

ALERT

Trump Revokes Nondisplacement Executive Order for Federal Contractors

November 4, 2019

WHAT: On October 31, 2019, President Trump signed Executive Order (EO) 13897, Improving Federal Contractor Operations by Revoking Executive Order 13495. EO 13495, known as the nondisplacement executive order, required successor contractors to offer employment to many “qualified” service employees when succeeding a government contract for the same or similar services in the same location. The new EO directed the Department of Labor (DOL) to immediately terminate any investigations or compliance actions based on the revoked order. The new EO also directed agencies to begin withdrawing rules and accompanying guidance implementing the nondisplacement EO.

WHEN: The Executive Order went into immediate effect on October 31, 2019.

WHAT DOES IT MEAN FOR INDUSTRY: Since EO 13495 went into effect in January 2009, the requirements imposed by the EO on successor contractors received criticism from the Federal contracting industry for requiring that service contractors, who were taking over a government contract from another company, offer jobs to nonmanagerial employees from the incumbent contractor before hiring new employees, *i.e.* a right of first refusal. Many contractors felt the requirements were unnecessary because as a matter of industry practice, successor contractors frequently hired workers from their predecessor. In addition, the requirement prevented contractors from hiring a worker they may feel was better suited for the position.

In practice, contractors may have felt compelled to offer employment to unsuitable candidates of the predecessor contractor just to avoid DOL investigations and potential consequences. That concern bore

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out by some extreme enforcement positions taken by DOL—including pursuing a contractor for arguable failure to offer employment to an employee from a predecessor contract whom the *contracting agency itself* had identified as not qualified to perform on the successor contract.

Now, contractors will have more flexibility when creating the ideal workforce for their contract proposals. While contractors are still likely to retain incumbent employees due to the experience they offer, now, contractors will not be forced to use incumbent workers for positions that they determine in their business judgment would be better filled by new personnel who did not perform on the previous contract. This new flexibility may allow contractors to better fulfill the Government's needs and allow contractors to decide the best workforce as they transition to performance of a newly awarded service contract.

Given the immediate application of the revocation of EO 13495, we advise service contractors to carefully review pending solicitations and new contract awards to ensure that agencies do not include EO 13495 or relevant FAR provisions or clauses implementing EO 13495. Contractors should consider taking exception to solicitations or contracts incorporating such clauses, citing this new EO as the basis.