



VIA ELECTRONIC SUBMISSION

May 18, 2010

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Deputy Administrator
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Room S-3502
Washington, DC 20210

Michel Smyth
Chief, Regulatory Analysis Branch
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Re: Notice of Proposed Rulemaking – Nondisplacement of Qualified Workers Under Service Contracts; Docket ID DOL-2010-0001; RIN 1235-AA02

Dear Deputy Administrator Leppink and Mr. Smyth:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor's Wage and Hour Division (DOL), in response to the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* on March 19, 2010 at 75 Fed. Reg. 13382.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing more than 25,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 77 chapters throughout the United States and Guam. ABC member contractors employ more than 2 million construction workers, whose training and experience span all of the twenty-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses.

Our 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 full and open competition unfettered by the government, nondiscrimination due to labor affiliation, and

the award of construction contracts to the lowest responsible bidder through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Background

On January 30, 2009, President Obama signed Executive Order 13495, titled, “Nondisplacement of Qualified Workers Under Service Contracts” (Order). The Order 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 (SCA or Act). The required clauses state that successor contractors and subcontractors that win a bid for covered work must offer employment to the predecessor contractor’s (or subcontractor’s) employees (other than managerial or supervisory employees) in positions for which those employees are qualified. 74 Fed. Reg. at 6103. The Order requires the successor and its subcontractors to provide the predecessor’s employees at least 10 days to accept or decline the offer. 74 Fed. Reg. at 6104.

Further, “not less than 10 days before completion of the contract, the predecessor contractor must furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance.” 75 Fed. Reg. at 13383. The contracting officer is required to provide that list to the successor contractor. *Id.*

The Order exempts the following SCA contracts or subcontracts: less than \$100,000; awarded pursuant to the Javits-Wagner-O’Day Act; guard, elevator operator, messenger, or custodial services provided to the federal government under contracts or subcontracts with sheltered workshops employing the severely handicapped; agreements for vending facilities; and employees who were hired to work under a federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purpose of the Order. 75 Fed. Reg. at 13383.

In addition, the Order authorizes the head of a federal agency contracting department to exempt its department or agency from the requirements of the Order with respect to a contract or subcontract, “if the application of any of the requirements of the Order would not serve the purposes of the Order or would impair the ability of the federal government to procure services on an economical and efficient basis.” 75 Fed. Reg. at 13383.

ABC’s Comments in Response to DOL’s Proposed Rule

In the NPRM, DOL proposes regulatory changes to implement Executive Order 13495. ABC has identified a number of concerns regarding the NPRM and the Order itself, and believes the proposed rule will have a substantial negative impact on our members that perform SCA work, particularly our small businesses members.

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.

At the outset, ABC is concerned that, as written, the NPRM conflicts with the plain language of the SCA, which does not authorize DOL (or the President) to require contractors to hire the incumbent employees of predecessor contractors on projects covered by the Act.

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. *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). 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.” 593 F. 2d at 1261-2. The *Clark* court followed the reasoning of *Trinity*, including the reference to strong legislative history expressing Congress’s intent that the Act not require successor contractors to hire the predecessor’s employees. 659 F. 2d at 52-53 (citing the “uncontroverted” Statement of Cong. Blackburn, 118 Cong. Rec. 17, 139 (1972)).

Neither the President by executive order nor DOL by regulation is authorized to override statutory language. *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.”).

Because of the above described conflict with the language of the Act, the NPRM must be withdrawn in its entirety or else face legal challenge. However, in addition to and apart from the above conflict between the DOL proposal and the governing statute, ABC is also concerned that DOL’s 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 Order 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. Often, the cost savings that an agency may seek

to 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 NPRM will make successor contracts under the SCA, the 10-day time frame specified in the proposed rule for predecessor contractors to furnish information about their employees working on covered contracts is both impracticable and unworkable. The NPRM states that, “not less than 10 days before completion of the contract, the [predecessor] contractor must furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance.” 75 Fed. Reg. at 13383. Such time frame is inadequate for the successor contractor to inform, interview, and evaluate the displaced workers prior to the commencement of the contract.

In addition, the NPRM requires the successor contractor to provide displaced workers no less than 10 days to accept an employment offer. 75 Fed. Reg. at 13383. Under such time frame, 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. Indeed, under the provisions proposed by DOL, it is conceivable that, under the NPRM, a successor contractor may not have its workforce in place for months.

ABC is also concerned that under the NPRM the successor contractor would be required to hire potentially poorly-performing workers in the event that they are unable to acquire sufficient information with which to make an evaluation of predecessor employees’ work performance. Under the NPRM a successor contractor or subcontractor is required to presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract. 75 Fed. Reg. at 13390. As the proposed rule states, “a contractor or subcontractor would not be required to offer employment to any employee of the predecessor contractor 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.” *Id.* ABC is concerned that the predecessor contractor may not allow the successor contractor access to the performance records. DOL notes that the NPRM would not require a predecessor contractor to provide performance information. *Id.* The potential lack of information about the employee’s past performance and the limited time to vet candidates does not provide 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 as a result of the NPRM, its provisions could also place the successor contractor’s reputation and future business prospects at substantial risk.

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. For the reasons outlined above, ABC supports the recommendations proposed by the U.S. Small Business Administration's Office of Advocacy (Advocacy), and incorporates them into our comments by reference (See Docket ID DOL-2010-0001-0007.1). Like Advocacy, ABC agrees that, at a minimum, DOL must incorporate additional flexibility for small federal contractors and provide those businesses with a Small Entity Compliance Guide.

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In conclusion, for the reasons listed above, ABC believes that, due to conflicts between the Department of Labor's proposal and the statutory language of the Service Contracts Act, the NPRM must be withdrawn in its entirety. However, should DOL opt 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 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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