



Service Workers Right of First Refusal

Implementation of Executive Order 13495

The Department of Labor (DOL) issued the implementing regulations for Executive Order (EO) 13495 which was signed on January 30, 2009 by President Barack Obama. The EO is the current Presidential order in a history of conflicting orders by the last three U.S. Presidents.

President Clinton started the right of first refusal policy for federal contract employees with EO 12933. President Bush rescinded that order by Executive Order 13204 of February 17, 2001. Bush's EO was rescinded by this order which not only reinstated the Clinton policy but expanded the right to all SCA contractor and subcontractor employees.

The new regulation basically requires the winning contractor to offer employment to the service employees who worked on the current contract who will be laid off or discharged as a result of the new contract award. The right of first refusal applies to those positions that are covered to the Service Contract Act. Therefore, managerial, supervisory, or non-service employees on the current contract are not covered.

This is how the process is going to operate

First, the incumbent contractor must supply the Contracting Officer a list of service employees working on the prime and subcontracts within 30 days of contract completion. Next, the CO then delivers the list to the successor contractor who, along with subcontractors must make a bona fide, express offer of employment to each employee including stating the time within which the employee must accept such offer, which must be no less than 10 days.

Until the right of first refusal is completed, no employment is open to anyone else under the successor contract. However the successor contractor can retain its own service employees if the employee has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge. So the successor doesn't have to lay off its employees to hire to current contractor's employees.

So, is the successor contractor required to hire all the service employees of the current contractor? The answer is yes, unless one of the few exceptions applies.

The successor contractor can refuse to hire a current service employee when "the new contractor has reason to believe, based on written credible information from a knowledgeable source, that an employee's job performance while working on the current contract has been unsuitable."

How would the successor contract have access to "written credible information"? Examples include evidence of disciplinary action taken for poor performance or performance appraisals. But get this; there is no requirement that the predecessor contractor to provide performance information to the successor and information regarding the general performance of the predecessor contractor would not be sufficient proof.



What if the successor wants to reduce the number of service employees it hires? Then the obligation to offer employment continues for 90 days after the successor contractor's first date of performance on the contract.

Finally, every services subcontract entered into under the successor contract will include provisions that ensure that each subcontractor will honor the requirements of the prime contract with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as employees of a predecessor contractor and its subcontractors.

The penalty for non-compliance with these new requirements is potential debarment for 3 years.

Here is the list of contracts that are exempt from this requirement

1. Contracts or subcontracts under the simplified acquisition threshold.
2. Contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act. This is the program for hiring the blind and disabled.
3. Guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act.
4. Agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; and
5. Employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job
6. Head of a contracting department or agency to exempt its department or agency from the requirements

Be ready to staff up your HR department after you win your next federal contract and good luck!

About the author of this article

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