

February 11, 2013

Federal Contractors Beware: Service Contract Act Employees Now Have the Right of First Refusal for Employment with the Successor Contractor

New Burden on Federal Contractors:

The final rule implementing President Obama's Executive Order 13495, which provides federal Service Contract Act employees with a right of first refusal of employment with a successor contractor, applies to all solicitations issued after January 18, 2013.

The final rule will also benefit organized labor. Its likely impact will be to entrench unions and protect union jobs, regardless whether subpar performance and inefficiencies in such operations motivated the change in contractors. This rule may also call into question the validity and enforceability of non-competition covenants in the government contract context.

New Right of First Refusal Limits Employer Staffing Discretion:

Successor contractors who provide prime and subcontractor services pursuant to the Service Contract Act now are required to give the predecessor's employees a right of first refusal of positions for which they are qualified under the successor contract. This right of first refusal must remain open for at least 10 days. The successor contractor may not hire new employees to replace any predecessor employees who would otherwise lose their jobs as the result of the completion or expiration of a contract, until the right of first refusal has been offered to each qualified employee of the predecessor contractor.

Exceptions:

There are particular exceptions to the rule: For example, the rule does not apply to: (i) contracts or subcontracts under the Simplified Acquisition Threshold (currently \$150,000 in most cases); (ii) employees who split their time between Service Contract Act covered contracts and other commercial, non-federal government contracts; (iii) employees under the predecessor contractor who are exempt under the Fair Labor Standards Act; (iv) employees under the predecessor contractor whom the successor reasonably believes, based on the employee's past performance, failed to perform suitably on the job; or (v) positions for which the successor intends to utilize its existing employees, provided that those employees have worked for the successor for at least 3 months and would face discharge if not offered employment under the successor contract.

Going Forward: Violators Face Debarment:

Successor contractors who provide services pursuant to the Service Contract Act should act to ensure full compliance with the new rule.

Penalties for non-compliance include back pay, reinstatement, and potential suspension and/or debarment.