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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, and 52

[FAR Case 2011-028; Docket 2011-0028; Sequence 1]

RIN: 9000-AM21

**Federal Acquisition Regulation; Nondisplacement of
Qualified Workers Under Service Contracts**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement an Executive order for nondisplacement of qualified workers under service contracts, as implemented in Department of Labor regulations.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2011-028 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by

searching "FAR Case 2011-028". Select the link "Submit a Comment" that corresponds with "FAR Case 2011-028." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2011-028" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR Case 2011-028, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at 202-501-0650, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2011-028.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement Executive Order (E.O.) 13495, Nondisplacement of Qualified Workers Under Service Contracts, dated January 30,

2009, published in the Federal Register at 74 FR 6103 on February 4, 2009, and the Department of Labor (DOL) implementing regulations, published in the Federal Register at 76 FR 53720, August 29, 2011, with an effective date to be established later. The E.O. revoked E.O. 13204 of February 17, 2001, which had resulted in the deletion of FAR subpart 22.12 in its entirety. This proposed rule would amend the FAR to add subpart 22.12 and a new clause at FAR 52.222-XX, providing the policy of the Federal Government, as expressed in E.O. 13495, to require service contractors and their subcontractors under successor contracts to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified. The E.O. provides a clause for service contracts that will succeed service contracts for performance of the same or similar work at the same location.

Executive Order 13495 specifically excludes service contracts and subcontracts in the following categories:

- Under the simplified acquisition threshold;
- Awarded through the AbilityOne Program pursuant to the rules of the Committee for Purchase From People Who Are Blind or Severely Disabled (41 USC chapter 85);

- Guard, elevator operator, messenger, or custodial services provided to the Federal Government by sheltered workshops employing the "severely handicapped" as described in 40 U.S.C. 593;
- Vending facility agreements entered into under the Randolph-Sheppard Act; 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 purposes of E.O. 13495.

The E.O. and DOL regulations provide (see 29 CFR 9.1(b)) that nothing in either document can be used as a reason for failure to comply with any provision of law or other E.O. With this policy, the E.O. and the DOL implementing regulations allow for compliance with (a) the HUBZone Program (15 U.S.C. 657a and 632(p) and FAR subpart 19.13), (b) Executive Order 11246 (Equal Employment Opportunity), and (c) the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 U.S.C. 4212). For these reasons, the FAR proposed rule includes a paragraph regarding such compliance, at FAR 22.1202(b), Policy, and paragraph (b)(2) of the clause at FAR 52.222-XX, to be used in procurements

where one of the offerors for the successor contract may have been certified by the Small Business Administration as a HUBZone small business concern.

In addition to the exemptions listed above, the E.O. provides, at section 4, the authority for the head of a contracting department or agency to waive the application of the E.O. to a contract, subcontract, or purchase order (or a class of contracts, subcontracts, or purchase orders) upon a determination that its application would impair the ability of the Government to procure services on an economical and efficient basis or would not serve the purposes of the E.O. (see also 29 CFR 9.4(d)). A decision to exempt a procurement or class of procurements from one or more provisions of the E.O. is a requirements decision, and the associated analysis, documentation, and other requirements necessary for an exemption are subject to 29 CFR part 9. However, the FAR puts contracting officials on notice that any waiver that is not completed in accordance with 29 CFR part 9 prior to the contract solicitation date automatically makes the agency waiver determination inoperative. Failure to comply will require resolicitation.

The E.O. tasked the Secretary of Labor with enforcement, authorized the Secretary of Labor, among other things, to issue final orders prescribing appropriate sanctions and

remedies, and required the Secretary of Labor to issue regulations that implement the requirements of the E.O.

The E.O. required FAR regulations 180 days after the date of the E.O. FAR Case 2009-001 was opened February 5, 2009. However, that FAR case was closed and a new FAR case opened upon publication of the final DOL rule, which occurred on August 29, 2011.

II. Discussion and Analysis

This proposed rule would add FAR subpart 22.12, entitled Nondisplacement of Qualified Workers Under Service Contracts, and the associated clause at FAR 52.222-XX, entitled Nondisplacement of Qualified Workers. The requirements in FAR subpart 22.12 and the associated clause are taken directly from E.O. 13495 and the implementing regulations published August 29, 2011, by the Department of Labor at 29 CFR part 9 (see 76 FR 53720). However, the FAR does not repeat elements of the investigative methods, available reviews, or enforcement mechanisms established by the Department of Labor except as necessary to ensure that contracting officers and contractors, including subcontractors, are aware of their requirements and responsibilities.

For the reasons listed above, FAR subpart 22.12 includes the following, using as its source both the text of E.O. 13495 and 29 CFR part 9:

A. The definitions "service contract" and "United States" at FAR 22.1201 apply to the new subpart. The definition of "service employee" has been moved to FAR 22.001 to apply to all of part 22.

B. Statement of policy: The sources for the coverage at FAR 22.1202(a) are section 1 of E.O. 13495 and 29 CFR section 9.1. The coverage applies only to service contracts for performance of the same or similar services at the same location.

C. Exemptions: The sources for this coverage are section 3 of E.O. 13495 and 29 CFR section 9.4. The five exemptions in the E.O. are repeated in FAR 22.1203-2.

D. Waiver authority and limitations: The sources of this coverage are section 4 of E.O. 13495 and 29 CFR section 9.4(d), both of which permit waiver, with certain limitations, of the E.O.'s requirements by the head of a contracting department or agency. By longstanding FAR convention, agencies would be able to delegate this authority pursuant to FAR 1.108(b). DoD, GSA, and NASA are evaluating the need for potential restrictions on the level to which the authority may be delegated. When an agency exercises its waiver authority, it must notify DOL of its decision in accordance with 29 CFR 9.4(d)(2) and provide the Department of Labor with a copy of its written analysis no later than 5 business days after the solicitation date which

DOL will then post on its website. The waiver authority has specific penalties for agencies that do not comply.

Contracting officers are impacted because the agency's failure to comply with DOL regulations regarding waivers makes the waiver inoperative and requires the contracting officer to insert the clause in the solicitation.

E. Certified employee lists: The sources of this coverage are section 5 of E.O. 13495 and 29 CFR section 9.12(e). The predecessor contractor is required to provide a certified list of its employees who are qualified to work on the successor contract. The contracting officer must provide the list to the successor contractor in a timely manner.

F. Required notifications to contractors and employees: The sources for this coverage are 29 CFR sections 9.11 and 9.12. 29 CFR section 9.11(b) states that "the Contracting Officer will ensure that the predecessor contractor provides written notice to its service employees. . . of their possible right to an offer of employment." In addition, 29 CFR section 9.12(e) states that "the contractor shall, not less than 30 days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with a list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted." The likelihood exists

that, during the initial implementation of the E.O., service employees of the predecessor contractor may not receive written notice and Contracting Officers (and hence successor contractors) may not receive the list 30 days before the end of the contract. As a general matter, predecessor contractors will be operating under the existing notification clause set forth at FAR 52.222-41(n) (applicable to contracts subject to the Service Contract Act (SCA)). This clause does not address notification to service employees because there was not previously a right of first refusal. In addition, the clause permits submission of the list to the Contracting Officer as few as 10 days prior to completion of the contract. DoD, GSA, and NASA note that under 29 CFR section 9.12(a)(2), a successor contractor's obligation to offer a right of first refusal exists even if the information is not provided by the incumbent within the 30-day window (i.e., "even if the successor contractor was not provided a list of the predecessor contractor's employees or the list did not contain the names of all persons employed during the final month of contract performance.") The FAR Council is considering possible steps that might be taken, as agencies transition to the new clause, to reduce instances where service employees of the predecessor contractor and successor contractors do not receive notice of their rights

and successors receive lists less than 30 days before the end of the contract. One possible step the FAR Council is considering is to encourage agencies to enter into bilateral modifications (starting with the largest SCA-covered contracts) that obligate predecessor contractors to (1) inform their service employees of their right of first refusal and (2) provide the list to the Contracting Officer no less than 30 days before contract completion. DoD, GSA, and NASA invite the public to offer their views and ideas as part of their comments on this rulemaking.

G. Remedies and sanctions: The sources of this coverage are section 6 of E.O. 13495 and 29 CFR 9.24. This area is within the purview of the DOL. The FAR, at section 22.1206, addresses the contracting officer's role.

H. Contract clause: The sources of this coverage are section 5 of E.O. 13495 and Appendix A of 29 CFR part 9. The paragraphs in the proposed FAR clause have been reordered by importance and in accordance with FAR drafting procedures.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health

and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DOD, GSA, and NASA do not believe that this rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq. Nonetheless, they are preparing an Initial Regulatory Flexibility Analysis (IRFA), in the interest of soliciting public comments, which is summarized as follows:

DoD, GSA, and NASA are issuing a proposed rule to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13495, entitled Nondisplacement of Qualified Workers Under Service Contracts (dated January 30, 2009) and the Department of Labor final rule implementing the E.O. (29 CFR part 9, published at 76 FR 53720, dated August 29, 2011).

It is the policy of the Federal Government to require service contractors and their subcontractors under successor contracts to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified. The E.O. provides a clause for service contracts that will succeed service contracts for performance of the same or similar work at the same location. The E.O. revoked E.O. 13204 of February 17, 2001, which resulted in the deletion of FAR subpart 22.12 in its entirety. This FAR proposed rule would add subpart 22.12 and a new clause at FAR 52.222-XX.

Executive Order 13495 excludes service contracts and subcontracts in the following categories:

- Under the simplified acquisition threshold.
- Awarded through the AbilityOne Program pursuant to the rules of the Committee for Purchase From People Who Are Blind or Severely Disabled (41 USC chapter 85).
- Guard, elevator operator, messenger, or custodial services provided to the Federal Government by sheltered workshops employing the severely handicapped as described in 40 U.S.C. 593.
- Vending facility agreements entered into under the Randolph- Sheppard Act.
- 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 purposes of E.O. 13495.

The FAR proposed rule adds coverage that allows for compliance with (a) the HUBZone Program (see FAR subpart 19.13), (b) Executive Order 11246 (Equal Employment Opportunity), and (c) the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

In addition to the exemptions above, the E.O. provides, at section 4, the authority for the head of a contracting department or agency to waive the application of the E.O. to a contract, subcontract, or purchase order (or a class of contracts, subcontracts, or purchase orders) upon a determination its application would impair the ability of the Government to procure services on an economical and efficient basis or would not serve the purposes of E.O. 13495 (see also 29 CFR 9.4(d)). A decision to exempt a procurement or class of procurements from one or more provisions of the E.O. is a requirements decision, and the associated analysis, documentation, and other requirements necessary for an exemption are subject to 29 CFR part 9. However, the FAR puts contracting officials on notice in this FAR proposed rule that any waiver that is not completed in accordance with 29 CFR part 9 prior to the contract solicitation date automatically makes the agency determination inoperative.

The E.O. tasked the Secretary of Labor with enforcement authority that, among other things, authorizes the Secretary Labor to issue final orders prescribing appropriate sanctions and remedies, including but not limited to, orders requiring employment and payment of wages lost, and required the Secretary to develop implementing regulations. These matters are not addressed in the FAR because they are outside the contracting function.

The estimated impact that follows is based entirely upon the DOL figures reported in the proposed and final rules

that it published implementing E.O. 13495. Although DOL prepared an initial regulatory flexibility analysis, the agency, in the final rule, certified that 29 CFR part 9 does not have a significant economic impact on a substantial number of small entities. There is no additional impact due to the implementation of the DOL regulations in the FAR. The requirements in the FAR are taken from the E.O. and 29 CFR part 9 without addition.

DOL estimated that 28,800 small entities will be subject to its regulation and the majority of these small entities will incur compliance costs of less than \$100. The analysis offsets the actions that a successor contractor would already be taking, such as determining an individual's suitability for available positions and documenting employment decisions. Further, DOL assumed a time/cost savings on the part of small entities because the entities will not have to engage in recruiting and training an entirely new workforce.

The predecessor contractor is required to provide a certified list of the names of all service employees working under that contract, and its subcontracts, to the contracting agency no later than 30 days before completion of performance of the predecessor contract. DOL notes, however, that there is little or no cost associated with this requirement because the certified list is the same list as the certified seniority list currently required to be provided under the Service Contract Act clause, FAR 52.222-41(n). The minimal new reporting requirements mandated by the DOL implementation of E.O. 13495 are addressed in the information collection justification submitted by DOL in connection with its final rule (see 76 FR 53720 dated August 29, 2011). No additional reporting requirements are imposed by the FAR rule, which merely relocates the contract clause from the E.O. into FAR part 52.

The rule does not duplicate, overlap, or conflict with any other Federal rules. The requirements of E.O. 13495 do not allow for any alternatives.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in

subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2011-028), in correspondence.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however these changes to the FAR do not imposed additional information collection requirements to the paperwork burden previously approved under the Office of Management and Budget Control Number 1235-0007 and 1235-XXXX, titled: Labor Standards for Federal Service Contracts - Regulations 29 CFR, Part 4 and Nondisplacement of Qualified Workers Under Service Contracts Executive Order 13495, respectively.

List of Subjects in 48 CFR Parts 2, 22, And 52

Government procurement.

Dated: April 30, 2012.

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 22, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 22, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2-DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101, in paragraph (a), in the definition "United States" by redesignating paragraphs 4 through 10 as paragraphs 5 through 11, respectively; and adding a new paragraph 4 to read as follows:

2.101 Definitions.

* * * * *

(a) * * *

Unites States * * *

(4) For use in subpart 22.13, see the definition at 22.1201.

* * * * *

PART 22-APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

3. Amend section 22.001 by adding, in alphabetical order, the definition "Service employee" to read as follows:

22.001 Definitions.

* * * * *

Service employee means any person engaged in the performance of a service contract other than any person

employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

* * * * *

22.1001 [Amended]

4. Amend section 22.1001 by removing the definition "Service employee".

5. Add subpart 22.12 to read as follows:

**Subpart 22.12—Nondisplacement of Qualified Workers Under
Service Contracts**

- 22.1200 Scope of subpart.
- 22.1201 Definitions.
- 22.1202 Policy.
- 22.1203 Applicability.
- 22.1203-1 General.
- 22.1203-2 Exemptions.
- 22.1203-3 Waiver.
- 22.1204 Certified employee lists.
- 22.1205 Notification to contractors and employees.
- 22.1206 Remedies and sanctions for violations of this subpart.
- 22.1207 Contract clause.

**Subpart 22.12—Nondisplacement of Qualified Workers Under
Service Contracts**

22.1200 Scope of subpart.

This subpart prescribes policies and procedures for implementing Executive Order 13495 of January 30, 2009,

Nondisplacement of Qualified Workers Under Service Contracts.

22.1201 Definitions.

As used in this subpart—

Service contract means any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under the Service Contract Labor Standards (41 U.S.C. chapter 67; see 22.1003-3 and 22.1003-4), or any subcontract at any tier thereunder. See 22.1003-5 and 29 CFR 4.130 for a partial list of services covered by the Act.

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and outer Continental Shelf as defined in the outer Continental Shelf Lands Act (43 U.S.C. 1331, et seq.), but does not include any other place subject to United States jurisdiction or any United States base or possession in a foreign country (29 CFR 4.112).

22.1202 Policy.

(a) When a service contract succeeds a contract for performance of the same or similar services at the same location, the successor contractor and its subcontractors are required to offer those employees (other than managerial and supervisory employees) that are employed under the

predecessor contract, and whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. Executive Order 13495 generally prohibits employment openings under the successor contract until such right of first refusal has been provided, when consistent with applicable law.

(b) Nothing in Executive Order 13495 shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive order or law. For example, the requirements of the HUBZone Program (see subpart 19.13), Executive Order 11246 (Equal Employment Opportunity), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 may conflict with the requirements of Executive Order 13495. Those laws and Executive orders must be satisfied in tandem with, and if necessary prior to, the requirements of Executive Order 13495 and this subpart.

22.1203 Applicability.

22.1203-1 General.

This subpart applies to service contracts that succeed contracts for the same or similar services at the same location.

22.1203-2 Exemptions.

(a) This subpart does not apply to—

(1) Contracts and subcontracts under the simplified acquisition threshold;

(2) Contracts or subcontracts awarded pursuant to 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled;

(3) Guard, elevator operator, messenger, or custodial services provided to the Government under contracts or subcontracts with sheltered workshops employing the "severely handicapped" as described in 40 U.S.C. 593;

(4) Agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph Sheppard Act, 20 U.S.C. 107; or

(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, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this subpart.

(b) The exclusions in paragraphs (a)(2) through (a)(4) of this subsection apply when either the predecessor or successor contract has been awarded for services produced or provided by the "severely handicapped."

22.1203-3 Waiver.

(a) If the head of the procuring agency determines in writing that the application of this subpart would not serve the purposes of Executive Order 13495 or would impair the

ability of the Federal Government to procure services on an economical and efficient basis, the agency head may waive some or all of the provisions of this subpart. Such waivers may be made for a contract, subcontract, or purchase order, or with respect to a class of contracts, subcontracts, or purchase orders. See 29 CFR 9.4(d)(4) for regulatory provisions addressing circumstances in which a waiver could or would not be appropriate. The waiver must be reflected in a written analysis as described in 29 CFR 9.4(d)(4)(i) and must be completed prior to the contract solicitation date, or the waiver is inoperative.

(b)(1) When an agency exercises its waiver authority with respect to any contract, subcontract, or purchase order, the contracting officer shall direct the contractor to notify affected workers and their collective bargaining representative in writing, no later than five business days after the solicitation issuance date, of the agency's determination. The notice shall include facts supporting the determination. The contracting officer's failure to direct that the contractor provide the notice as provided in this subparagraph shall render the waiver decision inoperative, and the contracting officer shall include the clause at 52.222-XX in the solicitation.

(2) Where a contracting agency waives application to a class of contracts, subcontracts, or purchase orders, the

contracting officer shall, with respect to each individual solicitation, direct the contractor to notify incumbent workers and their collective bargaining representatives in writing, no later than five business days after each solicitation issuance date, of the agency's determination. The notice shall include facts supporting the determination. The contracting officer's failure to direct that the contractor provide the notice provided in this subparagraph shall render the waiver decision inoperative, and the contracting officer shall include the clause at 52.222-XX in the solicitation.

(3) In addition, the agency shall notify the Department of Labor of its waiver decision and provide the Department of Labor with a copy of its written analysis no later than five business days after the solicitation issuance date. Failure to comply with this notification requirement shall render the waiver decision inoperative, and the contracting officer shall include the clause at 52.222-XX in the solicitation.

22.1204 Certified employee lists.

(a) The predecessor contractor is required to furnish to the contracting officer, not less than 30 days before completion of the predecessor contract, a certified list of the names of all service employees working under the contract and its subcontracts at the time the list is

submitted. The certified list must also contain anniversary dates of employment of each service employee under the contract and subcontracts for services. This list is the same as the seniority list required by paragraph (n) of the clause at 52.222-41, Service Contract Act of 1965. If there are no changes to the workforce before the predecessor contract is completed, then the predecessor contractor is not required to submit a revised list 10 days prior to completion of performance and the requirements of 52.222-41(n) are met. When there are changes to the workforce after submission of the 30-day list, the predecessor contractor shall submit a revised certified list not less than 10 days prior to performance completion.

(b) The contracting officer shall provide the seniority list to the successor contractor and, if requested, to employees of the predecessor contractor or subcontractors or their authorized representatives.

22.1205 Notification to contractors and employees.

(a) The contracting officer shall ensure that the predecessor contractor provides written notice to service employees of their possible right to an offer of employment with the successor contractor. The written notice shall be—

- (1) Posted in a conspicuous place at the worksite; or
- (2) Delivered to the employees individually. If such delivery is via e-mail, the notification must result in an

electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.

(b) Contracting officers may advise contractors to provide the notice in Appendix B to 29 CFR chapter 9. Where a significant portion of the predecessor contractor's workforce is not fluent in English, the notice shall be provided in English and language(s) with which employees are more familiar. English and Spanish versions of the notice are available on the Department of Labor website at <http://www.dol.gov/whd>.

22.1206 Remedies and sanctions for violations of this subpart.

(a) The Secretary of Labor has the authority to issue orders prescribing appropriate remedies, including, but not limited to, requiring the successor contractor to offer employment, in positions for which the employees are qualified, to employees from the predecessor contract and payment of wages lost.

(b) After an investigation and a determination by the Administrator, Wage and Hour Division, Department of Labor, that lost wages or other monetary relief is due, the Administrator may direct that so much of the accrued payments due on either the contract or any other contract between the contractor and the Government shall be withheld

as are necessary to pay the monies due. Upon the final order of the Secretary of Labor that such monies are due, the Administrator may direct that such withheld funds be transferred to the Department of Labor for disbursement.

(c) If the contracting officer or the Administrator, Wage and Hour Division, Department of Labor, finds that the predecessor contractor has failed to provide the list required by 22.1204, the contracting officer may in his or her discretion, or on request by the Administrator, suspend contract payment until such time as the list is provided to the contracting officer.

(d) The Secretary of Labor may also suspend or debar a contractor or subcontractor for a period of up to three years.

22.1207 Contract clause.

The contracting officer shall insert the clause at 52.222-XX, Nondisplacement of Qualified Workers, in solicitations and contracts for services 1) defined at 22.1201, 2) that succeed contracts for performance of the same or similar work at the same location and 3) that are not exempted by 22.1203-2 or waived in accordance with 22.1203-3.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.212-5 by—
 - a. Revising the date of the clause;

b. Redesignating paragraphs (c) (7) and (c) (8) as paragraphs (c) (8) and (c) (9), respectively;

c. Adding a new paragraph (c) (7);

d. Redesignating paragraphs (e) (1) (xiii) and (e) (1) (xiv) as paragraphs (e) (1) (xiv) and (e) (1) (xv), respectively; and

e. Adding a new paragraph (e) (1) (xiii) to read as follows.

52.212-5 Contract Terms and Conditions Required to Implement Statutes of Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OF

EXECUTIVE ORDERS—COMMERCIAL ITEMS (DATE)

* * * * *

(c) * * *

____(7) 52.222-XX, Nondisplacement of Qualified Workers (DATE) (E.O. 13495).

* * * * *

(e) (1) * * *

(i) * * *

(xiii) 52.222-XX, Nondisplacement of Qualified Workers (DATE) (E.O. 13495).

* * * * *

7. Add section 52.222-XX to read as follows:

52.222-XX Nondisplacement of Qualified Workers.

As prescribed in 22.1207, insert the following clause:

NONDISPLACEMENT OF QUALIFIED WORKERS (DATE)

(a) Consistent with the efficient performance of this contract, the Contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The Contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor Contractor employed in connection with performance of the work. Except as provided in paragraph (b) of this clause, there shall be no employment opening under this contract, and the Contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The Contractor and its subcontractors shall make a bona fide express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

(b)(1) Notwithstanding the obligation under paragraph (a) of this clause, the Contractor and any subcontractors (i) may employ under this contract any employee who has worked for the Contractor or subcontractor for at least three months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (ii) are not required to offer a right of first refusal to any employee(s) of the predecessor Contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3), and (iii) are not required to offer a right of first refusal to any employee(s) 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.

(2) In addition, any Contractor or subcontractor that has been certified by the U.S. Small Business Administration as a HUBZone small business concern must ensure that it complies with the statutory and regulatory requirements of the HUBZone Program (e.g., it must ensure that at least 35 percent of all of its employees reside within a HUBZone).

The HUBZone small business Contractor or subcontractor must consider whether it can meet the requirements of this clause and Executive Order 13495 while also ensuring it meets the HUBZone Program's requirements.

(3) Nothing in this clause shall be construed to permit a Contractor or subcontractor to fail to comply with any provision of any other Executive order or law. For example, the requirements of the HUBZone Program (see FAR subpart 19.13), Executive Order 11246 (Equal Employment Opportunity), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 may conflict with the requirements of Executive Order 13495. Those laws and Executive orders must be satisfied in tandem with, and if necessary prior to, the requirements of Executive Order 13495, 29 CFR part 9, and this clause.

(c)(1) The Contractor shall, not less than 30 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 working under this contract and its subcontracts at the time the list is submitted. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Where changes to the workforce are made after the submission of the certified list described in this paragraph, the Contractor shall, in accordance with paragraph (d) of this clause, not less than 10 days before completion of the services on a contract, furnish the Contracting Officer with an updated certified list of the names of all service employees employed within the last month of contract performance. The updated list shall 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. Only Contractors experiencing a change in their workforce between the 30- and 10-day periods will have to submit a list in accordance with paragraph (d) of this clause.

(2) The Contracting Officer will provide the list to the successor Contractor, and the list shall be provided on request to employees or their representatives.

(3) The Contracting Officer will direct the predecessor Contractor to provide written notice (Appendix B to 29 CFR chapter 9) to service employees of their possible

right to an offer of employment with the successor Contractor. Where a significant portion of the predecessor Contractor's workforce is not fluent in English, the notice shall be provided in English and language(s) with which employees are more familiar. The written notice shall be-

(i) Posted in a conspicuous place at the worksite;
or

(ii) Delivered to the employees individually. If such delivery is via e-mail, the notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.

(d) (1) If required in accordance with 52.222-41(n), the Contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor Contractors or their subcontractors. If there are no changes to the workforce before the predecessor contract is completed, then the predecessor Contractor is not required to submit a revised list 10 days prior to completion of performance and the requirements of 52.222-41(n) are met. When there are changes to the workforce after submission of the 30-day list, the predecessor Contractor shall submit a revised certified list not less than 10 days prior to performance completion.

(2) The Contracting Officer will provide the list to the successor Contractor, and the list shall be provided on request to employees or their authorized representatives.

(e) The Contractor and subcontractor shall maintain the following records (regardless of format, e.g., paper or electronic) of its compliance with this clause for not less than a period of three years from the date the records were created.

(1) Copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any employee meeting(s) at which the offers were extended, a summary of each meeting, a copy of any written notice that may have been distributed, and the names of the

employees from the predecessor contract to whom an offer was made.

(2) A copy of any record that forms the basis for any exemption claimed under this part.

(3) A copy of the employee list provided to or received from the contracting agency.

(4) An entry on the pay records of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division to each employee, the period covered by such payment, and the date of payment, and a copy of any receipt form provided by or authorized by the Wage and Hour Division. The Contractor shall also deliver a copy of the receipt to the employee and file the original, as evidence of payment by the Contractor and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(f) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause (52.233-1) of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: The Contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract. The Contracting Officer will refer any employee who wishes to file a complaint, or ask questions concerning this contract clause, to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. Contact e-mail: displaced@dol.gov.

(g) The Contractor shall cooperate in any review or investigation by the Department of Labor into possible violations of the provisions of this clause and shall make such records requested by such official(s) available for inspection, copying, or transcription upon request.

(h) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the Contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the Contractor or its subcontractors, as provided in Executive Order 13495, the

regulations, and relevant orders of the Secretary, or as otherwise provided by law.

(i) The Contractor shall take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for noncompliance. However, if the Contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the Contractor may request that the United States, through the Secretary of Labor, enter into such litigation to protect the interests of the United States.

(j) The Contracting Officer will withhold, or cause to be withheld, from the prime Contractor under this or any other Government contract with the same prime Contractor, such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator, the Administrative Law Judge, or the Administrative Review Board, that there has been a failure to comply with the terms of this clause and that wages lost as a result of the violations are due to employees or that other monetary relief is appropriate. If the Contracting Officer or the Administrator, upon final order of the Secretary, finds that the Contractor has failed to provide a list of the names of employees working under the contract, the Contracting Officer may, in his or her discretion, or upon request by the Administrator, take such action as may be necessary to cause the suspension of the payment of contract funds until such time as the list is provided to the Contracting Officer.

(k) Subcontracts. In every subcontract over the simplified acquisition threshold entered into in order to perform services under this contract, the Contractor shall include a provision that ensures—

(1) That each subcontractor will honor the requirements of paragraphs (a) through (b) of this clause with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor Contractor and its subcontractors;

(2) That the subcontractor will provide the Contractor with the information about the employees of the subcontractor needed by the Contractor to comply with paragraphs (c) and (d) of this clause; and

(3) The recordkeeping requirements of paragraph (e) of this clause.

(End of clause)

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