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ALERT

More EO Activity: Contractor Minimum Wage Implementation and the Return of the Nondisplacement Rule

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What: Just before Thanksgiving, the Government took two actions likely to affect many federal service and construction contractors' pricing and staffing decisions. The Biden Administration issued Executive Order (EO) 14055 to revive and expand the nondisplacement rule applicable to many service contracts. (Wiley covered at length its prior incarnation and rescission.) And the Department of Labor (DoL) published its final rule implementing EO 14026, which, as previously covered by Wiley, raises the Federal Contractor minimum wage to $15/hour. The new wage rate will take effect January 30, 2022, but will not automatically be applied to contracts on that date. The final rule is substantially similar to DoL's proposed rule released in July 2021.

When: President Biden issued the EO 14055 on November 18, 2021; that EO directs DoL to issue final regulations within 180 days, followed within 60 days by amendments to the Federal Acquisition Regulation, DoL published the final rule implementing EO 14026 on November 23, 2021, with an effective date of January 30, 2022.

Impact on Industry: While in most respects the new EO 14055 nondisplacement rule mirrors the prior version, this new EO expands the rule's coverage and makes other changes that warrant careful attention from service contractors. Service and construction contractors expecting to be covered by EO 14026's minimum-wage requirements will notice little change from DoL's proposed rule to the new final rule.

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EO 14055, Nondisplacement of Qualified Workers Under Service Contracts

As a brief primer, under EO 14055, when a covered service contract succeeds a contract for performance of the same or similar work, the successor contractor must give a right of first refusal for positions on the successor contract to certain employees of the predecessor. The EO defines a "service contract" that can be covered as any contract, contract-like instrument or subcontract covered under the Service Contract Act of 1965 (SCA), though contracts under the simplified acquisition threshold ($250,000 in most applications) are excluded. Subcontracts under covered prime contracts are also covered.

The predecessor employees who must receive these job offers are "service employees" as defined under the SCA (i.e., employees who are not bona fide professional, administrative, or executive employees exempt from the Fair Labor Standards Act's minimum-wage and overtime requirements) who will lose their jobs as a result of the contract transition and who are "qualified" for one or more positions on the successor contract. The EO carves out an exclusion, however, for predecessor employees who were hired to work on a federal service contract and at least one non-federal service contract as part of a single job "provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order," said the executive order.

For further details on the nondisplacement rule's requirements, click here to review discussion of the prior incarnation under EO 13495. EO 14055 makes some key changes, though.

First, EO 14055 expands on the prior EO 13495's geographic scope. Under the EO 13495, coverage applied to successor contracts performed in the same location as the predecessor contracts. This new EO omits that limitation, which would mean that successors who plan to perform in a different location than their predecessors face an additional layer of transition complexity.

Next, although EO 14055 will "apply to solicitations issued on or after the effective date of the final regulations issued by the FAR Council," the EO also strongly encourages agencies to apply its requirements to existing solicitations. (This is akin to the Administrator's encouraging application of the federal contractor vaccine/masking EO to existing contracts.) Although it is unclear what, if any, increased costs a contractor would incur by having the nondisplacement obligations inserted into an existing solicitation, contractors should prepare for requests from agencies to add the clause imposing these requirements before the new nondisplacement rule completes regulatory implementation.

EO 14055 sets the bar for not offering a job to a "qualified" predecessor employee at "reliable evidence" of performance issues that would justify terminating the employee—a higher standard than the prior EO 13495 standard of a reasonable belief based on knowledgeable sources that the employee "failed to perform suitably on the job." This elevated standard also reinforces concerns about overzealous enforcement, a concern exemplified by DoL's enforcement action under EO 13495 against a contractor that had not offered employment to a single predecessor employee. Even the contracting officer had found that employee unqualified, yet the contractor had to incur the cost and burden of opposing enforcement, which a DoL administrative law judge found to be unsupportable.

At bottom, this nondisplacement rule is, as in prior incarnations, a solution in search of a problem. Federal service contractors recognize the value of retaining experienced, qualified workers of the predecessor—and they do so often. That customary practice is why the term "re-badging" is so well known. But when contractors do not hire some or all predecessor workers, there are reasons for it. And this EO once again removes that aspect of business judgment from successor contractors' managerial toolkits.

DoL Final Rule Implementing EO 14026, Increasing the Minimum Wage for Federal Contractors

In a similar vein, DoL's final rule for the increased contractor minimum wage largely mirrors the proposed rule published July 2021. The effects on contractors will likely be similar to that already discussed in depth in a prior Wiley alert. However, the Final Rule provides some minor clarifications and small additions that do not change from the substance of the proposed regulations. For example, at the request of commenters, DoL clarifies that task orders placed or issued under existing multiple-award contracts (MACs) will be covered by EO 14026 only if and when the MAC itself becomes subject to the EO. Further, DoL provides some additional details regarding what contracts qualify as contracts seasonal recreational services or seasonal recreational equipment rental for the general public; DoL notes that its comments in the proposed rule could result in overbroad interpretations. In addition, DoL responds to concerns about increased labor costs by revising the required contract clause that would require contractors to be compensated for the increase in labor costs resulting from the annual inflation-based increases to the EO starting January 2023. It remains to be seen, however, what the FAR Council's contract clause will state about cost increases and, under either version of the clause, how receptive contracting officers will be to reimbursing the costs of not just bringing wage rates up to each year's minimum, but also the cascading increases in wage rates above the minimum to avoid wage compression and limit employee-relations impacts.

Between these developments, federal contractors, particularly service contractors, grow closer to being subject to two obligations familiar from prior EOs but tweaked for the current implementation. Careful attention to the implementation details will be important for limiting enforcement/compliance risk, maximizing the chances of recovering the associated increases in costs, and, of course, minimizing operational impact on performing the covered services and construction.