contractors to hire the incumbent employees of predecessor contractors on projects covered by the SCA. It is well settled that the SCA does not require successor contractors to hire their predecessors' incumbent employees. Two courts have so held without contradiction by Congress or by any other courts.¹⁴ In each of these cases, the courts rejected efforts by employees and/or labor organizations to assert preferential hiring rights for incumbent employees under the Act.

Citing conclusive legislative history, the *Trinity* court flatly held: “[T]he Act does not require a successor to hire the predecessor’s work force.” The court further observed that, “Congress chose to recognize the employer’s interest in choosing his own work force. (citations omitted). If Congress intended that the Act enhance employment security, it would have been a simple enough matter to write the statute accordingly.”¹⁵ The *Clark* court followed the reasoning of *Trinity*, including the reference to strong legislative history expressing Congress’s intent that the SCA does not require successor contractors to hire the predecessor’s employees.¹⁶

Neither the president by executive order nor the DOL by regulation are authorized to override statutory language.¹⁷ Because of this conflict with the language of the SCA, the proposal must be withdrawn in its entirety or else face legal challenge.

In addition to and apart from the above conflict between the NPRM and the governing statute, ABC is also concerned that the proposal would create gross inefficiencies in the procurement process and would disproportionately impact small contractors and subcontractors through the imposition of additional regulatory burdens and substantial costs of compliance.

ABC observes that neither the EO nor the proposed rule contains any evidentiary support for the claim that the proposed changes will actually achieve greater efficiency in federal procurement. As is evident from the discussion of specific provisions of the NPRM which follows, the proposed rule is likely to create greater inefficiencies as successor contractors are forced to employ workers who are not familiar with the often-different work practices that the successors may wish to implement. Thus, the cost savings that an agency may seek to

¹⁴ See *Trinity Services, Inc. v. Marshall*, 593 F. 2d 1250 (D.C. Cir. 1978); accord, *Clark v. Unified Services, Inc.*, 659 F. 2d 49 (5th Cir. 1981).

¹⁵ 593 F. 2d at 1261-2.

¹⁶ 659 F. 2d at 52-53 (citing the “uncontroverted” Statement of Cong. Blackburn, 118 Cong. Rec. 17, 139 (1972)).

¹⁷ See *Aleman Food Services, Inc. v. The United States*, 25 Cl. Ct. 201 (U.S. Claims Court 1992) (“When a conflict exists between a statute and a regulation promulgated under that statute, the statute must control.”).

achieve by hiring a new contractor will be lost or unobtainable if the successor is not allowed to bring its own uniquely qualified workforce onto the project.

As an example of how inefficient the new NPRM will make successor contracts under the SCA, the contractor is required to give an employee at least 10 business days to accept an employment offer.¹⁸ This time frame is even more burdensome than under the Obama-era EO, where employees had 10 calendar days.¹⁹ Under a time frame of 10 business days, a successor contractor is not guaranteed a complete workforce on the day the contract commences. (If a prospective employee's acceptance is delayed more than one day, the successor contractor will be short-staffed on day one.) If the prospective employee declines employment, it is possible that the successor contractor will be unable to find a suitable replacement on such short notice. Under this proposal, it is conceivable that a successor contractor may not have its workforce in place for months.

Further, the 10-day time frame specified in the proposed rule for predecessor contractors to furnish updated lists about their employees working on covered contracts is both impracticable and unworkable. The proposal states that where changes to the workforce are made after the submission of the certified list, "the contractor will, not less than 10 days before completion of the contractor's performance of services on a contract, furnish the contracting officer with a certified list of the names of all service employees employed within the last month of contract performance. The list must also contain anniversary dates of employment and, where applicable, dates of separation of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors."²⁰ Such a time frame is completely inadequate for the successor contractor to inform, interview and evaluate the displaced workers prior to the commencement of the contract.

ABC is also concerned that under the new NPRM the successor contractor would be required to hire potentially poor-performing employees. Under the Obama final rule, "the contractor or any subcontractor is not required to offer employment to any employee of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job."²¹

Incredibly, the new rule's standard is even more onerous and makes it nearly impossible not to offer employment to a predecessor employee with a poor performance record.²² For example, the Biden DOL rule states "a successor contractor or subcontractor is not

¹⁸ 87 Fed. Reg. 42588-42589.

¹⁹ 87 Fed. Reg. 42554.

²⁰ 87 Fed. Reg. 42591.

²¹ 76 Fed. Reg. 53756-53757.

²² 87 Fed. Reg. 42590.

required to offer employment to an employee of the predecessor contractor if the successor contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employee's past performance, that there would be just cause to discharge the employee if employed by the successor contractor or any subcontractor."²³

The rule further states "a successor contractor may demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable written evidence that the predecessor contractor initiated a process to terminate the employee for conduct warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired."²⁴

Obviously, it will be extremely challenging for the successor contractor to obtain such records. It is entirely possible that the predecessor contractor will not allow the successor contractor access to written evidence of the termination process as the DOL's rule does not require a predecessor contractor to provide performance information for predecessor employees.

The potential lack of information about these workers' past performance and the limited time to vet them deprives the successor contractor appropriate tools to determine whether the predecessor employees are qualified to work on the project. In addition to the obvious risk of reduced productivity and higher taxpayer expense on federal contracts, the NPRM could also place the successor contractor's reputation and future business prospects at substantial risk.

ABC also objects to the new NPRM provision requiring agencies to consider whether the location of the predecessor contract is reasonably necessary to ensure economical and efficient provision of services and upon so finding to include a requirement or preference in the solicitation to that effect. This requirement, combined with omission of geographic scope for the successor job offer requirements, will needlessly limit successor contractors from performing the work in a new locality with employees who are familiar with the new location.

The addition of the proposed rule's logistical complexity to an already complicated and burdensome federal contracting process works to the detriment of small businesses and could result in delays in service to federal agencies. Furthermore, and perhaps most importantly, the NPRM will provide added disincentive for small businesses to engage in federal contracting. ABC believes that, at a minimum, the DOL must incorporate additional flexibility for small federal contractors and provide those businesses with a Small Entity Compliance Guide.

²³ 87 Fed. Reg. 42590.

²⁴ Id.

Conclusion

For the reasons listed above, ABC believes that, due to conflicts between the DOL's proposal and the statutory language of the SCA, the NPRM must be withdrawn in its entirety. We are also disappointed that the DOL's new proposal fails to address any of ABC's concerns related to the Obama rule and EO and instead imposes additional burdens on service contractors. Should DOL decide to proceed with this rulemaking, it should know that the proposal as written would create substantial inefficiencies in the federal procurement process. Any final rule must substantively address concerns regarding the predecessor employee review period, the predecessor employee offer acceptance period and the geographic scope of the rule, and improve provisions that do not currently protect successor contractors from the risk of potentially poorly performing predecessor employees. In addition, any final rule must incorporate better flexibility for small businesses and provide compliance assistance resources.

Thank you for the opportunity to submit comments in this matter.

Respectfully submitted,



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