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29 CFR Subtitle A (7-1-12 Edition)

contractor and, on request, to employees or their representatives.

(d) *Actions on complaints*—(1) *Reporting.* (i) *Reporting time frame.* Within 14 days of being contacted by the Wage and Hour Division, the Contracting Officer shall forward all information listed in paragraph (d)(1)(ii) of this section to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(ii) *Report contents:* Except as provided by paragraph (d)(3) of this section, the Contracting Officer shall forward to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 any:

(A) Complaint of contractor non-compliance with this part;

(B) Available statements by the employee or the contractor regarding the alleged violation;

(C) Evidence that a seniority list was issued by the predecessor and provided to the successor;

(D) A copy of the seniority list;

(E) Evidence that the nondisplacement contract clause was included in the contract or that the contract was exempted by the contracting agency;

(F) Information concerning known settlement negotiations between the parties, if applicable;

(G) Any other relevant facts known to the Contracting Officer or other information requested by the Wage and Hour Division.

(2) [Reserved]

§9.12 Contractor requirements and prerogatives.

(a) *General*—(1) *No employment openings prior to right of first refusal.* Except as provided under the exclusions listed in §9.4 of this part or paragraphs (c) and (d) of this section, a successor contractor or subcontractor shall fill no employment openings under the contract prior to making good faith offers of employment (*i.e.*, a right of first refusal to employment on the contract), in positions for which the employees are qualified, to those employees employed under the predecessor contract whose employment will be terminated as a result of award of the contract or the expiration of the contract under

which the employees were hired. The contractor and its subcontractors shall make a bona fide, express offer of employment to a position for which the employee is qualified to each employee 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.

(2) *No seniority list available.* The successor contractor's obligation to offer a right of first refusal exists even if the successor contractor has not been provided a list of the predecessor contractor's employees or the list does not contain the names of all persons employed during the final month of contract performance.

(3) *Determining eligibility.* While a person's entitlement to a job offer under this part usually will be based on whether he or she is named on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance, a contractor must also accept other credible evidence of an employee's entitlement to a job offer under this part. For example, even if a person's name does not appear on the list of employees on the predecessor contract, an employee's assertion of an assignment to work on a contract during the predecessor's last month of performance coupled with contracting agency staff verification could constitute credible evidence of an employee's entitlement to a job offer, as otherwise provided for in this part. Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked.

(b) *Method of job offer*—(1) *Bona-fide offer.* Except as otherwise provided in this part, a contractor must make a bona fide express offer of employment to each qualified employee on the predecessor contract before offering employment on the contract to any other person. In determining whether an employee is entitled to a bona fide, express offer of employment, a contractor may consider the exceptions set forth in paragraph (c) of this section and may utilize employment screening processes (*i.e.*, drug tests, background

checks, security clearance checks, and similar pre-employment screening mechanisms) only when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive Order. The obligation to offer employment under this part shall cease upon the employee's first refusal of a bona fide offer to employment on the contract.

(2) *Establishing time limit for employee response.* The contractor shall state the time within which an employee must accept an employment offer, but in no case may the period in which the employee has to accept the offer be less than 10 days.

(3) *Process.* The successor contractor must, in writing or orally, offer employment to each employee. See also paragraph (f) of this section, Record-keeping. In order to ensure that the offer is effectively communicated, the successor contractor should take reasonable efforts to make the offer in a language that each worker understands. For example, if the contractor holds a meeting for a group of employees on the predecessor contract in order to extend the employment offers, having a co-worker or other person who fluently translates for employees who are not fluent in English would satisfy this provision.

(4) *Different job position.* As a general matter, an offer of employment on the successor's contract will be presumed to be a bona fide offer of employment, even if it is not for a position similar to the one the employee previously held but one for which the employee is qualified. If a question arises concerning an employee's qualifications, that question shall be decided based upon the employee's education and employment history, with particular emphasis on the employee's experience on the predecessor contract. A contractor must base its decision regarding an employee's qualifications on credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency.

(5) *Different employment terms and conditions.* An offer of employment to a position on the contract under different employment terms and conditions, in-

cluding changes to pay or benefits, than the employee held with the predecessor contractor will be considered bona fide, if the reasons are not related to a desire that the employee refuse the offer or that other employees be hired for the offer.

(6) *Termination after contract commencement.* Where an employee is terminated under circumstances suggesting the offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined during any compliance action to ensure the offer was bona fide.

(c) *Exceptions.* The successor contractor will bear the responsibility of demonstrating the appropriateness of claiming any of the following exceptions to the nondisplacement provisions subject to this part.

(1) *Nondisplaced employees.* (i) A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor who will be retained by the predecessor contractor.

(ii) The contractor must presume that all employees hired to work under a predecessor's Federal service contract will be terminated as a result of the award of the successor contract, absent an ability to demonstrate a reasonable belief to the contrary that is based upon credible information provided by a knowledgeable source such as the predecessor contractor or the employee.

(2) *Successor's current employees.* A contractor or subcontractor may employ under the contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge.

(3) *Predecessor contractor's non-service employees.* (i) A contractor or subcontractor is not required to offer employment to any employee of the predecessor who is not a service employee. See § 9.2 of this part for definitions of *employee*, *managerial employee* and *supervisory employee*.

(ii) The contractor must presume that all employees hired to work under a predecessor's Federal service contract are service employees, absent an

ability to demonstrate a reasonable belief to the contrary that is based upon credible information provided by a knowledgeable source such as the predecessor contractor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry is not sufficient to claim this exemption.

(4) *Employee's past unsuitable performance.* (i) A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor for 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.

(ii)(A) The contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract, absent an ability to demonstrate a reasonable belief to the contrary that is based upon written credible information provided by a knowledgeable source such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency.

(B) For example, a contractor may demonstrate its reasonable belief that the employee, in fact, failed to perform suitably on the predecessor contract through written evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. The performance determination must be made on an individual basis for each employee. Information regarding the general performance of the predecessor contractor is not sufficient to claim this exception.

(5) *Non-Federal work.* (i) A contractor or subcontractor is not required to offer employment to any employee hired to work under a predecessor's Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employee was not deployed in a manner that was designed to avoid the purposes of this part.

(ii) The successor contractor must presume that no employees hired to work under a predecessor's Federal

service contract worked on one or more nonfederal service contracts as part of a single job, unless the successor can demonstrate a reasonable belief to the contrary. The successor contractor must demonstrate that its belief is reasonable and is based upon credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry is not sufficient.

(iii) A contractor that makes a reasonable determination that a predecessor contractor's employee also performed work on one or more nonfederal service contracts as part of a single job must also make a reasonable determination that the employee was not deployed in such a way that was designed to avoid the purposes of this part. The successor contractor must demonstrate that its belief is reasonable and is based upon credible information that has been provided by a knowledgeable source such as the employee or the contracting agency. For example, evidence from a contracting agency that an employee worked only occasionally on a Federal service contract combined with a statement from the employee indicating fulltime employment with the predecessor would, absent other facts, constitute the basis for a reasonable belief that there is no obligation to offer employment to the employee. On the other hand, information suggesting a change in how a predecessor contractor deployed employees near the end of the contract period could suggest an effort to evade the purposes of this part.

(d) *Reduced staffing—(1) Contractor determines how many employees.* (i) A contractor or subcontractor shall determine the number of employees necessary for efficient performance of the contract or subcontract and, for bona fide staffing or work assignment reasons, may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Thus, the successor contractor need not offer employment on the contract to all employees on the predecessor contract,

but must offer employment only to the number of eligible employees the successor contractor believes necessary to meet its anticipated staffing pattern, except that:

(ii) Where, in accordance with this authority to employ fewer employees, a successor contractor does not offer employment to all the predecessor contract employees, the obligation to offer employment shall continue for 90 days after the successor contractor's first date of performance on the contract. The contractor's obligation under this part will end when all of the predecessor contract employees have received a bona fide job offer, including stating the time within which the employee must accept such offer, which must be no less than 10 days, or the 90-day window of obligation has expired. The following three examples demonstrate the principle.

(A) A contractor with 18 employment openings and a list of 20 employees from the predecessor contract must continue to offer employment to individuals on the list until 18 of the employees accept the contractor's employment offer or until the remaining employees have rejected the offer. If an employee quits or is terminated from the successor contract within 90 days of the first date of contract performance, the contractor must first offer employment to any remaining eligible employees of the predecessor contract.

(B) A successor contractor originally offers 20 jobs to predecessor contract employees on a contract that had 30 positions under the predecessor contractor. The first 20 predecessor contract employees the successor contractor approaches accept the employment offer. Within a month of commencing work on the contract, the successor determines that it must hire seven additional employees to perform the contract requirements. The first three predecessor contract employees to whom the successor offers employment decline the offer; however, the next four predecessor contract employees accept the offers. In accordance with the provisions of this section, the successor contractor offers employment on the contract to the three remaining predecessor contract employees who all accept; however, two em-

ployees on the contract quit five weeks later. The successor contractor has no further obligation under this part to make a second employment offer to the persons who previously declined an offer of employment on the contract.

(C) A successor contractor reduces staff on a successor contract by two positions from the predecessor contract's staffing pattern. Each predecessor contract employee the successor approaches accepts the employment offer; therefore, employment offers are not made to two predecessor contract employees. The successor contractor terminates an employee five months later. The successor contractor has no obligation to offer employment to the two remaining employees from the predecessor contract, because more than 90 days have passed since the successor contractor's first date of performance on the contract.

(2) *Contractor determines which employees.* The contractor, subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), will determine to which employees it will offer employment. See §9.1(b) regarding compliance with other requirements.

(3) *Changes to staffing pattern.* Where a contractor reduces the number of employees in any occupation on a contract with multiple occupations, resulting in some displacement, the contractor shall scrutinize each employee's qualifications in order to offer positions to the greatest number of predecessor contract employees possible. Example: A successor contract is awarded for a food preparation and services contract with Cook II, Cook I and dishwasher positions. The Cook II position requires a higher level of skill than the Cook I position. The successor contractor reconfigures the staffing pattern on the contract by increasing the number persons employed as a Cook II and Dishwashers but reducing the number of Cook I employees. The successor contractor must examine the qualifications of each Cook I to see if a position as either a Cook II or Dishwasher is possible. Conversely, were the contractor to increase the number of Cook I employees, decrease the number of Cook II employees, and keep the

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same number of Dishwashers the contractor would generally be able offer Cook I positions to some Cook II employees, because the Cook II performs a higher level occupation. The contractor would also need to consider whether offering Dishwasher positions to Cook I employees would result in less overall displacement. Finally, should some Dishwashers decline the employment offer, the Contractor would need to consider the qualifications of the Cooks at both levels and offer positions on the contract in a way that results in the least displacement.

(e) *Contractor obligations near end of contract performance.* (1) Certified list of employees provided 30 days before contract completion. 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 list shall also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Assuming there are no changes to the workforce before the contract is completed, the contractor may use the list submitted, or to be submitted, to satisfy the requirements of the contract clause specified at 29 CFR 4.6(1)(2) to meet this provision.

(2) Certified list of employees provided 10 days before contract completion. Where changes to the workforce are made after the submission of the certified list described in paragraph (e)(1) of this section, the contractor shall, not less than 10 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 employed within the last month of contract performance. The 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. The contractor may use

the list submitted to satisfy the requirements of the contract clause specified at 29 CFR 4.6(1)(2) to meet this provision.

(f) *Recordkeeping—(1) Form of records.* This part prescribes no particular order or form of records for contractors. A contractor may use records developed for any purpose to satisfy the requirements of this part, provided the records otherwise meet the requirements and purposes of this part and are fully accessible. The requirements of this part shall apply to all records regardless of their format (*e.g.*, paper or electronic).

(2) *Records to be retained.* (i) The contractor shall maintain 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.

(ii) The contractor shall maintain a copy of any record that forms the basis for any exclusion or exemption claimed under this part.

(iii) The contractor shall maintain a copy of the employee list received from the contracting agency. *See* paragraph (e) of this section, contractor obligations near end of contract.

(iv) Every contractor who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to §9.24(b) of this part, shall:

(A) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(B) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and

(1) Preserve a copy as part of the records,

(2) Deliver a copy to the employee, and

(3) 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.

(3) *Records retention period.* The contractor shall retain records prescribed by section §9.12(f)(2) of this part for not less than a period of three years from the date the records were created.

(4) *Disclosure.* The contractor must provide copies of such documentation upon request of any authorized representative of the contracting agency or Department of Labor.

(g) *Investigations.* The contractor shall cooperate in any review or investigation conducted pursuant to this part and shall not interfere with the investigation or intimidate, blacklist, discharge, or in any other manner discriminate against any person because such person has cooperated in an investigation or proceeding under this part or has attempted to exercise any rights afforded under this part. This obligation to cooperate with investigations is not limited to investigations of the contractor's own actions, but also includes investigations related to other contractors (*e.g.*, predecessor and subsequent contractors) and subcontractors.

Subpart C—Enforcement

§ 9.21 Complaints.

With Wage and Hour Division. Any employee(s) or authorized employee representative(s) of the predecessor contractor who believes the successor contractor has violated this part may file a complaint with the Wage and Hour Division within 120 days from the first date of contract performance. The employee may file a complaint directly with the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

§ 9.22 Wage and Hour Division conciliation.

After obtaining information regarding alleged violations, the Wage and Hour Division may contact the successor contractor about the complaint and attempt to conciliate and reach a resolution that is consistent with the requirements of this part and is accept-

able to both the complainant(s) and the successor contractor.

§ 9.23 Wage and Hour Division investigation.

(a) *Initial investigation.* The Administrator may initiate an investigation under this part either as the result of the unsuccessful conciliation of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may inspect the records of the predecessor and successor contractors (and make copies or transcriptions thereof), question the predecessor and successor contractors and any employees of these contractors, and require the production of any documentary or other evidence deemed necessary to determine whether a violation of this part (including conduct warranting imposition of ineligibility sanctions pursuant to §9.24(d) of this part) has occurred.

(b) *Subsequent investigations.* The Administrator may conduct a new investigation or issue a new determination if the Administrator concludes circumstances warrant, such as where the proceedings before an Administrative Law Judge reveal that there may have been violations with respect to other employees of the contractor, where imposition of ineligibility sanctions is appropriate, or where the contractor has failed to comply with an order of the Secretary.

§ 9.24 Remedies and sanctions for violations of this part.

(a) *Authority.* Executive Order 13495 provides that the Secretary shall have the authority to issue orders prescribing appropriate remedies, including, but not limited to, requiring the contractor to offer employment, in positions for which the employees are qualified, to employees from the predecessor contract and the payment of wages lost.

(b) *Unpaid wages or other relief due.* In addition to satisfying any costs imposed under §9.34(j) or §9.35(d) of this part, a contractor who violates any provision of this part shall take appropriate action to abate the violation, which may include hiring each affected employee in a position on the contract