



VIA ELECTRONIC SUBMISSION

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industry is employed by small businesses).² In fact, construction companies that employ fewer than 100 construction professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.³

In addition to small businesses that build private and public works projects, ABC's membership includes large member companies that contract directly with federal, state and local governments to successfully build projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals.⁴

ABC's 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 nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Background

On Nov. 18, 2021, President Biden issued Executive Order 14055, Nondisplacement of Qualified Workers Under Service Contracts, which states that "when a service contract expires and a follow-on contract is awarded for the same or similar services, the Federal Government's procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor's employees, thus avoiding displacement of these employees."⁵

The EO 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. The required clause states that successor contractors and subcontractors who win a bid for covered work must offer qualified employees

2

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 new NPRM will make successor contracts under the SCA,

required to offer employment to an employee of the predecessor contractor if the successor contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employee's past performance, that there would be just cause to discharge the employee if employed by the successor contractor or any subcontractor."²³

The rule further states "a successor contractor may demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable written evidence that the predecessor contractor initiated a process to terminate the employee for conduct warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired."²⁴

Obviously, it will be extremely challenging for the successor contractor to obtain such records. It is entirely possible that the predecessor contractor will not allow the successor contractor access to written evidence of the termination process as the DOL's rule does not require a predecessor contractor to provide performance information for predecessor employees.

The potential lack of information about these workers' past performance and the limited time to vet them deprives 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, the NPRM could also place the successor contractor's reputation and future business prospects at substantial risk.

ABC also objects to the new NPRM provision requiring agencies to consider whether the location of the predecessor contract is reasonably necessary to ensure economical and efficient provision of services and upon so finding to include a requirement or preference in the solicitation to that effect. This requirement, combined with omission of geographic scope for the successor job offer requirements, will needlessly limit successor contractors from performing the work in a new locality with employees who are familiar with the new location.

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. ABC believes that, at a minimum, the DOL must incorporate additional flexibility for small federal contractors and provide those businesses with a Small Entity Compliance Guide.

²³ 87 Fed. Reg. 42590.

²⁴ Id.

Conclusion