

**DEPARTMENT OF LABOR****Wage and Hour Division****29 CFR Part 9****RIN 1235-AA42****Nondisplacement of Qualified Workers Under Service Contracts****AGENCY:** Wage and Hour Division, Department of Labor.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Labor (Department) proposes regulations to implement Executive Order 14055, Nondisplacement of Qualified Workers Under Service Contracts, signed by President Joseph R. Biden, Jr. on November 18, 2021. The order establishes a general policy of the Federal Government that service contracts which succeed contracts for the same or similar services, and solicitations for such contracts, shall include a non-displacement clause. The non-displacement clause requires the contractor and its subcontractors to offer qualified employees employed under the predecessor contract a right of first refusal of employment under the successor contract. The Executive order also directs the Secretary of Labor (Secretary) to issue regulations to implement the requirements of this order. The order further directs that within 60 days of the Secretary issuing final regulations, the Federal Acquisition Regulatory Council (FAR Council) shall amend the Federal Acquisition Regulation (FAR) to provide for inclusion of the clause in section 3 of the order. Finally, the order requires the Director of the Office of Management and Budget (OMB) to issue guidance to implement section 6(c) of this order.

**DATES:** Interested persons are invited to submit written comments on this notice of proposed rulemaking (NPRM) on or before August 15, 2022.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA42, by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Address written submissions to: Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

*Instructions:* Please submit only one copy of your comments by only one

method. Of the two methods, the Department strongly recommends that commenters submit their comments electronically via <https://www.regulations.gov> to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. All comments must be received by 11:59 p.m. ET on August 15, 2022, for consideration in this rulemaking; comments received after the comment period closes will not be considered.

Commenters submitting file attachments on <https://www.regulations.gov> are advised that uploading text-recognized documents—i.e., documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. This recommendation applies particularly to mass comment submissions, when a single sponsoring individual or organization submits multiple comments on behalf of members or other affiliated third parties. The Wage and Hour Division (WHD) posts such comments as a group under a single document ID number on <https://www.regulations.gov>.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. Accordingly, the Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM.

*Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the

nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/local-offices> for a nationwide listing of WHD district and area offices.

**SUPPLEMENTARY INFORMATION:****I. Background**

On November 18, 2021, President Joseph R. Biden, Jr. issued Executive Order 14055, "Nondisplacement of Qualified Workers Under Service Contracts." 86 FR 66397 (Nov. 23, 2021). This order explains 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." *Id.* Accordingly, Executive Order 14055 provides that contractors and subcontractors performing on covered Federal service contracts must in good faith offer service employees employed under the predecessor contract a right of first refusal of employment. *Id.*

Section 1 of Executive Order 14055 sets forth a general policy of the Federal Government 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. 86 FR 66397. Using a carryover workforce reduces disruption in the delivery of services during the period of transition between contractors, maintains physical and information security, and provides the Federal Government with the benefits of an experienced and well-trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. *Id.* Section 1 explains that these same benefits are also often realized when a successor contractor or subcontractor performs the same or similar contract work at the same location where the predecessor contract was performed. *Id.*

Section 2 of Executive Order 14055 defines "service contract" or "contract" to mean any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, (SCA) and its implementing regulations. 86 FR 66397. Section 2 also

defines “employee” to mean a service employee as defined in the SCA, 41 U.S.C. 6701(3). *See* 86 FR 66397. Finally, section 2 defines “agency” to mean an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 *et seq.* *See* 86 FR 66397 (citing 40 U.S.C. 102(4)(A)).

Section 3 of Executive Order 14055 provides the wording for a required contract clause that each agency must, to the extent permitted by law, include in solicitations for service contracts and subcontracts that succeed a contract for performance of the same or similar work. 86 FR 66397–98. Specifically, the contract clause provides that the contractor and its subcontractors must, except as otherwise provided in the clause, in good faith offer service employees, as defined in the SCA, employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award of the contract or the expiration of the predecessor contract under which the employees were hired, a right of first refusal of employment under the contract in positions for which those employees are qualified. *Id.* at 66397. The contractor and its subcontractors determine the number of employees necessary for efficient performance of the contract and may elect to employ more or fewer employees than the predecessor contractor employed in connection with performance of the work. *Id.* Except as otherwise provided by the contract clause, there is to be no employment opening under the contract or subcontract, and the contractor and any subcontractors may not offer employment under the contract to any employee prior to having complied fully with the obligation to offer employment to employees on the predecessor contract. *Id.* The contractor and its subcontractors must make an express offer of employment to each employee and must state the time within which the employee must accept such offer, and an employee must be provided at least 10 business days to accept the offer of employment. *Id.* at 66397–98.

The contract clause also provides that, notwithstanding the obligation to offer employment to employees on the predecessor contract, the contractor and any subcontractors (1) 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 SCA and (2) are not required to offer a right of first refusal to any employee(s)

of the predecessor contractor for whom the 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(s). 86 FR 66398.

The contract clause also provides that a contractor must, not fewer than 10 business days before the earlier of the completion of the contract or of its work on the contract, furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance. 86 FR 66398. The list must also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. *Id.* The contracting officer must provide the list to the successor contractor, and the list must be provided on request to employees or their representatives, consistent with the Privacy Act and other applicable law. *Id.* The contract clause further provides that if it is determined, pursuant to regulations issued by the Secretary of Labor, that the contractor or its subcontractors are not in compliance with the requirements of the contract clause or any regulation or order of the Secretary of Labor, the Secretary may impose appropriate sanctions against the contractor or its subcontractors, as provided in the Executive order, the regulations, and relevant orders of the Secretary, or as otherwise provided by law. *Id.*

The contract clause also provides that in every subcontract entered into in order to perform services under the contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of the clause in the prime contract with respect to the employees of a predecessor subcontractor or subcontractors working under the contract, as well as of a predecessor contractor and its subcontractors. *Id.* The subcontract must also include provisions to ensure that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with the prime contractor’s requirements. *Id.* The contractor must also take action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing these 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 enter into the litigation to protect the interests of the United States. *Id.* Finally, the contract clause states that nothing in the order must be construed to require or recommend that agencies, contractors, or subcontractors pay the relocation costs of employees who exercise their right to work for a successor contractor or subcontractor pursuant to the Executive order. *Id.*

Section 4 of Executive Order 14055 provides that when an agency prepares a solicitation for a service contract that succeeds a contract for performance of the same or similar work, the agency will consider whether performance of the work in the same locality or localities in which the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services. 86 FR 66398. If an agency determines that performance of the contract in the same locality or localities is reasonably necessary to ensure economical and efficient provision of services, section 4 requires the agency, to the extent consistent with law, to include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities. 86 FR 66399.

Section 5 of Executive Order 14055 provides exclusions. Specifically, section 5 provides that the order does not apply to (a) contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134 (*i.e.*, currently contracts less than \$250,000); and (b) 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 the order. 86 FR 66399.

Section 6 of Executive Order 14055 authorizes a senior official of an agency to grant an exception from the requirements of section 3 of the order for a particular contract under certain circumstances. In order to grant an exception from the requirements of section 3 of the order, the senior official must, by no later than the solicitation date, provide a specific written explanation of why at least one of the following circumstances exists with respect to the contract: (i) adhering to the requirements of section 3 would not advance the Federal Government’s interests in achieving economy and efficiency in Federal procurement; (ii) based on a market analysis, adhering to the requirements of section 3 of the order would: (A) substantially reduce

the number of potential bidders so as to frustrate full and open competition; and (B) not be reasonably tailored to the agency's needs for the contract; or (iii) adhering to the requirements of section 3 would otherwise be inconsistent with Federal statutes, regulations, Executive Orders, or Presidential Memoranda. 86 FR 66399. The order also requires each agency to publish descriptions of the exceptions it has granted on a centralized public website, and any contractor granted an exception to provide written notice to affected workers and their collective bargaining representatives. *Id.* In addition, the Executive order requires each agency to report to OMB any exceptions granted on a quarterly basis. *Id.*

Section 7 of Executive Order 14055 provides that, consistent with applicable law, the Secretary will issue final regulations to implement the requirements of the order. 86 FR 66399. In addition, to the extent consistent with law, the FAR Council is to amend the FAR to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to the order. *Id.* Additionally, the Director of OMB must, to the extent consistent with law, issue guidance to implement section 6(c) of the order, requiring each agency to report to OMB any exceptions granted on a quarterly basis. *Id.*

Section 8 of Executive Order 14055 assigns responsibility for investigating and obtaining compliance with the order to the Department. 86 FR 66399. This section authorizes the Department to issue final orders in such proceedings prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. *Id.* The Department may also provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of the Executive order or its implementing regulations, the contractor or subcontractor, its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, may be ineligible to be awarded any contract of the United States for a period of up to 3 years. 86 FR 66399–66400. Neither an order for debarment of any contractor or subcontractor from further Federal Government contracts nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors is to be carried out without affording the contractor or subcontractor an opportunity to present information and argument in opposition to the proposed debarment or inclusion on the list. 86 FR 66400. Section 8 also

specifies that Executive Order 14055 creates no rights under the Contract Disputes Act, and that disputes regarding the requirements of the contract clause prescribed by section 3 of the order, to the extent permitted by law, will be disposed of only as provided by the Department in regulations issued under the order. *Id.*

Section 9 of Executive Order 14055 revokes Executive Order 13897 of October 31, 2019, which itself rescinded Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts. 86 FR 66400. *See also* 84 FR 59709 (Nov. 5, 2019); 74 FR 6103 (Jan. 30, 2009). It also explains that Executive Order 13495 remains rescinded. 86 FR 66400.

Section 10 of Executive Order 14055 provides that if any provision of the order, or the application of any provision of the order to any person or circumstance, is held to be invalid, the remainder of the order and its application to any other person or circumstance will not be affected. 86 FR 66400.

Section 11 of Executive Order 14055 provides that the order is effective immediately and applies to solicitations issued on or after the effective date of the final regulations issued by the FAR Council under section 7 of the order. 86 FR 66400. For solicitations issued between the date of Executive Order 14055 and the date of the action taken by the FAR Council, or solicitations that were previously issued and were outstanding as of the date of Executive Order 14055, agencies are strongly encouraged, to the extent permitted by law, to include in the relevant solicitation the contract clause described in section 3 of the order. *Id.*

Section 12 of Executive Order 14055 specifies that nothing in the order is to be construed to impair or otherwise affect the authority granted by law to an executive department or agency, or the head thereof, or the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals. 86 FR 66400. In addition, the order is to be implemented consistent with applicable law and subject to the availability of appropriations. The order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities; its officers, employees, or agents; or any other person. 86 FR 66401.

#### *Prior Relevant Executive Orders*

As indicated, section 9 of Executive Order 14055 revoked Executive Order

13897, which itself rescinded Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. On August 29, 2011, after engaging in notice-and-comment rulemaking, the Department promulgated regulations, 29 CFR part 9 (76 FR 53720), to implement Executive Order 13495, and per Executive Order 13897, rescinded them in a Notice published in the **Federal Register** on January 31, 2020 (85 FR 5567).

Executive Order 14055 is very similar to Executive Order 13495, but there are a few notable differences. For example, Executive Order 14055 requires that the contractor give an employee at least 10 business days to accept an employment offer, whereas Executive Order 13495 only required 10 calendar days. 86 FR 66398, 74 FR 6104. Similarly, Executive Order 14055 requires that the contractor must provide the contracting officer a certified list of the names of all service employees working under the contract during the last month of contract performance at least 10 business days before contract completion, whereas Executive Order 13495 only required 10 calendar days. *Id.* Executive Order 13495 required that performance of the work be at the same location for the order's requirements to apply to the successor contract, whereas Executive Order 14055 does not include a requirement that the successor contract be performed at the same location as the predecessor contract. Further, Executive Order 14055 directs an agency to consider, when preparing a solicitation for a service contract that succeeds a contract for performance of the same or similar work, whether performance of the contract in the same locality is reasonably necessary to ensure economical and efficient provision of services. If an agency determines that performance of the contract in the same locality or localities is reasonably necessary to ensure economical and efficient provision of services, then the agency will, to the extent consistent with law, include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality.

Executive Order 14055 also differs from Executive Order 13495 in its provisions regarding a contracting agency's authority to grant an exception from the requirements of the order for a particular contract. Specifically, section 6 of Executive Order 14055 provides that a senior official within an agency may except a particular contract from the requirements of section 3 of the order by, no later than the solicitation date, providing a specific written explanation of why at least one of the

particular circumstances enumerated in the order exists with respect to that contract that would warrant exception from the requirements of the order. 86 FR 66399. It also requires agencies to publish descriptions of each exception on a centralized public website and report exceptions to OMB on a quarterly basis. *Id.* Finally, agencies are required to ensure that the incumbent contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception. *Id.* In contrast, Executive Order 13495 provided that if the head of a contracting department or agency found that the application of any of the requirements of the order would not serve the purposes of the order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency could exempt its department or agency from the requirements of any or all of the provisions of the order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders. 74 FR 6104.

## II. Discussion of Proposed Rule

### A. Legal Authority

President Biden issued Executive Order 14055 pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Procurement Act, 40 U.S.C. 101 *et seq.* 86 FR 66397. The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 14055 directs the Secretary to issue regulations to "implement the requirements of this order." 86 FR 66399. The Secretary has delegated his authority to promulgate these types of regulations to the Administrator of the WHD (Administrator) and to the Deputy Administrator of the WHD if the Administrator position is vacant. Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (published Dec. 24, 2014); Secretary's Order 01–2017 (Jan. 12, 2017), 82 FR 6653 (published Jan. 19, 2017).

### B. Overview of the Proposed Rule

This NPRM, which proposes to amend Title 29 of the CFR by adding part 9, proposes standards and procedures for implementing and

enforcing Executive Order 14055. Proposed subpart A of part 9 relates to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, exclusions, and exceptions that the rule provides pursuant to the Executive order. Proposed subpart B establishes requirements for contracting agencies and contractors to comply with the Executive order. Proposed subpart C specifies standards and procedures related to complaint intake, investigations, and remedies. Proposed subpart D specifies standards and procedures related to administrative enforcement proceedings.

The following section-by-section discussion of this proposed rule presents the contents of each section in more detail. The Department invites comments on the issues addressed in this NPRM.

#### Part 9 Subpart A—General

Proposed subpart A of part 9 pertains to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, exclusions, and exceptions that the rule provides pursuant to the Executive order.

##### Section 9.1 Purpose and Scope

Proposed § 9.1(a) explains that the purpose of the proposed rule is to implement Executive Order 14055. The paragraph emphasizes that the Executive order assigns enforcement responsibility for the nondisplacement requirements to the Department.

Proposed § 9.1(b) explains the underlying policy of Executive Order 14055. First, the paragraph repeats a statement from the Executive order that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor or subcontractor hires the predecessor's employees. The proposed rule elaborates that a carryover workforce minimizes disruption in the delivery of services during a period of transition between contractors, maintains physical and information security, and provides the Federal Government the benefit of an experienced and well-trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. It is for these reasons that the Executive order concludes that requiring successor service contractors and subcontractors performing on Federal contracts to offer a right of first refusal to suitable employment under the contract to service employees under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award

of the successor contract will lead to improved economy and efficiency in Federal procurement.

Proposed § 9.1(b) further explains the general requirement established in section 3 of Executive Order 14055 that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include a clause that requires the contractor and its subcontractors to offer a right of first refusal of employment to service employees employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award of the successor contract in positions for which the employees are qualified. Proposed § 9.1(b) also clarifies that nothing in Executive Order 14055 or part 9 is to be construed to excuse noncompliance with any applicable Executive order, regulation, or law of the United States.

Proposed § 9.1(c) outlines the scope of this proposal and provides that neither Executive Order 14055 nor part 9 creates or changes any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, or any private right of action. The Department does not interpret the Executive order as limiting existing rights under the Contract Disputes Act. The provision also restates the Executive order's directive that disputes regarding the requirements of the contract clause prescribed by the Executive order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Executive order. This paragraph also clarifies that neither the Executive order nor the proposed rule would preclude review of final decisions by the Secretary in accordance with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

##### Section 9.2 Definitions

Proposed § 9.2 defines terms for purposes of this rule implementing Executive Order 14055. Most defined terms follow common applications and are based on either Executive Order 14055 itself or the definitions of relevant terms set forth in the text of related statutes and Executive orders or the implementing regulations for those statutes and orders. The Department notes that, while the proposed definitions discussed in this proposed rule would govern the implementation and enforcement of Executive Order 14055, nothing in the proposed rule is intended to alter the meaning of or to be interpreted inconsistently with the

definitions set forth in the FAR for purposes of that regulation.

Consistent with the definition provided in Executive Order 14055, the Department proposes to define *agency* to mean an executive department or agency, including an independent establishment subject to the Procurement Act. *See* 86 FR 66397. As used in its definition of *agency*, the Department proposes to define executive departments and agencies by adopting the definition of executive agency provided in section 2.101 of the FAR. 48 CFR 2.101. The proposed definition of *agency* therefore would include executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. This proposed definition would include independent regulatory agencies.

The Department proposes to adopt the definition of *Associate Solicitor* in 29 CFR 6.2(b), which means the Associate Solicitor for Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210. Consistent with section 2(a) of the Executive order, the Department proposes to define *contract* or *service contract* to mean any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the SCA and its implementing regulations. 86 FR 66397.

The Department proposes to substantially adopt the definition of *contracting officer* in section 2.101 of the FAR, which means an agency official with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. *See* 48 CFR 2.101.

The Department proposes to define *contractor* to mean any individual or other legal entity that is awarded a Federal Government service contract or subcontract under a Federal Government service contract. The Department notes that, unless the context reflects otherwise, the term *contractor* refers collectively to both a prime contractor and all of its subcontractors of any tier on a service contract with the Federal Government. This proposed definition incorporates relevant aspects of the definitions of the term contractor in section 9.403 of the

FAR, *see* 48 CFR 9.403, and the SCA's regulations at 29 CFR 4.1a(f).

Importantly, the Department notes that the fact that an individual or entity is a *contractor* under the Department's definition does not mean that such an entity has legal obligations under the Executive order. A contractor only has obligations under the Executive order if it has a service contract with the Federal Government that is covered by the order. Thus, an entity that is awarded a service contract with the Federal Government will qualify as a "contractor" pursuant to the Department's definition, but that entity will only be subject to the nondisplacement requirements of the Executive order in connection with a particular contract if such contractor is awarded or otherwise enters into a covered contract for the same or similar services as an existing service contract, as described in proposed § 9.3, for a solicitation issued after the effective date of the FAR Council's amendment of the FAR in accordance with section 7(b) of Executive Order 14055.

The Department proposes to define *business day* as Monday through Friday, except Federal holidays declared under 5 U.S.C. 6103 or by executive order.

Consistent with the definition provided in Executive Order 14055, the Department proposes to define *employee* to mean a service employee as defined in the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3). 86 FR 66397. Accordingly, *employee* "means an individual engaged in the performance of" an SCA-covered contract. 41 U.S.C. 6701(3)(A). The term *employee* "includes an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor," and it therefore includes an individual who identified as an independent contractor on the contract. The term "does not include an individual employed in a bona fide executive, administrative, or professional capacity" as those terms are defined in 29 CFR part 541. 41 U.S.C. 6701(3)(B)–(C).

The Department proposes to define *employment opening* to mean any vacancy in a service employee position on the successor contract. This is consistent with the definition of *employment opening* in the regulations that implemented Executive Order 13495.

The Department proposes to define the term *Federal Government* as an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the

Constitution or the laws of the United States. This proposed definition is based on the definition set forth in the regulations that implemented Executive Order 13495. Consistent with that definition and the SCA, the proposed definition of the term *Federal Government* includes nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. *See* 29 CFR 4.107(a). This proposed definition also includes independent agencies because such agencies are subject to the order's requirements. *See* 86 FR 66397. For purposes of Executive Order 14055 and part 9, the Department's proposed definition does not include the District of Columbia or any Territory or possession of the United States.

The Department proposes to define *month* under the Executive order as a period of 30 consecutive calendar days, regardless of the day of the calendar month on which it begins. The Department believes defining the term will clarify how to address partial months and will balance calendar months of different lengths. This is consistent with the definition of *month* in the regulations that implemented Executive Order 13495.

The Department proposes to define *same or similar work* to mean work that is either identical to or has primary characteristics that are alike in substance to work performed on a contract that is being replaced either by the Federal Government or by a prime contractor on a Federal service contract. This would require the work under the successor contract to, at a minimum, share the characteristics essential to the work performed under the predecessor contract. Accordingly, work under a successor contract would not be considered to be *same or similar work* where it only shares characteristics incidental to performance of the contract under the predecessor contract.

The Department proposes to define the term *Service Contract Act* (SCA) to mean the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.*, and its implementing regulations. *See* 29 CFR 4.1a(a).

The Department proposes to define *solicitation* as any request to submit offers, bids, or quotations to the Federal Government. This definition is consistent with the definition of *solicitation* in both the regulations that implemented Executive Order 13495 and in 48 CFR 2.101. The Department broadly interprets the term *solicitation* to apply to both traditional and nontraditional methods of solicitation, including informal requests by the

Federal Government to submit offers or quotations. However, the Department notes that requests for information issued by Federal agencies and informal conversations with Federal workers are not “solicitations” for purposes of the Executive order.

The Department proposes to define the term *United States* as the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. When the term is used in a geographic sense, the Department proposes that the United States means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. The geographic scope component of this proposed definition is derived from the regulations implementing the SCA at 29 CFR 4.112(a) and the SCA’s definition of the term “United States” at 41 U.S.C. 6701(4).

Finally, the Department proposes to adopt the definitions of the terms *Administrative Review Board*, *Administrator*, *Office of Administrative Law Judges*, *Secretary*, and *Wage and Hour Division* set forth in the regulations that implemented Executive Order 13495.

### Section 9.3 Coverage

Proposed § 9.3 addresses the coverage provisions of Executive Order 14055. Proposed § 9.3 explains the scope of the Executive order and its coverage of executive agencies and contracts.

Executive Order 14055 provides that agencies must, to the extent permitted by law, ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include a clause specifying that the successor contractor and its subcontractors must, except as otherwise provided in the order, in good faith offer service employees employed under the predecessor contract and its subcontracts, whose employment would be terminated as a result of the award of the successor contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under the

successor contract in positions for which those employees are qualified. Section 2 states that “service contract” means any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the SCA. Section 2 also defines “agency” to mean an executive department or agency of the Federal Government, including an independent establishment subject to the Procurement Act, 40 U.S.C. 102(4)(A). Section 5 specifies that the order would not apply to contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134.

Proposed § 9.3 would implement these coverage provisions by stating in proposed § 9.3(a) that Executive Order 14055 and part 9 would apply to any contract or solicitation for a contract with an executive department or agency of the Federal Government, provided that: (1) it is a contract for services covered by the SCA; and (2) the prime contract exceeds the simplified acquisition threshold as defined in 41 U.S.C. 134. Proposed § 9.3(b) would require all contracts that satisfy the requirements of proposed § 9.3(a) to contain the contract clause set forth in Appendix A, and all contractors on such contracts to comply, without limitation, with the requirements of paragraphs (e), (f), and (g) of proposed § 9.12. Proposed § 9.3(c) would require all contracts that satisfy the requirements of proposed § 9.3(a) and that also succeed a contract for performance of the same or similar work, to contain the contract clause set forth at Appendix A, and all contractors on such contracts to comply, without limitation, with all the requirements of proposed § 9.12. Several issues relating to the coverage provisions of the Executive order and proposed § 9.3 are discussed below.

### Coverage of Executive Departments and Agencies

Executive Order 14055 would apply to contracts and solicitations for contracts with the Federal Government that meet the requirements of § 9.3. The Department proposes to define Federal Government to include “an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States.” See § 9.2. Consistent with section 2(c) of the Executive order, the Department proposes to define agency as all “[e]xecutive department[s] and agenc[ies], including independent establishment[s] subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A).” As used in its definition of agency, the Department

proposes to define executive departments and agencies by adopting the definition of executive agency provided in section 2.101 of the FAR. 48 CFR 2.101. The proposed rule therefore would interpret the Executive order as applying to contracts entered into by executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. This proposed definition would include independent regulatory agencies.

The plain text of Executive Order 14055 reflects that the order applies to executive departments and agencies, including independent establishments, but only when such establishments are subject to the Procurement Act, 40 U.S.C. 121, *et seq.* Thus, for example, contracts awarded by the U.S. Postal Service would not be covered by the order or part 9 because the U.S. Postal Service is not subject to the Procurement Act. Finally, pursuant to the proposed definition of executive departments and agencies, contracts awarded by the District of Columbia and any Territory or possession of the United States would not be covered by the order.

### Coverage of Contracts

Proposed § 9.3(a) provides that the requirements of the Executive order generally would apply to “any contract or solicitation for a contract with the Federal Government.” Section 2(a) of the Executive order defines contract to mean “any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.*, and its implementing regulations.” The Department proposes to set forth a broadly inclusive definition of the term contract that is consistent with the Executive order and how the term is used in the SCA. Consistent with the definition of the term “contract” in the Restatement (Second) of Contracts, which was in the process of being developed when Congress enacted the SCA, an agreement is a “contract” for SCA purposes if it amounts to “a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.” *In re Cradle of Forestry in Am. Interpretive Ass’n*, No. 99–035, 2001 WL 32813, at \*3 (ARB Mar. 30, 2001) (quoting Restatement (Second) of Contracts

section 1 (Am. L. Inst. 1979)). Licenses, permits, and similar instruments thus may qualify as contracts under the SCA, *id.*, regardless of whether parties typically consider such instruments to be “contracts” and regardless of whether such instruments are characterized as “contracts” for purposes of the specific programs under which they are administered. Given the SCA’s coverage of a such a wide variety of service contracts and its broad definition of covered contracts, *see, e.g., id.*; 29 CFR 4.110, the Department views the term “contract-like instrument” as not expanding the scope of coverage under Executive Order 14055, but rather as simply reinforcing the breadth of contract coverage under the SCA.

Proposed § 9.3(a) also provides that part 9 would apply to “any . . . solicitation for a contract” that meets the requirements of proposed § 9.3(a). The Department proposes to define solicitation in § 9.2 to mean “any request to submit offers, bids, or quotations to the Federal Government.” The Department broadly interprets the term solicitation to apply to both traditional and nontraditional methods of solicitation, including informal requests by the Federal Government to submit offers or quotations. However, requests for information issued by Federal agencies and informal conversations with Federal workers would not be “solicitations” for purposes of the Executive order. If the solicitation is for a contract that would be covered by part 9, then the solicitation would also be covered.

Consistent with section 2(a) of Executive Order 14055, proposed § 9.3(a)(1) clarifies that the contract must be a contract for services covered by the SCA in order to be covered by the Executive order and part 9. The SCA generally applies to every “contract or bid specification for a contract that . . . is made by the Federal Government or the District of Columbia” and that “has as its principal purpose the furnishing of services in the United States through the use of service employees.” 41 U.S.C. 6702(a)(3). The SCA is intended to cover a wide variety of service contracts with the Federal Government, so long as the principal purpose of the contract is to provide services through the use of service employees. *See, e.g.,* 29 CFR 4.130(a). As reflected in the SCA’s regulations, where the principal purpose of the contract with the Federal Government is to provide services through the use of service employees, the contract is covered by the SCA. *See* 29 CFR 4.133(a). Such coverage exists regardless of the direct beneficiary of the services or the source of the funds

from which the contractor is paid for the service and irrespective of whether the contractor performs the work in its own establishment, on a Federal Government installation, or elsewhere. *Id.* Coverage of the SCA, however, does not extend to contracts for services to be performed exclusively by persons who are not service employees, *i.e.*, persons who qualify as bona fide executive, administrative, or professional employees as defined in the Fair Labor Standards Act’s (FLSA) regulations at 29 CFR part 541. Similarly, a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA and thus would not be covered by the Executive order or part 9. *See* 41 U.S.C. 6702(a)(3); 29 CFR 4.113(a) and 4.156; WHD Field Operations Handbook (FOH) ¶¶ 14b05, 14c07.

#### Coverage of Contracts Above the Simplified Acquisition Threshold

Proposed § 9.3(a)(2) provides that a prime contract must exceed the simplified acquisition threshold to be covered by part 9. This is consistent with section 5 of Executive Order 14055, which provides that the order does not apply to contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134. Unlike Executive Order 13495, which excluded “contracts or subcontracts under the simplified acquisition threshold,” section 5 of Executive Order 14055 expressly excludes only “contracts under the simplified acquisition threshold[.]” Accordingly, the Department proposes that all subcontracts for services, regardless of size, would be covered by part 9 if the prime contract meets the coverage requirements of § 9.3. The Department notes, however, that the definitions sections of both Executive Order 13495 and Executive Order 14055 define “contract” to include “contract or subcontract,” which could support a continued exception for subcontracts under the simplified acquisition threshold. For this reason, the Department is seeking comment from the public on the potential impact, including any unintended consequences, of covering subcontracts below the simplified acquisition threshold.

#### Coverage of Successor Contracts

Proposed § 9.3(c) provides requirements that would apply only to contracts that satisfy the requirements of paragraph (a) of proposed § 9.3 and that “succeed at contract for performance of

the same or similar work[.]” (emphasis added). Pursuant to section 1 of Executive Order 14055, this successor contract relationship exists when an existing service contract “expires” and a follow-on contract is awarded. Under the Executive order, the Department views a service contract as expired when the contract ends after a fixed period of time or is terminated. In contrast, when a term of an existing contract is simply extended pursuant to an option clause, and no solicitation is issued for a follow-on contract, the original contract is not considered expired, the extended term of the contract is not a follow-on contract under the Executive order, and the requirements of the order and this part would not apply.

In accordance with the terms of Executive Order 14055, if a contract expires, the Department would consider successor service contracts and subcontracts for performance of the same or similar work, and solicitations for such contracts and subcontracts, to be covered by the order, assuming the successor contracts meet the requirements of proposed § 9.3(a). Thus, for example, when the term of a contract ends and a follow-on contract is awarded as a result of a solicitation, a predecessor-successor relationship would exist for purposes of Executive Order 14055 if the two contracts were for the same or similar work. Similarly, if a contract is terminated, a solicitation for a follow-on contract is issued and the follow-on contract is awarded, a predecessor-successor relationship would exist for purposes of Executive Order 14055, again if the two contracts were for the same or similar work. The identity of the contractor awarded the successor contract would not impact the coverage determination. For example, when a contract expires and the same contractor is awarded the successor contract, the terms of the order and part 9 would apply. Similarly, the successor contract would not need to be awarded by the same contracting agency as the predecessor contract in order to be covered by the Executive order and this part.

#### Coverage of Contracts for Same or Similar Work

Consistent with section 3 of Executive Order 14055, proposed § 9.3(c) would require successor contracts that satisfy the requirements of paragraph (a) of proposed § 9.3 and that are for “performance of the same or similar work” to meet additional requirements of part 9. As explained in the discussion of proposed § 9.2, the Department proposes to define same or similar work



as “work that is either identical to or has primary characteristics that are alike in substance to work performed on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract.” This definition would require the work under the successor contract to, at a minimum, share the characteristics essential to the work to be performed under the predecessor contract. Accordingly, work under a successor contract would not be considered to be same or similar work where it only shares characteristics incidental to performance of the contract under the predecessor contract.

In many instances, determining whether a contract involves the same or similar work as the predecessor contract will be straightforward. For example, when a contract for food service at a Federal building expires and a new contract for food service begins at the same location that requires many of the same job classifications as the predecessor contract, the work on the successor contract would be considered to be “same or similar work.” This would be true even where more limited food services are provided under the successor contract than the predecessor contract, or where work on the successor contract requires additional job classifications that were not required for work under the predecessor contract. In other instances, the particular facts and circumstances may need to be carefully scrutinized in order to determine whether a contract involves the same or similar work as the predecessor contract. For example, when a contract expires, specific requirements from the contract may be broken out and placed in a new contract or combined with requirements from other contracts into a consolidated new contract. In such circumstances, it will be necessary to evaluate the extent to which the prior and new contracts involve the same or similar functions of work and the same or similar job classifications in order to determine whether the prior and new contracts involve the same or similar services. Finally, in some instances, it will be evident that two contracts do not involve the same or similar work. For example, if an SCA-covered contract to operate a gift shop in a Federal building expires, and a new contract is awarded to operate a dry cleaning service in the same physical space as had been occupied by the gift shop, the two contracts would not involve the same or similar work because, even though the place of contract performance would be the same, the nature of the work performed under the contracts, and the

job classifications performing the work, would not be the same or similar.

#### Coverage of Subcontracts

Consistent with sections 2 and 3 of Executive Order 14055, which specify that the nondisplacement requirements apply equally to subcontracts, the Department notes that where a prime contract is covered by the order and part 9, any subcontracts for services are also covered and subject to the requirements of the order and part 9. However, the Executive order does not apply to non-service subcontracts between a subcontractor and a prime contractor for use on a covered Federal contract. For example, a subcontract to supply napkins and utensils to a prime contractor as part of a covered contract to operate a cafeteria in a Federal building is not a covered subcontract for purposes of this order because it is a supply subcontract rather than a subcontract for services.

#### Geographic Scope

The Executive Order and this part would only apply to contracts with the Federal Government requiring performance in whole or in part within the United States, which is defined to mean, when used in a geographic sense, the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. Under this approach—which is consistent with the geographic scope of coverage under the SCA—the Executive order and this part would not apply to contracts with the Federal Government to be performed in their entirety outside the geographical limits of the United States as thus defined. However, if a contract with the Federal Government is to be performed in part within and in part outside these geographical limits and is otherwise covered by the Executive order and this part, the order and this part would apply to the contract and require a right of first refusal for any workers that have performed work inside the geographical limits of the United States as defined. As noted previously, contracts awarded by the District of Columbia or any Territory or possession of the United States would not be covered by the order, as neither the District of Columbia nor any Territory or possession of the United States would constitute an executive department or agency under this part.

#### Section 9.4 Exclusions

Pursuant to section 5(a) of Executive Order 14055, proposed § 9.4(a) addresses the exclusion for contracts under the simplified acquisition threshold, as defined in 41 U.S.C. 134. The simplified acquisition threshold currently is \$250,000. 41 U.S.C. 134. The proposed regulations would omit that amount from the regulatory text in the event that a future statutory amendment changes the amount. Any such change would automatically apply to contracts subject to part 9.

Proposed § 9.4(a)(2) clarifies that the exclusion provision at § 9.4(a)(1) would apply only to prime contracts under the simplified acquisition threshold and that whether a subcontract is excluded from the requirements of part 9 is dependent on the prime contract amount. As discussed above, section 5(a) of Executive Order 14055 excludes only “contracts under the simplified acquisition threshold[.]” This language differs from Executive Order 13495, which excluded “contracts or subcontracts under the simplified acquisition threshold” (emphasis added). Accordingly, proposed § 9.4(a)(2) explains that subcontracts would be excluded under § 9.4(a)(1) only if the prime contract is under the simplified acquisition threshold, but, as explained above, the Department is seeking comment from the public on the potential impact, including any unintended consequences, of covering subcontracts below the simplified acquisition threshold.

Proposed § 9.4(b) would implement the exclusion in section 5(b) of Executive Order 14055 relating to employment where Federal service work constitutes only part of the employee’s job.

Proposed § 9.4 does not include an exclusion for contracts awarded for services produced or provided by persons who are blind or have severe disabilities. Executive Order 14055 diverges from Executive Order 13495 with respect to such contracts. Section 3 of Executive Order 13495 specifically excluded “contracts or subcontracts awarded pursuant to the Javits-Wagner-O’Day Act, 41 U.S.C. 46–48c;” “guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103–329;” and “agreements for vending facilities entered into pursuant to the preference regulations issued under the



Randolph-Sheppard Act, 20 U.S.C. 107[.].” In contrast, section 5 of Executive Order 14055 does not enumerate any such exclusions. Accordingly, proposed § 9.4 does not exclude such contracts from the requirements of part 9.

However, section 12 of Executive Order 14055 expressly provides that nothing in the order should be construed “to impair or otherwise affect . . . the authority granted by law” and directs that the order be “implemented consistent with applicable law.” The applicable law encompassed by these sections includes, for example, the Javits-Wagner-O’Day Act, 41 U.S.C. 8501–8506, section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103–329, and the Randolph-Sheppard Act, 20 U.S.C. 107. Each of these laws establishes requirements for contracts awarded for services produced or provided by persons who are blind or have severe disabilities that may conflict with the requirements of Executive Order 14055 in that these laws may impose hiring requirements that preclude, in whole or in part, offering employment to the employees on the predecessor contract. Where direct legal conflicts squarely exist between the requirements of Executive Order 14055 and the requirements of another statute, regulation, Executive Order, or Presidential Memoranda under the particular factual circumstances of a specific situation, the requirements of this part would not apply. As with any determination to except a particular contract from the application of the nondisplacement requirements, a contracting agency would be obligated to follow the procedures proposed at § 9.5 to support a determination that the requirements of this part do not apply because of a direct legal conflict.

The Department recognizes that contracting agencies award contracts under a wide variety of programs, including those mentioned above, many of which have, by law, specific processes and requirements. The Department understands that some of these requirements may make implementation of the requirements of Executive Order 14055 more challenging under certain programs than others. The Department invites comment on any specific programs with contracting requirements that may conflict with Executive Order 14055 or the provisions of this proposed rule. For example, the Department recognizes that applying the requirements of Executive Order 14055 to some contracts awarded pursuant the

Randolph-Sheppard Act, specifically the Randolph-Sheppard Vending Facility Program (RSVFP), may present certain challenges. The Department invites interested parties to comment on the interaction of the requirements in the proposed rule with the provisions of the Randolph-Sheppard Act.

#### Section 9.5 Exceptions Authorized by Agencies

##### Exceptions Authorized by Agencies

Section 6 of the order provides a procedure for Federal agencies to except particular contracts from the application of the nondisplacement requirements. The Department proposes to implement this procedure through language in § 9.5 of the regulations. Under section 6 of the order, and in proposed § 9.5, an agency would be permitted to grant an exception from the requirements of section 3 of the order (the incorporation of the nondisplacement contract clause) for a particular contract under certain circumstances. The determination must be made no later than the solicitation date for the contract and must include a specific written explanation of why at least one of the qualifying circumstances exists with respect to that contract.

In § 9.5(a), the Department proposes to list the qualifying circumstances for an agency exception based on the agency exceptions provision in section 6(a) of the order. These include (1) where adhering to the requirements of the order or the implementing regulations would not advance the Federal Government’s interests in achieving economy and efficiency in Federal procurement; (2) where based on a market analysis, adhering to the requirements of the order or the implementing regulations would both substantially reduce the number of potential bidders so as to frustrate full and open competition and not be reasonably tailored to the agency’s needs for the contract; or (3) where adhering to the requirements of the order or the implementing regulations would otherwise be inconsistent with statutes, regulations, Executive orders, or Presidential Memoranda.

The Department proposes to interpret section 6(a) of the order as allowing agencies to make exceptions only for prime contracts and not for individual subcontracts. As discussed above, whether a subcontract is covered by the order depends on whether the prime contract is covered. If the prime contract is covered, then the subcontracts under that prime contract will also be covered. If a prime contract is not covered (whether because it does not satisfy an

element of coverage or because an agency has made an exception for that prime contract), then the subcontracts under that prime contract will also not be covered. Under the Department’s interpretation of section 6(a), there would be no mechanism for a prime contract to be covered, but for an agency to exempt individual subcontracts for services under that prime contract.

The Department’s proposed interpretation of section 6(a) follows from a comparison of this section with the agency exemption provision in Executive Order 13495. In Executive Order 13495, the agency exemption provision permitted agencies to exempt “a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.” In Executive Order 14055, however, section 6(a) permits agencies to make exceptions only for “a particular contract.” Accordingly, the proposed regulatory text at § 9.5(a) only provides the authority for agencies to make an exception for “a prime contract.” However, the Department also recognizes that section 2(a) of the order defines the term “contract” as including “subcontract,” which could support an interpretation of section 6(a) as allowing a continued case-by-case exception for subcontracts. For this reason, the Department is seeking comment from the public on the potential impact, including any unintended consequences, of not allowing agency exceptions for particular subcontracts or classes of subcontracts.

Section 6(a) of Executive Order 14055 limits contracting agency exception decisions by requiring that a decision to except a contract must be made by a “senior official” within the agency. The Department interprets “senior official” to mean the senior procurement executive, as defined in 41 U.S.C. 1702(c). Consistent with this interpretation, the Department proposes regulatory text at § 9.5(a) that identifies the senior procurement executive as the senior official who must make an exception decision. Because the order specifically requires the decision to be made by a senior official, the Department concludes that the decision cannot be delegated by the senior procurement executive to a lower-level official. *See* 77 FR 75773 (stating the same non-delegation principle applied to the FAR rule implementing Executive Order 13495).<sup>1</sup>

<sup>1</sup> Section 4 of Executive Order 13495 also included the authority to grant a waiver of that order’s effect but limited the authority to the “head of a contracting department or agency.”

Proposed § 9.5(b) reiterates the procedural requirements that section 6(a) of the order states must be satisfied for an exception to be effective. The proposed language would require that the action to except a contract from some or all of the requirements of the Executive order or the regulations include a specific written explanation of the facts and reasoning supporting the determination. Following the text of section 6(a) of the order, the proposed language in § 9.5(b) would require that this written explanation be issued no later than the solicitation date, which is also the latest date that the action to except a contract may be taken. The proposed language in § 9.5(b) provides that any determination by an agency to exercise its exception authority that is made after the solicitation date or without the specific written explanation would be inoperative. In such a circumstance, the contract clause has been wrongly omitted and the agency would be required to take action consistent with paragraph (f) of § 9.11 of this part.

#### Bases for Agency Exceptions

The Department also proposes to provide additional guidance and requirements applicable to each of the three circumstances in which an agency may make an exception for a particular contract.

Proposed § 9.5(c) would address the provision in section 6(a)(i) of Executive Order 14055 permitting an exception where adhering to the requirements of the order would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. Although the wording differs slightly, the Department interprets this circumstance to be effectively the same as the agency exemption that was included in section 4 of Executive Order 13495, which authorized an exemption where the requirements "would not serve the purposes of [the] order" or "would impair the ability of the Federal Government to procure services on an economical and efficient basis." Both provisions require consideration of whether, in the specific circumstances of the particular contract, economy and efficiency will not be served if the contract clause is incorporated. In 2011, the Department issued detailed regulations to implement the Executive Order 13495 exemption, including factors that could be considered and others that could not be considered. *See* 76 FR 53726–29 (discussion of comments), 53754–55 (regulatory text); *see also* 29 CFR 9.4(d)(4) (2012). Because the exception authorized by

section 6(a)(i) of Executive Order 14055 requires a similar consideration of economy and efficiency, the Department proposes language in § 9.5(c) that would incorporate much of that previous regulatory language.

In § 9.5(c), the Department also proposes to include language stating that the written analysis that accompanies the determination must, among other things, compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce. In addition, the Department proposes to include the requirement that the consideration of cost and other factors in exercising the agency's exception authority must reflect the general findings made in section 1 of the Executive order that the government's procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor's employees, and must specify how the particular circumstances support a contrary conclusion.

In § 9.5(c)(1), the Department proposes to list factors that the contracting agency may consider in making its determination. These factors are the same factors that the Department adopted in the regulations that implemented Executive Order 13495. They would include circumstances where the use of the carryover workforce would greatly increase disruption to the delivery of services during the period of transition between contracts. This might occur where, for example, the entire predecessor workforce would require extensive training to learn new technology or processes that would not be required of a new workforce. They also could include emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees. Finally, they could include situations where the senior official at the contracting agency reasonably believes, based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively, to perform suitably—and it would not be economical or efficient to provide supplemental training to these workers.

The determination that the entire workforce failed cannot be made lightly. A senior agency official that makes such a determination must demonstrate that their belief is reasonable and is based upon reliable evidence that has been provided by a knowledgeable source, such as department or agency officials responsible for monitoring performance under the contract. Absent an ability to

demonstrate that this belief is based upon reliable evidence, such as written credible information provided by such a knowledgeable source, the employees working under the predecessor contract in the last month of performance would be presumed to have performed suitable work on the contract. The head of a contracting agency or department may demonstrate a reasonable belief that an entire workforce, in fact, failed to perform suitably on the predecessor contract through written evidence that all of the employees, collectively and individually, did not perform suitably. Alone, information regarding the general performance of the predecessor contractor is not sufficient to justify an exception. It is also less likely that the agency would be able to make this showing where the predecessor employed a large workforce.

In § 9.5(c)(2), the Department proposes to list factors that the contracting agency may not consider in making an exception determination related to economy and efficiency. These include any general presumptions that directly contravene the purpose and findings of the order, such as any general presumption—without some contract-specific facts—that the use of a carryover workforce would increase (as opposed to decrease) disruption of services during the transition between contracts. While, as described above, contract-specific factors demonstrating a potential for disruption are a potential factor that may be considered, any general presumption as to such disruption would be contrary to and inconsistent with the purpose and findings of the order. Similarly, it would not be permissible to consider hypothetical cost savings that a contractor might attempt to achieve by hiring a workforce with less seniority, given the critical benefits that an experienced contractor workforce provides to the government.

The Department proposes, as it did in the regulations that implemented Executive Order 13495, to preclude agencies from using any potential reconfiguration of the contract workforce by the successor contractor as a factor in supporting an exception. Successor contractors are permitted to reconfigure the staffing pattern to increase the number of employees employed in some positions while decreasing the number of employees in others. In such cases, providing a right of first refusal does not affect the contractor's ability to do so, except that proposed § 9.12(c)(3) would require the contractor to examine the qualifications of each employee so as to minimize displacement. Thus, any potential for

reconfiguration cannot justify excepting the entire contract from coverage.

The Department also proposes, as it did in the regulations that implemented Executive Order 13495, to prohibit any exception decision based solely on the contract performance by the predecessor contractor. This would include the termination of a service contract for default, which, standing alone, would not satisfy the exception standards of section 6(a)(i) of the Executive order. Such defaults, as well as other performance problems not leading to default, may result from poor management decisions of the predecessor contractor that have been addressed by awarding the contract to another entity. Even where contract problems can be traced to specific poor performing service employees, that is not necessarily sufficient to justify invocation of the exception, as, consistent with section 3(a) of the Executive order, the successor contractor can decline to offer the right of first refusal to employees for whom the contractor reasonably believes, based on reliable evidence of the particular employees' past performance, that there would be just cause to discharge the employee.

Finally, the Department limits contracting agencies from considering wage rates and fringe benefit rates of services employees in most circumstances. Minimum wage and fringe benefit rates are set by the SCA and will apply regardless of whether the predecessor workforce is re-hired. Thus, as a general matter, cost savings from a reduction in wage or fringe benefits is not an appropriate basis for making an exception for a contract from the order's requirements. Moreover, even where cost savings may be achieved theoretically by lowering wages and fringe benefits, such savings would be an inappropriate basis alone for an exception from the order because higher wages and benefits allow for the employment of workers with more skills and experience. *Cf.* 48 CFR 52.222–46 (stating, with regard to professional contracts not subject to the SCA, that “[p]rofessional compensation that is unrealistically low or not in reasonable relationship to the various job categories, since it may impair the Contractor’s ability to attract and retain competent professional service employees, may be viewed as evidence of failure to comprehend the complexity of the contract requirements”). While barring the consideration of wage costs in most circumstances, the proposed language in § 9.5(c)(2) would allow such costs to be considered in exceptional circumstances. These exceptional

circumstances would be limited to emergency situations; where the entire workforce would need significant training; or in other similar situations in which the cost of employing a carryover workforce on the successor contract would be prohibitive.

Proposed § 9.5(d) would address the provision in section 6(a)(ii) of Executive Order 14055 providing that an exception may be appropriate where application of the nondisplacement requirements would substantially reduce the number of potential bidders so as to frustrate full and open competition and not be reasonably tailored to the agency’s needs for the contract. The proposed language of § 9.5(d) would clarify that a reduction in the number of potential bidders is not, alone, sufficient to except a contract from coverage under this authority; the senior official at the contracting agency must also find that inclusion of the contract clause would frustrate full and open competition and would not be reasonably tailored to the agency’s needs for the contract. The proposed language states that on finding that inclusion of the contract clause would not be reasonably tailored to the agency’s needs, the agency must specify in its written explanation how it intends to more effectively achieve the benefits that would have been provided by a carryover workforce, including physical and information security and a reduction in disruption of services.

The order, and the proposed regulatory language, requires that any exercise of this authority must be based on a market analysis. As a general matter, during the acquisition process for FAR-covered procurements, an agency must “conduct market research appropriate to the circumstances.” 48 CFR 10.001. Thus, the extent of market research conducted for any acquisition “will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience.” 48 CFR 10.002. The market analysis must be an objective, contemporary, and proactive examination of these factors. To justify the exception from the nondisplacement requirements, the market analysis would have to show that adherence to the requirements would “substantially” reduce the number of potential bidders so as to frustrate full and open competition. The likely reduction in the number of potential offerors indicated by market analysis is not, by itself, sufficient to except a contract from coverage under this authority unless the agency concludes that adhering to the nondisplacement requirements would diminish the number of potential

offerors to such a degree that adequate competition at a fair and reasonable price could not be achieved and adhering to the nondisplacement requirements would not be reasonably tailored to the agency’s needs.

Consistent with section 6(a) of Executive Order 14055, as with any of the exceptions, where an agency seeks to except a particular contract under this competition-related analysis, the agency would be required to provide a “specific written explanation” of why the circumstance exists. Thus, the agency’s market analysis—and consideration of whether the requirements are nonetheless reasonably tailored to its needs—would need to be documented in a manner sufficient to provide and support such an explanation. *See also* 48 CFR 4.801(b) (requiring sufficient documentation in contract files to support actions taken).

Proposed § 9.5(e) would address the provision in section 6(a)(iii) of Executive Order 14055 providing that an exception may be appropriate where adhering to the requirements of the order would otherwise be inconsistent with statutes, regulations, Executive orders, or Presidential Memoranda. In § 9.5(e), the Department proposes to require that contracting agencies consult with the Department prior to excepting contracts on this basis, unless: (1) the governing statute at issue is one for which the contracting agency has regulatory authority, or (2) the Department has already issued guidance finding an exception on the basis of the specific statute, rule, order, or memorandum to be appropriate. The Department proposes this requirement in order to provide consistency, to the extent possible, in the application of the order.

#### Reconsideration of Agency Exceptions

The Department proposes language at § 9.4(f) to provide a procedure for interested parties to request reconsideration of agency exception determinations. This proposed language mirrors the procedure that was included in the regulations that implemented Executive Order 13495. *See* 29 CFR 9.4(d)(5) (2012). In using the term “interested parties,” the Department intends to extend the opportunity to request reconsideration to affected workers or their representatives, in addition to actual or prospective bidders. The Department does not intend that the term be limited to actual or prospective bidders as it is under the Competition in Contracting Act. *See* 31 U.S.C. 3551(2). The Department seeks input from commenters on whether there should be a time limit within

which interested parties would have to request reconsideration, or whether the request for reconsideration instead should just have to be made before the contract is awarded.

#### Notification, Publication, and Reporting of Agency Exceptions

Section 6(b) of the order requires agencies, to the extent permitted by law and consistent with national security and executive branch confidentiality interests, to publish, on a centralized public website, descriptions of the exceptions it has granted under that section, and to ensure that the contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception. Section 6(c) of the order also requires that, on a quarterly basis, each agency must report to the OMB descriptions of the exceptions granted under this section. In § 9.5(g), the Department proposes to include a recitation of these notification, publication, and reporting requirements.

#### Subpart B—Requirements

Proposed subpart B of part 9 establishes the requirements that contracting agencies and contractors will undertake to comply with the nondisplacement provisions.

#### Section 9.11 Contracting Agency Requirements

Proposed § 9.11 would implement section 3 of Executive Order 14055, which directs agencies to ensure that covered contracts and solicitations include the nondisplacement contract clause. The proposed section specifies contracting agency responsibilities to incorporate the nondisplacement contract clause in covered contracts, provide notice to employees on predecessor contracts of their possible right to an offer of employment, and to consider whether performance of the work in the same locality or localities in which a predecessor contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services. The proposed section also specifies contracting agency responsibilities to provide the list of employees on the predecessor contract to the successor, to forward complaints and other pertinent information to WHD when there are allegations of contractor non-compliance with the Executive order and this part, and to retroactively incorporate the contract clause when it was not initially incorporated.

Section 3 of Executive Order 14055 specifies a contract clause that must be

included in solicitations and contracts for services that succeed contracts for the performance of the same or similar work. 86 FR 66397. Proposed § 9.11(a) provides the regulatory requirement to incorporate the contract clause specified in Appendix A in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar work, except for procurement contracts subject to the FAR. For procurement contracts subject to the FAR, contracting agencies will use the clause set forth in the FAR developed to implement this rule; that clause must both accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

Including the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under Executive Order 14055. Therefore, the Department prefers that covered contracts include the contract clause in full. However, the Department notes that there could be instances in which a contracting agency, or a contractor, does not include the entire contract clause verbatim in a covered contract or solicitation for a covered contract, but the facts and circumstances establish that the contracting agency, or contractor, sufficiently apprised a prime or lower-tier contractor that the Executive order and its requirements apply to the contract. In such instances, the Department believes it would be appropriate to find that the full contract clause has been properly incorporated by reference. See *Nat'l Electro-Coatings, Inc. v. Brock*, Case No. C86–2188, 1988 WL 125784 (N.D. Ohio 1988); *In re Progressive Design & Build, Inc.*, WAB Case No. 87–31, 1990 WL 484308 (WAB Feb. 21, 1990). The Department specifically notes that the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that “Executive Order 14055

(Nondisplacement of Qualified Workers Under Service Contracts), and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract,” with a citation to a web page that contains the contract clause in full or to the provision of the Code of Federal Regulations containing the contract clause set forth at Appendix A.

Contract clause paragraphs (a) through (e) of proposed Appendix A repeat the clause in paragraphs (a) through (e) of the Executive Order verbatim, with one exception. The

proposed modification of the contract clause would insert the number of the Executive order, 14055, to replace the blank line that appears in paragraph (d) of the contract clause contained in the order, as its number was not known at the time the President signed the order.

Proposed contract clause paragraph (a) would require the successor contractor and its subcontractors to provide the service employees employed under the predecessor contract (including its subcontracts) the right of first refusal of employment in positions for which the employees are qualified. Proposed contract clause paragraph (b) would create two exceptions to the right of first refusal. One is for employees who are not service employees and the other is for any employee for whom there would be just cause to discharge based on evidence of the particular employee's past performance. Proposed contract clause paragraph (c) would require contractors to furnish the contracting officer with a list of employees that the contracting officer will provide to the successor contractor to ensure the successor contractor has the information necessary to provide the employees with the right of first refusal. Proposed contract clause paragraph (d) provides that the Secretary may pursue sanctions against a contractor for its failure to comply with Executive Order 14055. Proposed contract clause paragraph (e) would require contractors to include provisions in their subcontracts that ensure that each subcontractor will honor the requirements of paragraphs (a) through (c), and require contractors to take any 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.

Proposed Appendix A sets forth additional provisions that are necessary to implement the order. The additional paragraphs would appear in paragraphs (f) through (i) of the contract clause contained in Appendix A to part 9. Specifically, proposed contract clause paragraph (f)(1) provides notice that the contractor must furnish the contracting officer with a certified list of names of all service employees working under the contract (including its subcontracts) at the time the list is submitted. The list must also include 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. Proposed paragraph (f)(1) further explains that if there are changes to the workforce made after the

submission of this certified list, the contractor must, in accordance with proposed paragraph (c), furnish the contracting officer with an updated certified list of all service employees employed within the last month of contract performance, including anniversary dates of employment and dates of separation, if applicable.

Proposed contract clause paragraph (f)(2) provides notice that under certain circumstances the contracting officer will, upon their own action or upon written request of the Administrator, withhold or cause to be withheld as much of the accrued payments due on either the contract or any other contract between the contractor and the Government that the Administrator requests or that the contracting officer decides may be necessary to pay unpaid wages or to provide other appropriate relief due under part 9.

Proposed contract clause paragraph (g) would require the contractor to maintain certain records to demonstrate compliance with the substantive requirements of part 9. This proposed paragraph would enable contractors to understand their obligations and provide a readily accessible list of records that contractors would be required to maintain. The proposed paragraph specifies that the contractor would be required to maintain the particular records (regardless of format, *e.g.*, paper or electronic) for 3 years. The specified records would include 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; a copy of any record that forms the basis for any exclusion or exception claimed under part 9; a copy of the employee list(s) provided to or received from the contracting agency; and, an entry on the pay records for an employee of the amount of any retroactive payment of wages or compensation under the supervision of the WHD Administrator, the period covered by such payment, the date of payment, along with a copy of any receipt form provided by or authorized by WHD. The proposed clause also states that the contractor is to deliver a copy of the receipt form provided by or authorized by WHD to the employee and, as evidence of payment by the contractor, file the original receipt signed by the employee

with the Administrator within 10 business days after payment is made.

Proposed contract clause paragraph (h) would require the contractor, as a condition of the contract award, to cooperate in any investigation by the contracting agency or the Department into possible violations of the provisions of the nondisplacement clause and to make records requested by such official(s) available for inspection, copying, or transcription upon request. Proposed contract clause paragraph (i) provides that disputes concerning the requirements of the nondisplacement clause would not be subject to the general disputes clause of the contract. Instead, such disputes would be resolved in accordance with the procedures in part 9.

Proposed § 9.11(b) specifies that when a contract will be awarded to a successor for the same or similar work, the contracting officer must take steps to ensure that the predecessor contractor provides written notice to service employees employed under the predecessor contract of their possible right to an offer of employment, consistent with the requirements in § 9.12(e)(3).

Proposed § 9.11(c) would implement the location continuity requirements in section 4 of the order. In § 9.11(c)(1), the proposed regulatory language restates the requirement in section 4(a) of the order that, in preparing covered solicitations, contracting agencies “consider whether performance of the work in the same locality or localities in which the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services.” In § 9.11(c)(2), the proposed regulatory language also restates the requirement in section 4(b) of the order, that, if a contracting agency determines that performance in the same locality is reasonably necessary, then the agency must, “to the extent consistent with law, include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities.”

In § 9.11(c)(3), the Department proposes procedural safeguards for the required location continuity determination. The Department proposes to require that agencies complete the location continuity analysis prior to the date of issuance of the solicitation. The Department also proposes to require that any agency determination not to include a location continuity requirement or preference must be made in writing by the agency’s senior procurement executive. The requirement that the determination be

made in writing is consistent with 48 CFR 4.801(b) of the FAR, which requires sufficient documentation in contract files to support actions taken. The Department seeks input from commenters regarding these proposed procedural safeguards and any alternative safeguards that might assist agencies in ensuring that the location continuity determination is carried out as required by the order.

Proposed § 9.11(c)(3) includes safeguards to ensure that interested parties are able to request reconsideration of a determination not to include a location continuity requirement or preference. Where an agency has conducted the location continuity analysis and determined that no such requirement or preference is warranted, the proposed language would require that the agency include a statement to that effect in the solicitation. The statement in the solicitation would assist interested parties by clarifying that the agency conducted the location continuity analysis and determined not to include the requirement or preference, and did not simply fail to conduct the analysis at all. The agency would also be required to ensure that the incumbent contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency’s determination not to include a location continuity requirement or preference and of the workers’ right to request reconsideration. This notification, and the contractor’s confirmation to the agency that the notification has been made, would need to occur within 5 business days after the solicitation is issued. The Department has proposed language in the nondisplacement contract clause set forth in Appendix A that would require contractors to agree to provide this notification. Finally, § 9.11(c)(3) would provide that any request by an interested party for reconsideration of an agency’s decision to include, or not to include, a location continuity requirement or preference must be directed to the head of the contracting department or agency. This provision for requesting reconsideration is similar to the approach the Department proposes with regard to agency exceptions in § 9.5 of the regulations. As in that section, the use of the term “interested parties” is intended to include workers and worker representatives in addition to contractors and prospective bidders. The Department seeks input from commenters on an appropriate time limit within which interested parties

would have to request reconsideration, or whether the request for reconsideration instead should just have to be made before the contract is awarded.

In § 9.11(c)(4), the Department proposes language that restates, in part, the language from section 3(b) of the order, which clarifies that nothing in the order should be interpreted as requiring or recommending that contractors, subcontractors, or contracting agencies must pay relocation costs for employees of predecessor contractors hired pursuant to their exercise of their rights under the order. The Department proposes similar language, directed at contractors and subcontractors specifically, in § 9.12(b)(6).

The location continuity provision in the order and the proposed implementing regulations serve an important purpose. Like Executive Order 13495, Executive Order 14055 reflects that there is a relationship between the effectiveness of the nondisplacement order and the location of a successor contract. In sections 1 and 5 of Executive Order 13495, the order limited coverage only to contracts for similar services at the “same location.” While Executive Order 14055 does not contain a similar limitation to contracts at the “same location,” it contains the provision at section 4 that requires contracting agencies to consider requiring location continuity for all covered contracts.

Executive 14055 also contains additional interrelated provisions governing how the order will apply related to the location of covered contracts. As an initial matter, because there is no “same location” requirement, the order applies regardless of the location of the successor contract. Thus, even if the place of performance for a successor contract will be in a different locality from the predecessor contract, the successor contract would still be required to include the nondisplacement contract clause and the successor contractor would still be required to provide workers on the predecessor contract with a right of first refusal for positions on the new contract. Section 3(b) of the order, however, clarifies that it should not be construed to require or recommend the payment of relocation costs to workers who exercise their right to take a new position under those circumstances.

The central location continuity provisions, in section 1 and section 4 of Executive Order 14055, reflect the basic conclusion that the right of first refusal in the contract clause may have a more limited effect if a contract is moved

beyond commuting distance from the predecessor contract. Section 1 states that location continuity can often provide the same benefits that stem from the core nondisplacement requirement—which, the order explains, includes reducing disruption in the delivery of services between contracts, maintaining physical and information security, and providing experienced and well-trained workforces that are familiar with the Federal Government’s personnel, facilities, and requirements. The benefits of using a carryover workforce and location continuity are intertwined because, for many contracts, moving performance to a different locality will mean that most (or all) of the incumbent contractor’s workers will ultimately not be able or willing to relocate and therefore will not provide a carryover workforce. In such circumstances, imposing a location continuity requirement or preference may be the best way to ensure the effectiveness of Executive Order 14055. For that reason, section 4 of the order requires that for each covered contract, the contracting officer consider whether to include a requirement or preference for location continuity.

In many cases, contracts may already require location continuity for reasons other than those stated in the Executive order. For example, where the services are related to the physical security or maintenance of a specific Federal facility, the location of the contract performance will not be in question. In other circumstances, where the Federal employees who receive services from or provide oversight for the contract at issue are located at a specific Federal facility, location continuity or a related geographic limitation may be appropriate to ensure continuity of services or facilitate site visits to the contractor’s facilities for oversight or collaboration purposes. *See, e.g., Matter of: Novad Mgmt. Consulting, LLC*, B–419194.5 (July 1, 2021) (finding geographic limitation to locate contracted loan services within 50 miles of Tulsa to be appropriate to facilitate oversight and monitoring of contractor facility by agency’s Tulsa office). In still other cases, however, where the place of performance would otherwise be unspecified, a location continuity requirement may be reasonably necessary to secure the economy and efficiency benefits identified by Executive Order 14055.

Executive Order 14055 does not suggest that a location continuity requirement is appropriate in all circumstances. Rather, it instructs contracting agencies to consider whether to impose such a requirement

or preference on a case-by-case basis. In some cases, location continuity may be particularly important because the use of a carryover workforce provides critical benefits. This may be particularly true, for example, where the incumbent workforce on the contract handles classified information or sensitive information, such as personal financial or identifiable information. For such workforces, the contracting agency may have an overriding interest in keeping the contract’s incumbent employees—whose dependability and trust have already been tested—rather than starting over with a new set of contractor employees. In other cases, the contracting agency’s basic interest in a carryover workforce may be outweighed by an agency re-organization that creates different location needs. If, for example, an agency moves the Federal facility that will be providing oversight for the contract from one state to another, it may make sense not to require or prefer location continuity but instead to move the preferred contract locality along with the related Federal facility even if it may have a detrimental effect on contract-employee retention.

Given the order’s requirement that contracting agencies consider these questions, the Department is contemplating whether the proposed regulatory provision at § 9.11(c) should provide additional guidance on the relevant factors that an agency should consider when it is considering location continuity. The Department seeks comment on whether the factors should be provided in the regulatory text, and, if so, which factors to include and whether to provide guidance regarding any particular weight that should be given to each of them. In this regard, the Department notes that the ultimate question here—of economy and efficiency—may also be at issue in the determination of whether a contract should be excepted entirely from the application of the order, as detailed in proposed § 9.5. The location continuity determination thus presents some of the same questions as those exception determinations. For example, given the purpose and policy of the order, to what extent should contracting agencies be required to start with a presumption in favor of location continuity in order to secure the full benefits of the nondisplacement clause on workforce retention? When, if ever, is it appropriate for contracting officers to consider costs—such as the potential to reduce labor costs by moving operations to a lower-cost locality—as a reason to decline to require location continuity? What other factors may weigh in favor

of location continuity? For example, where there have been significant training investments in the incumbent contract workforce, or where the incumbent workforce has been particularly successful in achieving contract objectives? How might the HUBZone program or other procurement-related programs factor into a location continuity analysis? How should an agency weigh the history of remote work or telework by incumbent contractor employees in the importance of location continuity? Are there circumstances in which the contracting agency should indicate in the solicitation that telework is permitted or require the successor contractor to allow workers to telework?

Finally, as discussed further in proposed § 9.5 regarding exceptions authorized by agencies, the Department is proposing regulatory language that would make an exception determination ineffective as a matter of law if the agency does not follow the procedural requirements for such an exception. The Department seeks comment on whether a similar provision is appropriate for addressing agency failures to follow location continuity procedures. The Department also seeks comment on whether the regulations should include specific remedies for workers or sanctions for contractors in the circumstances in which a contractor fails to timely provide the workers or workers' representative the required notice that a contracting agency has determined not to include location continuity requirements or preferences in the solicitation for a successor contract.

Proposed § 9.11(d) would require the contracting officer to provide the predecessor contractor's list of employees referenced in proposed § 9.12(e)(1) to the successor contractor and that, on request, the list will be provided to employees or their representatives, consistent with the Privacy Act, 5 U.S.C. 552a, and other applicable law. The predecessor contractor's list of employees must be provided no later than 21 calendar days prior to the beginning of performance on the contract, and if an updated list is provided by the predecessor contractor pursuant to § 9.12(e)(2), the updated list must be provided within 7 calendar days of the beginning of performance on the contract. However, if the contract is awarded less than 30 days before the beginning of performance, then the predecessor contractor and the contracting agency must transmit the list as soon as practicable.

Although the Department anticipates that contracting officers typically will be

able to provide the successor contractor with the seniority list almost immediately after receiving it from the predecessor contractor, there may be circumstances (such as if the contracting officer has questions about the accuracy of the list) in which the contracting officer needs several days to check or verify the list before transmitting it to the successor contractor. The proposed deadlines set forth in § 9.11(d) take such circumstances into account while also providing specific deadlines by which the seniority list must be transmitted to the successor contractor in order to ensure the successor has sufficient time to provide the workers with the right of first refusal and to ensure continuity of performance on the contract.

Proposed § 9.11(e) addresses contracting officers' responsibilities regarding complaints of alleged violations of part 9. The proposal states that the contracting officer would be responsible for reporting complaint information to the WHD within 15 calendar days of WHD's request for such information. The Department believes 15 calendar days is an appropriate timeframe within which to require production of information necessary to evaluate the complaint. The proposed section elaborates that the contracting officer must provide to WHD any complaint of contractor noncompliance with this part; available statements by the employee or the contractor regarding the alleged violation; evidence that a seniority list was issued by the predecessor and provided to the successor; a copy of the seniority list; evidence that the nondisplacement contract clause was included in the contract or that the contract was excepted by the agency; information concerning known settlement negotiations between the parties (if applicable); and other pertinent information the contracting officer chooses to disclose.

When the nondisplacement contract clause is erroneously excluded from the contract, proposed § 9.11(f) would require a contracting agency to retroactively incorporate the nondisplacement contract clause on its own initiative or within 15 calendar days of notification by an authorized representative from the Department. There may be limited circumstances where only prospective, rather than retroactive, application of the contract clause is warranted. For example, solely prospective relief might be warranted where the contracting officer omitted the clause in good faith because, based on the available information at the time, a predecessor-successor relationship was not evident. Proposed § 9.11(f)

acknowledges this and permits the Administrator, at their discretion, to determine that the circumstances warrant prospective, rather than retroactive, incorporation of the contract clause. The requirements for successor contractors on how to proceed when the nondisplacement clause is retroactively incorporated into a contract after the successor contractor already has begun performance on the contract are detailed in § 9.12(b)(8). If the erroneous omission of the contract clause from a solicitation is discovered before contract award, proposed § 9.11(f) would also require the contracting agency to amend the solicitation.

#### Section 9.12 Contractor Requirements and Prerogatives

Proposed § 9.12 would implement contractors' requirements and prerogatives under the nondisplacement requirements. The proposed section would consist of the general obligation to offer employment, the method of the job offer, exceptions, reduced staffing, obligations near the end of the contract, recordkeeping, and obligations to cooperate with reviews and investigations.

Proposed § 9.12(a)(1) would implement the requirement that the successor contractor and any subcontractors offer employment to the employees on the predecessor contract prior to filling employment openings. Specifically, the proposal provides that, except as provided under the exclusion listed in proposed § 9.4(b) or the exceptions listed in paragraph (c) of proposed § 9.12, a successor contractor or subcontractor must not fill any employment openings under the contract prior to making good faith offers of employment, 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. Because the term *employee* "includes an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor," the obligation to make good faith offers of employment extends to independent contractor service employees performing work under the predecessor contract. In making such an offer, a successor contractor may hire as an employee a worker who was an independent contractor under the predecessor contract. To the extent necessary to meet its anticipated staffing pattern and in accordance with the requirements described at 9.12(d), the



successor contractor and its subcontractors would be required to make a bona fide, express offer of employment to each employee to a position for which the employee is qualified and state the time within which the employee must accept such offer. Although the offer must be for a position for which the employee is qualified, it does not necessarily need to be for the same or similar position as the employee held on the predecessor contract, as discussed in proposed § 9.12(b)(4). In no case may the contractor or subcontractor give an employee fewer than 10 business days to consider and accept the offer of employment.

Proposed § 9.12(a)(2) would clarify that the successor contractor's obligation to offer a right of first refusal exists even if the successor contractor were not provided a list of the predecessor contractor's employees or if the list did not contain the names of all employees employed during the final month of contract performance.

Proposed § 9.12(a)(3) discusses how a successor contractor should determine employee eligibility for a job offer. Under this proposal, an employee would be entitled to a job offer if the employee's name is included on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance. In addition, a successor contractor would also be required to accept other reliable evidence of an employee's entitlement to a job offer. The successor contractor would be allowed to verify the information as a condition of accepting it. For example, even if an employee'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. Similarly, an employee could demonstrate eligibility by producing a paycheck stub that identifies the work location and dates worked for the predecessor or that otherwise reflects that the employee worked on the predecessor contract during the last month of performance. The successor contractor could verify the claim with the contracting agency, the predecessor, or another person who worked at the facility, though if the successor contractor is unable to verify the claim, the paycheck stub would be considered sufficient to demonstrate eligibility absent evidence from the

predecessor employer indicating otherwise.

Proposed § 9.12(a)(4) proposes to clarify that contractors and subcontractors have an affirmative obligation to ensure that any covered contracts they hold contain the contract clause. The contractor or subcontractor must notify the contracting officer as soon as possible if the contracting officer did not incorporate the required contract clause into a covered contract.

Proposed § 9.12(b) discusses the method of the job offer. Proposed § 9.12(b)(1) would require that, except as otherwise provided in part 9, 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 employee. To determine whether an employee is entitled to a bona fide, express offer of employment, a contractor may consider the exceptions set forth in proposed § 9.12(c) and the conditions detailed in § 9.12(d). Proposed § 9.12(b)(1) would clarify that a contractor may only use employment screening processes, such as drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms under certain circumstances. These employment screening processes may only be used when they are specifically provided for by the contracting agency, are conditions of the service contract, and are consistent with Executive Order 14055 and applicable local, state, and Federal laws. Proposed § 9.12(b)(1) also would clarify that while the results of such screenings may show that an employee is unqualified for a position and thus not entitled to an offer of employment, a contractor may not use the requirement of an employment screening process by itself to conclude an employee is unqualified because they have not yet completed that screening process. For example, a successor contractor that requires all employees to undergo a background check cannot deem predecessor employees unqualified solely because they have not completed the specific background check the successor contractor requires before receiving a job offer.

Proposed § 9.12(b)(2) discusses the time limit in which the employee has a right to accept the offer, which the contractor determines, but which in no case can be fewer than 10 business days. The obligation to offer employment to a particular employee would cease upon the employee's first refusal of a bona fide offer to employment on the contract.

Proposed § 9.12(b)(3) provides the process for making the job offer. As

proposed, the successor contractor would be required to make a specific oral or written employment offer to each employee. An invitation to apply for a job, for example, is not a bona fide offer. In order to ensure that the offer is effectively communicated, the successor contractor must take reasonable efforts to make the offer in a language that each worker understands. The proposed rule contains an example of how if the successor contractor holds a meeting for a group of employees on the predecessor contract, it could satisfy this provision by having a co-worker or other person translate for employees who are not fluent in English. Where offers are not made in person, the offers should be sent by registered or certified mail to the employees' last known address or by any other means normally ensuring delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier or express delivery services, or by personal service to the last known address.

Proposed § 9.12(b)(4) would clarify that the employment offer may be for a different job position on the contract. More specifically, an offer of employment on the successor's contract would generally be presumed to be a bona fide offer of employment, even if it were not for a position similar to the one the employee previously held, if it were for a position for which the employee were qualified. If a question arises concerning an employee's qualifications, that question would 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 would have to base its decision regarding an employee's qualifications on reliable information provided by a knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. For example, an oral or written outline of job duties or skills used in prior employment, school transcripts, or copies of relevant certificates and diplomas all would be credible information.

Proposed § 9.12(b)(5) would allow for an offer of employment to a position providing different employment terms and conditions than the employee held with the predecessor contractor, provided the offer is still bona fide, *i.e.*, the different employment terms and conditions are not offered to discourage the employee from accepting the offer. This would include changes to pay or benefits. The Department also proposes

language in § 9.12(b)(5) that addresses how this principle would apply to telework or remote work. If a successor contractor places limitations on telework or remote work for predecessor employees that it does not consistently place on other, similarly situated workers, that may reflect that those limitations are intended to cause the predecessor employees to refuse the offer. Therefore, such a difference likely would be impermissible under the order. Accordingly, under this proposed language, where the successor contractor has had or will have any employees who work or will work entirely in a remote capacity, and the successor contractor has employment openings on the successor contract in the same or similar occupational classifications as the positions held by those successor employees, the successor contractor's employment offer to qualified predecessor employees for such openings must include the option of remote work under terms and conditions that are reasonably similar to those afforded to the other employees of the successor contractor. Such employment, where it is permitted on a successor contract and is consistent with security and privacy requirements, would generally assist with workforce carryover even in circumstances where the location of contract performance is changing.

In § 9.12(b)(6), the Department proposes to repeat, in part, the statement in section 3(b) of Executive Order 14055 that nothing in the order should be interpreted as requiring or recommending that contractors, subcontractors, or contracting agencies must pay relocation costs for employees of predecessor contractors hired pursuant to their exercise of their rights under the order. The Department proposes similar language, directed at contracting agencies specifically, in § 9.11(c)(3). The Department notes that this language does not forbid the voluntary payment of relocation expenses or the payment of any such expenses if they are otherwise required by contract or law. Proposed § 9.12(b)(7) would provide that, 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 would be closely examined to determine whether the offer was bona fide.

Proposed § 9.12(b)(8) would provide requirements for successor contractors for proceeding when the contracting agency retroactively incorporates the nondisplacement clause into a contract after the successor contractor has

already begun performance on the contract. Pursuant to proposed § 9.11(f), when the nondisplacement contract clause has been erroneously excluded from a contract, contracting agencies would be required to retroactively incorporate it. Upon retroactive incorporation, the successor contractor would be required to offer a right of first refusal of employment to the employees on the predecessor contract in accordance with the requirements of Executive Order 14055 and this part. Consistent with proposed § 9.11(f), proposed § 9.12(b)(8) acknowledges that the Administrator may exercise their discretion and require only prospective application of the contract clause in certain circumstances. In such cases, the successor contractor and its subcontractors would be required to provide employees on the predecessor contract a right of first refusal for any positions that remain open. In the event of a vacancy within 90 calendar days of the first date of contract performance, under proposed § 9.12(b)(8), the successor contractor and its subcontractors would be required to provide the employees under the predecessor contract the right of first refusal as well, regardless of whether incorporation of the contract clause is retroactive or prospective. The Department believes these requirements strike an appropriate balance between the interests of the employees on the predecessor and successor contracts.

Proposed § 9.12(c) addresses the exceptions to the general obligation to offer employment under Executive Order 14055. The exceptions would be included in the contract clause established in section 3 of the Order and are distinct from the exclusions and agency exceptions discussed in proposed § 9.4. The exclusions and agency exceptions specify both certain classes of contracts and certain employees that either would be or may be excluded from the provisions of Executive Order 14055. In contrast, the exceptions in proposed § 9.12(c)—exceptions from the successor contractor's obligation to offer employment on a contract to employees on the predecessor contract prior to making an offer to anyone else—would not relieve the contractor of other requirements of this part (e.g., the obligation near the end of the contract to provide a list of employees who worked on the contract during the last month). Under this proposal, the exceptions in proposed § 9.12(c) would be construed narrowly and the contractor would bear the burden of

proof regarding the applicability of any exception.

Under proposed § 9.12(c)(1), a successor contractor or subcontractor would not be required to offer employment to any employee of the predecessor whom the predecessor contractor will retain. The successor contractor is required to presume that all employees hired to work under a predecessor's Federal service contract would be terminated as a result of the award of the successor contract, unless the successor contractor can demonstrate a reasonable belief to the contrary, based upon reliable information provided by a knowledgeable source, such as the predecessor contractor, the employee, or the contracting agency.

Under proposed § 9.12(c)(2), the successor contractor or subcontractor would not be required to offer employment to any worker on the predecessor contract who is not a service employee. Consistent with the definition of service employee in proposed § 9.2, this exception would apply to a person employed on the predecessor contract in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. The successor contractor would be required to presume that all workers appearing on the list required by § 9.12(e) or who have demonstrated they should have been included on the list were service employees, unless the successor contractor can demonstrate a reasonable belief to the contrary, based upon reliable 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 would not be sufficient for purposes of this exception.

Under proposed § 9.12(c)(3), a successor contractor or subcontractor would not be required to offer employment to any employee on the predecessor contract 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 subcontractors. Again, the successor contractor would be required to presume that there is no just cause to discharge any employees working under the predecessor contract in the last month of performance, unless the successor contractor can demonstrate a reasonable belief to the contrary, based upon reliable evidence provided by a

knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. For example, a successor contractor could demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable 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. Similarly, conclusive evidence that an employee on the predecessor contract engaged in misconduct warranting discharge, such as sexual harassment or serious safety violations, would provide the successor contractor with a reasonable belief that there would be just cause to discharge the employee, even if the predecessor contractor elected to impose discipline rather than discharge the employee. However, evidence that the predecessor contractor took disciplinary action against an employee for poor performance but stopped short of recommending termination would not generally constitute sufficient evidence of just cause to discharge the employee. The determination that this exception applies must be made on an individual basis for each employee. Information regarding the general performance of the predecessor contractor or any subcontractors, or their respective workforces, would not be sufficient for purposes of this exception. The Department is seeking comment on whether there are other instances that would constitute just cause to discharge an employee that the Department should take into consideration to support the policy laid out in the Executive Order.

Under proposed § 9.12(c)(4), a successor contractor or subcontractor would not be required to offer employment to a service employee that provided services under both 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. The successor contractor would be required to presume that all employees hired to work under a predecessor's Federal service contract did not work on one or more nonfederal service contracts as part of a single job, unless the successor could demonstrate a reasonable belief to the contrary, based upon reliable evidence provided by a knowledgeable source, such as the predecessor contractor, the local supervisor, the

employee, or the contracting agency. In making such a reasonable determination, the successor must also reasonably determine that the predecessor did not deploy workers to both Federal and non-federal contractors purposely to evade the requirements of this part. Information regarding the general business practices of the predecessor contractor or the industry would not be sufficient for purposes of this exception. Knowledge that contractors generally deploy workers to both Federal and other clients would not be sufficient for the successor to claim the exception, because such general practices may not have been observed on the particular predecessor contract.

For example, claims from several employees who state a janitorial contractor reassigned its janitorial workers who previously worked exclusively in a Federal building to both Federal and other clients as part of a single job may indicate that the predecessor deployed workers to avoid the purposes of the nondisplacement provisions, which include Federal interests in economy and efficiency that would be served when the successor hires the predecessor's employees. Conversely, where the employees on the predecessor contract were traditionally deployed to Federal and nonfederal service work as part of their job, the successor would not be required to offer employment to the workers.

Proposed § 9.12(d) addresses the provision in paragraph (a) of Executive Order 14055's contract clause that allows the successor contractor to reduce staffing. Proposed § 9.12(d)(1) recognizes that the contractor or subcontractor may determine the number of employees necessary for efficient performance of the contract and, for bona fide staffing or work assignment reasons, permits the successor contractor or subcontractor to elect to employ fewer employees than the predecessor contractor employed in performance of the work. Thus, generally, the successor contractor or subcontractor would not be required to offer employment on the contract to all employees on the predecessor contract, but must offer employment to the number of eligible employees the successor contractor believes would be necessary to meet its anticipated staffing pattern. However, where a successor contractor does not offer employment to all the predecessor contract employees, the obligation to offer employment would continue for 90 calendar days after the successor contractor's first date of performance on the contract. The contractor's obligation under this part

would end either when all of the predecessor contract employees have received a bona fide job offer or when 90 calendar days have passed from the successor contractor's first date of performance on the contract. The proposed regulation provides several examples to demonstrate the principle.

A successor prime contractor may choose to use a different configuration of subcontractors than the predecessor prime contractor, but any change in the number of subcontracts or the scope of work that particular subcontractors perform does not by itself constitute reduced staffing under proposed § 9.12(d) or otherwise alter the requirements of Executive Order 14055 and this part. Consistent with proposed § 9.13, a prime contractor is responsible for ensuring that all qualified service employees working under the predecessor contract (whether they were employed directly by the predecessor prime contractor or by any subcontractors working under the predecessor contract) receive an offer of employment under the successor contract in accordance with the requirements of Executive Order 14055 and this part. Where a prime successor contractor chooses to use subcontractors, the prime contractor is responsible for ensuring that any of its subcontractors and lower-tier subcontractors offer employment to employees employed under the predecessor contract (including the predecessor subcontracts) in accordance with the requirements of Executive Order 14055 and this part. Where a prime successor contractor chooses to use fewer subcontractors than the predecessor prime contractor used, and instead chooses to employ more workers directly, the prime successor contractor must offer direct employment to the number of eligible employees employed under the predecessor contract (including workers employed by predecessor subcontractors) necessary to meet the prime successor contractor's anticipated staffing pattern and as otherwise required by Executive Order 14055 and this part.

Proposed § 9.12(d)(2) acknowledges that in some cases a successor contractor may reconfigure the staffing pattern to increase the number of employees employed in some positions while decreasing the number of employees in others. In such cases, proposed § 9.12(d)(2) would require the successor contractor to examine the qualifications of each employee in order to offer the greatest possible number of predecessor contract employees positions equivalent to those they held under the predecessor contract, thereby

minimizing displacement. The proposed regulation provides examples to demonstrate this principle.

Proposed § 9.12(d)(3) clarifies that subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), the successor contractor may determine to which employees it will offer employment. Consistent with proposed § 9.1(b), this paragraph is not to be construed to excuse noncompliance with any applicable Executive order, regulation, or Federal, state, or local laws. For example, a contractor could not use this provision to justify unlawful discrimination against any worker. While WHD would not make determinations regarding Federal contractors' compliance with nondiscrimination requirements administered by other agencies, a finding by the Department's Office of Federal Contract Compliance Programs, another agency, or by a court that a contractor has unlawfully discriminated against a worker would be considered in determining whether the discriminatory action has also violated the nondisplacement requirements.

Proposed § 9.12(e) specifies an incumbent contractor's obligations near the end of the contract. Proposed § 9.12(e)(1) would require a contractor to, no less than 30 calendar days before completion of the contractor's performance of services on a contract, furnish the contracting officer a list of the names of all service employees under the contract and its subcontracts at that time. This list must also contain the anniversary dates of employment for each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. A service employee is considered employed under the contract if they are in a leave status with the predecessor prime contractor or any of its subcontractors, whether paid or unpaid, and whether for medical or other reasons, during the last month of contract performance. Proposed § 9.12(e)(1) would allow a contractor to satisfy these requirements using the list it submits or that it plans to submit to satisfy the requirements of the SCA contract clause specified at 29 CFR 4.6(l)(2), assuming there are no changes to the workforce before the contract is completed.

Where changes to the workforce are made after the submission of this certified list pursuant to proposed § 9.12(e)(1), proposed § 9.12(e)(2) would require a contractor to furnish the contracting officer a certified list of the names of all service employees working

under the contract and its subcontracts during the last month of contract performance not less than 10 business days before completion of the contract. This list must include the anniversary dates of employment with either the current or predecessor contractors or their subcontractors, and, where applicable, dates of separation of each service employee. The contractor may use the list submitted to satisfy the requirements of the SCA contract clause specified at 29 CFR 4.6(l)(2) to meet this provision.

Proposed § 9.12(e)(3) requires the predecessor contractor to, before contract completion, provide written notice to service employees employed under the predecessor contractor of their possible right to an offer of employment on the successor contract. Such notice must be either posted in a conspicuous place at the worksite or delivered to the employees individually. The text of the proposed notice is set forth in the Appendix B to part 9. The Department intends to translate the notice into several common foreign languages and make the English and translated versions available online in a poster format to allow easy access. Another form with the same information may be used. Proposed § 9.12(e)(3) further explains that where the predecessor contractor's workforce is comprised of a significant portion of workers who are not fluent in English, the notice must be provided in both English and a language in which the employees are fluent. Multiple foreign language notices would be required to be provided where significant portions of the workforce speak different foreign languages and there is no common language. If, for example, a significant portion of a workforce speaks Korean and another significant portion of the same workforce speaks Spanish, then the information must be provided in English, Korean, and Spanish. If there is a question of whether a portion of the workforce is significant and the Department has a poster in the language common to those workers, the notice should be posted in that language. The Department solicits comments on whether it should establish a percentage threshold for determining what constitutes a "significant portion of the workforce."

Proposed § 9.12(f) addresses recordkeeping requirements. Proposed § 9.12(f)(1) clarifies that this part prescribes no particular order or form of records for contractors, and that the recordkeeping requirements apply to all records regardless of their format (e.g., paper or electronic). A contractor would be allowed to use records developed for

any purpose to satisfy the requirements of part 9, provided the records otherwise meet the requirements and purposes of this part.

Proposed § 9.12(f)(2) specifies the records contractors must maintain, including 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. Proposed § 9.12(f)(2) also requires contractors to maintain a copy of any record that forms the basis for any exclusion or exception claimed under this part, the employee list provided to the contracting agency, and the employee list received from the contracting agency. In addition, every contractor that makes retroactive payment of wages or compensation under the supervision of WHD pursuant to proposed § 9.23(b) would be required to record and preserve as an entry in the pay records the amount of such payment to each employee, the period covered by the payment, and the date of payment to each employee, and to report each such payment on a receipt form authorized by WHD. Finally, proposed § 9.12(f)(2) requires contractors to maintain evidence of any notices that they have provided to workers, or workers' collective bargaining representatives, to satisfy the requirements of the order or these regulations. These would include records of notices of the possibility of employment on the successor contract that are required under § 9.12(e)(3) of the regulations; notices of agency exceptions that a contracting agency requires a contractor to provide under § 9.5(g) of the regulations and section 6(b) of the order; and notices that a contracting agency has declined to include location continuity requirements or preferences in a solicitation, pursuant to § 9.11(c)(3) of the regulations. WHD will use the records that are retained pursuant to § 9.12(f)(2) in determining a contractor's compliance and whether debarment is warranted. All contractors must retain the records listed in proposed § 9.12(f)(2) for at least 3 years from the date the records were created and must provide copies of such records upon request of any authorized representative of the contracting agency or the Department.

Proposed § 9.12(g) outlines the contractor's obligations to cooperate

during any investigation to determine compliance with part 9 and to not discriminate against any person because such person has cooperated in an investigation or proceeding under part 9 or has attempted to exercise any rights afforded under part 9. As proposed, this obligation to cooperate with investigations would not be limited to investigations of the contractor's own actions, but would also include investigations related to other contractors (*e.g.*, predecessor and subsequent contractors) and subcontractors.

#### Section 9.13 Subcontracts

Proposed § 9.13(a) discusses the responsibilities and liabilities of prime contractors and subcontractors with respect to subcontractor compliance with the nondisplacement clause. The proposed section would require prime contractors to ensure the inclusion of the nondisplacement clause contained in Appendix A in any subcontracts and would require any subcontractors to include the nondisplacement clause in Appendix A in any lower-tier subcontracts. Requiring that the contract clause be inserted in all subcontracts, including lower-tier subcontracts, notifies subcontractors of their obligation to provide employees the right of first refusal and of the enforcement methods WHD may use when subcontractors are found to be in violation of the Executive order, including the withholding of contract funds.

Proposed § 9.13(a) also clarifies that prime contractors would be responsible for the compliance of any subcontractor or lower-tier subcontractor with the contract clause in Appendix A. In the event of a violation of the contract clause, both the prime contractor and any subcontractor(s) responsible would be held jointly and severally liable. The prime contractors' contractual liability for subcontractor violations would be a strict liability that would not require that the prime contractor knew of or should have known of the subcontractors' violations. The requirements of this proposed section would ensure contractors cannot avoid the requirements of part 9 by subcontracting the work to other contractors. Thus, this section helps to ensure that all covered contractors and subcontractors of any tier are subject to the requirements of Executive Order 14055 and this part, and that employees receive the protections of the order and this part regardless of whether they are employed by the prime contractor or a subcontractor of any tier.

Proposed § 9.13(b) explains a prime contractor's responsibility to a subcontractor's employees when it discontinues the services of a subcontractor at any time during the contract and performs those services itself. Specifically, under this proposed section, the prime contractor must offer employment to qualified employees of the subcontractor who would otherwise be displaced.

#### Subpart C—Enforcement

Section 8 of Executive Order 14055, titled "Enforcement," grants the Secretary "authority to investigate potential violations of, and obtain compliance with, this order." 86 FR 66399. This proposed subpart addresses the process for filing complaints, investigations, and remedies and penalties for violations.

#### Section 9.21 Complaints

The Department proposes a procedure for filing complaints in § 9.21. Section 9.21(a) outlines the procedure to file a complaint with any office of WHD. It additionally provides that a complaint may be filed orally or in writing and that WHD will accept a complaint in any language. Section 9.21(b) states the well-established policy of the Department with respect to confidential sources. *See* 29 CFR 4.191(a); 29 CFR 5.6(a)(5).

#### Section 9.22 Wage and Hour Division Investigation

Proposed § 9.22(a), which outlines WHD's investigative authority, would permit the Administrator to initiate an investigation either as the result of a complaint or at any time on the Administrator's own initiative. As part of the investigation, the Administrator would be able to inspect the relevant records of the relevant contractors (and make copies or transcriptions thereof) as well as interview representatives and employees of those contractors. The Administrator would additionally be able to interview any of the contractors' workers at the worksite during normal work hours and require the production of any documents or other evidence deemed necessary for inspection to determine whether a violation of this part (including conduct warranting imposition of debarment pursuant to § 9.23(d) of this part) has occurred. The section would also require Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations. This section is consistent with WHD's investigative

authority under the acts administered by WHD.

Proposed § 9.22(b) addresses subsequent investigations and allows the Administrator to conduct a new investigation or issue a new determination if the Administrator concludes the circumstances warrant additional action. Situations where additional action may be warranted include, for example, situations where proceedings before an Administrative Law Judge (ALJ) 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.

#### Section 9.23 Remedies and Sanctions for Violations of This Part

Proposed § 9.23 discusses remedies and sanctions for violations of Executive Order 14055 and this part. Proposed § 9.23(a) reiterates the authority granted to the Secretary in section 8 of Executive Order 14055, providing the Secretary the authority to issue orders prescribing appropriate sanctions and remedies, including, but not limited to, requiring the contractor to offer employment to employees from the predecessor contract and payment of wages lost.

Proposed § 9.23(b) provides that, in addition to satisfying any costs imposed by an administrative order under proposed §§ 9.34(j) or 9.35(d), a contractor that violates part 9 would be required to take appropriate action to remedy the violation, which could include hiring the affected employee(s) in a position on the contract for which the employee is qualified, together with compensation (including lost wages and interest) and other terms, conditions, and privileges of that employment. Proposed § 9.23(b) would also require the contractor to pay interest on any underpayment of wages. A payment of interest is consistent with the instruction in section 8 of the Executive order that the Secretary will have the authority to issue final orders prescribing appropriate sanctions and remedies. The payment of interest is an appropriate remedial measure to make a worker fully whole with a back-pay award. The proposed language provides that interest would be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and would be compounded daily. Various OSHA whistleblower regulations use the tax underpayment rate and daily compounding because that accounting best achieves the make-

whole purpose of a back-pay award. See Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule, 80 FR 11865, 11872 (Mar. 5, 2015). The Department believes that a similar approach is warranted in implementing Executive Order 14055.

Proposed § 9.23(c) addresses the withholding of contract funds for non-compliance. Under proposed § 9.23(c)(1), the Administrator may direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld in such amounts as may be necessary to pay unpaid wages or to provide other appropriate relief. Proposed § 9.23(c)(1) permits the cross-withholding of monies due. Cross-withholding is a procedure through which contracting agencies withhold monies due a contractor from contracts other than those on which the alleged violations occurred, and it applies to require withholding regardless of whether the contract on which monies are to be withheld is held by a different agency from the agency that held the contract on which the alleged violations occurred. The provision further provides that where monies are withheld, upon final order of the Secretary that unpaid wages or other monetary relief are due, the Administrator may direct that withheld funds be transferred to the Department for disbursement. Withholding is a long-established remedy for a contractor's failure to fulfill its labor standards obligations under the SCA. The SCA provides for withholding to ensure the availability of monies for the payment of back wages to covered workers when a contractor or subcontractor has failed to pay the full amount of required wages. 29 CFR 4.6(i). The Department believes that withholding will be an important enforcement tool to effectively enforce the requirements of Executive Order 14055.

Proposed § 9.23(c)(2) similarly provides for the suspension of the payment of funds if the contracting officer or the Administrator finds that the predecessor contractor has failed to provide the required list of service employees working under the contract and its subcontracts as required by § 9.12(e). Proposed § 9.23(c)(3) clarifies that if the Administrator directs a contracting agency to withhold funds from a contractor pursuant to § 9.23(c), the Administrator or contracting agency must notify the affected contractor.

Proposed § 9.23(d) provides for debarment from Federal contract work for up to 3 years for noncompliance

with any order of the Secretary or for willful violations of Executive Order 14055 or the regulations in this part. The proposed provision provides that a contractor would have the opportunity for a hearing before an order of debarment is carried out and before the contractor is included on a published list of contractors subject to debarment. Like withholding, debarment is a long-established remedy for a contractor's failure to fulfill its labor standard obligations under the SCA. 41 U.S.C. 6706(b); 29 CFR 4.188(a). The possibility that a contractor will be unable to obtain government contracts for a fixed period of time due to debarment promotes contractor compliance with the SCA, and the Department expects such a remedy would enhance contractor compliance with Executive Order 14055 as well.

Proposed § 9.23(e) states that the Administrator may require a contractor to provide any relief appropriate, including employment, reinstatement, promotion, and the payment of lost wages, including interest, when the Administrator finds that a contractor has interfered with the Administrator's investigation or has in any manner discriminated against any person because they cooperated in the Administrator's investigation or attempted to exercise any rights afforded them under this part. The Department believes that such a provision would help ensure effective enforcement of Executive Order 14055, as effective enforcement requires worker cooperation. Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 14055 will depend "upon information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (internal quotation marks omitted). The antiretaliation provision is to be construed broadly to effectuate its remedial purpose. Importantly, and consistent with the Supreme Court's interpretation of the FLSA's antiretaliation provision, the Department's proposed rule would protect workers who file oral as well as written complaints. See *Kasten*, 563 U.S. at 17. The Department's proposed rule also would protect workers from retaliation for filing complaints regardless of whether they are filed with their employer, a higher-tier subcontractor or prime contractor, with the Department or another federal agency, or from retaliation for otherwise

taking reasonable action with the intent to seek compliance with or enforcement of the order.

While Section 8 of the order authorizes the Secretary to prescribe appropriate sanctions and remedies, the Department does not interpret this affirmative direction to the Secretary to limit contracting agencies from employing any sanctions or remedies otherwise available to them under applicable law or to limit contracting agencies from including noncompliance with nondisplacement contractual or regulatory provisions in past performance reports.

#### Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings

Proposed subpart D addresses informal and formal proceedings to determine compliance with the requirements of part 9 and resolution of disputes.

#### Section 9.31 Determination of the Administrator

Proposed § 9.31(a) provides that when an investigation is completed, the Administrator would issue a written determination of whether a violation occurred. A written determination would contain a statement of the investigation findings and would address the appropriate relief and the issue of debarment where appropriate. Notice of the determination would be sent by registered or certified mail to the parties' last known address or by any other means normally ensuring delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier or express delivery services, or by personal service to the last known address. As has been recently highlighted during the COVID-19 pandemic, while registered or certified mail may generally be a reliable means of delivery, in some circumstances other delivery methods may be just as reliable or even more successful at assuring delivery. This flexibility would allow the Department to choose methods to ensure that the necessary notifications are effectively delivered to the parties.

Proposed § 9.31(b)(1) explains that where the Administrator has concluded that relevant facts are in dispute, the notice of determination would advise that the Administrator's determination becomes the final order of the Secretary and is not appealable in any administrative or judicial proceeding unless a request for a hearing is sent within 20 calendar days of the date of the Administrator's determination, in

accordance with proposed § 9.32(b)(1). Determining when a request for a hearing or any other notification under this section was sent will depend on the means of delivery, such as by the date stamp on an email or the delivery confirmation provided by a commercial delivery service. The proposed section also states that such a request may be sent by letter or by any other means normally assuring delivery, and that a detailed statement of the reasons why the Administrator's determination is in error, including the facts alleged to be in dispute, if any, must be submitted with the request for hearing. The proposed regulation further explains that the Administrator's determination not to seek debarment is not appealable.

Proposed § 9.31(b)(2) would apply to situations where the Administrator has concluded that there are no relevant facts in dispute. The Administrator would advise the parties and their representatives, if any, that the Administrator has concluded that no relevant facts are in dispute and that the determination will become the final order of the Secretary and will not be appealable in any administrative or judicial proceeding unless a petition for review is properly filed within 20 days of the date of the determination with the Administrative Review Board (ARB). The Administrator's determination would also advise that if an aggrieved party disagrees with the Administrator's factual findings or believes there are relevant facts in dispute, the party may advise the Administrator of the disputed facts and request a hearing by letter or by any other means normally assuring delivery, sent within 20 calendar days of the date of the Administrator's determination. Upon such a request, the Administrator will either refer the request for a hearing to the Chief Administrative Law Judge or notify the parties and their representatives of the Administrator's determination that there are still no relevant issues of fact and that a petition for review may be filed with the ARB in accordance with proposed § 9.32(b)(2).

#### Section 9.32 Requesting Appeals

Proposed § 9.32 provides procedures for requesting appeals. Proposed § 9.32(a) provides that any party desiring review of the Administrator's determination, including judicial review, must first request a hearing with an ALJ or file a petition for review with the ARB, as appropriate, in accordance with the requirements of proposed § 9.31(b) of this part.

Proposed § 9.32(b)(1)(i) states that any aggrieved party may request a hearing by an ALJ within 20 days of the date of

the determination of the Administrator. To request a hearing, the aggrieved party must send the request to the Chief Administrative Law Judge (ALJ) of the Office of Administrative Law Judges (OALJ) by letter or by any other means normally assuring delivery and the request must include a copy of the Administrator's determination. The proposed section further requires that the party send a copy of the request for hearing to the complainant(s) or successor contractor, and their representatives, if any, and to the Administrator and the Associate Solicitor.

Proposed § 9.32(b)(1)(ii) provides that a complainant or any other interested party may request a hearing where the Administrator determines that there is no basis for a finding that the employer has committed violations(s), or where the complainant or other interested party believes that the Administrator has ordered inadequate monetary relief. The proposed section explains that in such a proceeding, the party requesting the hearing would be the prosecuting party and the employer would be the respondent. The Administrator may intervene in the proceeding as a party or as *amicus curiae* at any time at the Administrator's discretion. Proposed § 9.32(b)(1)(iii) provides that the employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). The proposed section provides that in such a proceeding, the Administrator would be the prosecuting party and the employer would be the respondent.

Proposed § 9.32(b)(2)(i) explains that any aggrieved party desiring a review of the Administrator's determination in which there were no relevant facts in dispute, or of an ALJ's decision, must file a petition for review with the ARB within 20 calendar days of the date of the determination or decision. The petition must be served on all parties, including the Chief ALJ if the case involves an appeal from an ALJ's decision. Proposed § 9.32(b)(2)(ii)(A) and (B) state that a petition for review must refer to the specific findings of fact, conclusions of law, or order at issue and that copies of the petition and all briefs filed by the parties must be served on the Administrator and the Associate Solicitor. Proposed § 9.32(b)(2)(ii)(C) further provides that if a timely request for a hearing or petition for review is filed, the Administrator's determination or the ALJ's decision, as appropriate, would be inoperative unless and until the ARB issues an order affirming the determination or

decision, or the determination or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision would be immediately effective. The proposed section clarifies that no judicial review would be available to parties unless a petition for review to the ARB is first filed.

#### Section 9.33 Mediation

In order to resolve disputes by efficient and informal alternative dispute resolution methods to the extent practicable, proposed § 9.33 generally encourages parties to use settlement judges to mediate settlement negotiations pursuant to the procedures and requirements of 29 CFR 18.13. Proposed § 9.33 also provides that the assigned administrative law judge must approve any settlement agreement reached by the parties consistent with the procedures and requirements of 29 CFR 18.71.

#### Section 9.34 Administrative Law Judge Hearings

Proposed § 9.34(a) provides for the OALJ to hear and decide in its discretion appeals concerning questions of law and fact from determinations of the Administrator issued under proposed § 9.31. The ALJ assigned to the case would act fully and finally as the authorized representative of the Secretary, subject to any appeal filed with the ARB, and subject to certain limits.

Proposed § 9.34(a)(2) details the limits on the scope of review for proceedings before the ALJ. Proposed § 9.34(a)(2)(i) would exclude from the ALJ's authority any jurisdiction to pass on the validity of any provision of part 9. Proposed § 9.34(a)(2)(ii) provides that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, would not apply to proceedings under part 9. The proceedings proposed in subpart D are not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, an ALJ has no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under part 9.

Proposed § 9.34(b) states that absent a stay to attempt settlement, the ALJ would notify the parties and any representatives within 15 calendar days following receipt of the request for hearing of the day, time, and place for hearing. The hearing would be held within 60 days from the date of receipt of the hearing request under proposed § 9.34(b).



Proposed § 9.34(c) provides that the ALJ may dismiss a party's challenge to a determination of the Administrator if the party or the party's representative requests a hearing and fails to attend the hearing without good cause. Proposed § 9.34(c) also provides that the ALJ may dismiss a challenge to a determination of the Administrator if a party fails to comply with a lawful order of the ALJ.

Under proposed § 9.34(d), the Administrator would have the right, at the Administrator's discretion, to participate as a party or as *amicus curiae* at any time in the proceedings. This would include the right to petition for review of an ALJ's decision in a case in which the Administrator has not previously participated. The Administrator would be required to participate as a party in any proceeding in which the Administrator has determined that part 9 has been violated, except where the proceeding only concerns a challenge to the amount of monetary relief awarded.

Under proposed § 9.34(e), a Federal agency that is interested in a proceeding would be able to participate as *amicus curiae* at any time in the proceedings. The proposed section also states that copies of all pleadings in a proceeding must be served on the interested Federal agency at the request of such Federal agency, even if the Federal agency is not participating in the proceeding.

Proposed § 9.34(f) provides that copies of the request for hearing under this part would be sent to the WHD Administrator and the Associate Solicitor, regardless of whether the Administrator is participating in the proceeding.

With certain exceptions, proposed § 9.34(g) would apply the rules of practice and procedure for administrative hearings before the OALJ at 29 CFR part 18, subpart A, to administrative proceedings under this part 9. The exceptions provide that part 9 would be controlling to the extent it provides any rules of special application that may be inconsistent with the rules in part 18, subpart A. In addition, proposed § 9.34(g) provides that the Rules of Evidence at 29 CFR part 18, subpart B, would be inapplicable to administrative proceedings under this part. This proposed section clarifies that rules or principles designed to assure production of the most probative evidence available would be applied, and that the ALJ may exclude immaterial, irrelevant, or unduly repetitive evidence.

Proposed § 9.34(h) would require ALJ decisions (containing appropriate findings, conclusions, and an order) to be issued within 60 days after

completion of the proceeding and to be served upon all parties to the proceeding.

Under proposed § 9.34(i), upon the issuance of a decision that a violation has occurred, the ALJ would order the successor contractor to take appropriate action to remedy the violation. The remedies may include ordering the successor contractor to hire each affected employee in a position on the contract for which the employee is qualified, together with compensation (including lost wages), terms, conditions, and privileges of that employment. If the Administrator has sought debarment, the order would also be required to address whether debarment is appropriate.

Proposed § 9.34(j) would allow the ALJ to assess against a successor contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding when an order finding the successor contractor violated part 9 is issued. This amount would be awarded in addition to any unpaid wages or other relief due.

Proposed § 9.34(k) provides that the ALJ's decision would become the final order of the Secretary, unless a timely appeal is filed with the ARB.

#### Section 9.35 Administrative Review Board Proceedings

Proposed § 9.35 describes the ARB's jurisdiction and provides the procedures for appealing an ALJ decision to the ARB under Executive Order 14055.

Proposed § 9.35(a)(1) states the ARB has jurisdiction to hear and decide in its discretion appeals from the Administrator's determinations issued under § 9.31, and from ALJ decisions issued under § 9.34.

Proposed § 9.35(a)(2) identifies the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of part 9, a general prohibition on receiving new evidence in the record (because the ARB is an appellate body and must decide cases based on substantial evidence in the existing record), and a bar on granting attorney fees or other litigation expenses under the EAJA.

Proposed § 9.35(b) provides that the ARB would issue a final decision within 90 days following receipt of the petition for review and would serve the decision by mail on all parties at their last known address, and on the Chief ALJ, if the case involves an appeal from an ALJ's decision.

Proposed § 9.35(c) requires the ARB's order to mandate action to remedy the violation if the ARB concludes a violation occurred. Such action may include hiring each affected employee in a position on the contract for which the employee is qualified, together with compensation (including lost wages), terms, conditions, and privileges of that employment. If the Administrator has sought debarment, the ARB would be required to determine whether debarment is appropriate. Proposed § 9.35(c) also provides that the ARB's order is subject to discretionary review by the Secretary as provided in Secretary's Order 01–2020 or any successor to that order. *See* Secretary of Labor's Order, 01–2020 (Feb. 21, 2020), 85 FR 13186 (Mar. 6, 2020).

Proposed § 9.35(d) allows the ARB to assess against a successor contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding. This amount would be awarded in addition to any unpaid wages or other relief due under § 9.23(b) of this part.

Proposed § 9.35(e) provides that the ARB's decision will become the Secretary's final order in the matter in accordance with Secretary's Order 01–2020 (or any successor to that order), which provides for discretionary review of such orders by the Secretary. *See id.*

#### Section 9.36 Severability

Section 10 of Executive Order 14055 states that if any provision of the order, or the application of any such provision to any person or circumstance, is held to be invalid, the remainder of the order and the application shall not be affected. *See* 86 FR 66400. Consistent with this directive, the Department proposes to include a severability clause in part 9. Proposed § 9.36 explains that each provision would be capable of operating independently from one another. If any provision of part 9 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intends that the remaining provisions would remain in effect.

### III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize

those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

This rulemaking would require the creation of a new information collection as well as modification to the burdens for an existing collection. As required by the PRA, the Department has submitted information collections, including a new information collection and a revision of an existing collection, to OMB for review to reflect new burdens and changes to existing burdens that will result from the implementation of Executive Order 14055.

**Summary:** This rulemaking proposes to enact regulations implementing Executive Order 14055, which generally requires Federal service contracts, subcontracts, and their solicitations to include a clause requiring the successor contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services, to offer service employees employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract a right of first refusal of employment in positions for which they are qualified. Section 5 of Executive Order 14055 contains exclusions, directing that the order will not apply to contracts under the simplified acquisition threshold or 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 the Executive order. Section 6 of the order permits agencies to except certain contracts from the requirements of the Executive Order in certain circumstances. Section 8 of Executive Order 14055 grants the Secretary of Labor authority to investigate potential violations of, and obtain compliance with, the order.

**Purpose and use:** This proposed rule, which would implement Executive Order 14055, contains the following provisions that could be considered to entail collections of information: (1) The requirement in proposed § 9.12(e) that contractors submit a list of the names of all service employees working under the contract and its subcontractors to the contracting officer before contract completion; (2) disclosure and recordkeeping requirements for covered contractors described in proposed § 9.12(f); (3) the complaint process described in proposed § 9.21; (4)

disclosure and records requirements under proposed § 9.5; and (5) the administrative proceedings described in proposed subpart D.

Proposed § 9.12 states compliance requirements for contractors covered by Executive Order 14055. Proposed § 9.12 would require, with certain exceptions, a successor contractor and its subcontractors to make good faith employment offers to qualified service employees employed on the predecessor contract whose employment will be terminated as a result of award of the successor contract or the expiration of the predecessor contract. Proposed § 9.12(e) would require a predecessor contractor to furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance. Additionally, proposed § 9.12(e)(3) would require a contractor to provide service employees with written notice of their possible right to an offer of employment on a successor contract. Proposed § 9.11 would require the contracting officer to furnish that list to the successor contractor prior to the start of performance of the successor's contract. The successor contractor would then use that list to aid in satisfying the requirements of § 9.12(a). Proposed § 9.12(e)(2) permits the contractor to submit and retain the list submitted to satisfy the requirements of 29 CFR 4.6(l)(2) (see OMB Control Number 1235–0007) to meet these provisions. As contractors are already required to develop this list to comply with the SCA, the Department believes that this requirement does not impose any additional information collection requirements on contractors. However, under proposed § 9.11(c)(3), when an agency decides not to include a location continuity requirement, the agency must ensure that the contractor notifies affected workers in writing of the agency determination and the right of interested parties to request reconsideration. The contractor is required to confirm to the contracting agency that such notice was provided.

In order to verify compliance with the requirements in part 9, proposed § 9.12(f) would require contractors to maintain for 3 years copies of certain records that are subject to OMB clearance under the PRA, including (1) 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) any record that forms the basis for any exclusion or exception claimed from the nondisplacement requirements; and (3) a copy of the employee list received from the contracting agency and the employee list provided to the contracting agency. *See* 44 U.S.C. 3502(3), 3518(c)(1); 5 CFR 1320.3(c), –.4(a)(2), –.4(c). Additionally, proposed § 9.12(f)(2) requires contractors to maintain evidence of any notices that they have provided to workers, or workers' collective bargaining representatives, to satisfy the requirements of the order or these regulations. These would include records of notices of the possibility of employment on the successor contract that are required under § 9.12(e)(3) of the regulations; notices of agency exceptions that a contracting agency requires a contractor to provide under section 6(b) of the order, and as described in § 9.5(g) of the regulations; and notices that a contracting agency has declined to include location continuity requirements or preferences in a solicitation, pursuant to § 9.11(c)(3) of the regulations.

WHD obtains PRA clearance under control number 1235–0021 for an information collection covering complaints alleging violations of various labor standards that the agency already administers and enforces. An Information Collection Request (ICR) has been submitted to revise the approval to incorporate the regulatory citations in this proposed rule applicable to complaints and adjust burden estimates to reflect any increase in the number of complaints filed.

Proposed subpart D establishes administrative proceedings to resolve investigation findings. Particularly with respect to hearings, the rule would impose information collection requirements. The Department notes that information exchanged between the target of a civil or an administrative action and the agency in order to resolve the action would be exempt from PRA requirements. *See* 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). This exemption applies throughout the civil or administrative action (such as an investigation and any related administrative hearings). Therefore, the Department has determined the administrative requirements contained in subpart D of this proposed rule are exempt from needing OMB approval under the PRA.

**Information and technology:** There is no particular order or form of records prescribed by the proposed regulations.

A contractor may meet the requirements of this proposed rule using paper or electronic means. WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process in which complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

**Public comments:** The Department seeks comments on its analysis that this NPRM creates a slight increase in paperwork burden associated with ICR 1235–0021 and creates a new collection and supporting burdens on the regulated community in 1235–ONEW. Commenters may send their views on the Department’s PRA analysis in the same way they send comments in response to the NPRM as a whole (e.g., through the [www.regulations.gov](http://www.regulations.gov) website), including as part of a comment responding to the broader NPRM. Alternatively, commenters may submit a comment specific to this PRA analysis by sending an email to [WHDPRAComments@dol.gov](mailto:WHDPRAComments@dol.gov). While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the supporting statements for the new recordkeeping collection and revised complaint process collection by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. Alternatively, a copy of the new ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the [RegInfo.gov](http://RegInfo.gov) website. Similarly, the complaint process ICR is available by visiting <http://www.reginfo.gov/public/do/PRAMain> website. As previously indicated, written comments directed to the Department may be submitted within 30 days of publication of this notification.

OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Total burden for the new and complaint process information collections, including the burdens that will be unaffected by this proposed rule and any changes are summarized as follows:

**Type of review:** Revision to currently approved information collections.

**Agency:** Wage and Hour Division, Department of Labor.

**Title:** Employment Information Form.

**OMB Control Number:** 1235–0021.

**Affected public:** Private sector, businesses or other for-profits and Individuals or Households.

**Estimated number of respondents:** 38,254 (10 from this rulemaking).

**Estimated number of responses:** 38,254 (10 from this rulemaking).

**Frequency of response:** On occasion.

**Estimated annual burden hours:** 12,751 (3 burden hours due to this NPRM).

**Estimated annual burden costs (capital/startup):** \$0 (\$0 from this rulemaking).

**Estimated annual burden costs (operations/maintenance):** \$0 (\$0 from this rulemaking).

**Estimated annual burden costs:** \$559,896 (\$132 from this rulemaking).

**Type of Review:** New Collection.

**Title:** Nondisplacement of Qualified Workers Under Service Contracts.

**OMB Control Number:** 1235–ONEW.

**Affected public:** Private sector, businesses or other for-profits and Individuals or Households.

**Estimated number of respondents:** 249,400.

**Estimated number of responses:** 4,257,000.

**Frequency of response:** Various.

**Estimated annual burden hours:** 230,050.

**Estimated annual burden costs:** \$14,237,795.

#### **IV. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improved Regulation and Regulatory Review**

Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of

the Executive Order and OMB review.<sup>2</sup> Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is a “significant regulatory action” under section 3(f) of Executive Order 12866 and is economically significant.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

#### **A. Introduction**

On November 18, 2021, President Joseph R. Biden, Jr. issued Executive Order 14055, “Nondisplacement of Qualified Workers Under Service Contracts.” 86 FR 66397 (Nov. 23, 2021). This order explains that “[w]hen 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

<sup>2</sup> See 58 FR 51735, 51741 (Oct. 4, 1993).

subcontractor hires the predecessor's employees, thus avoiding displacement of these employees." Accordingly, Executive Order 14055 provides that contractors and subcontractors performing on covered Federal service contracts must in good faith offer service employees employed under the predecessor contract a right of first refusal of employment. The order applies to all contracts that are covered by the SCA.

This proposed rule requires that contracting agencies incorporate into every covered Federal service contract the contract clause included in Executive Order 14055. That clause requires a successor contractor and its subcontractors to make bona fide, express offers of employment to service employees employed under the predecessor contract whose employment would be terminated with the change of contract. The required contract clause also forbids successor contractors or subcontractors from filling any contract employment openings prior to making such good faith offers of employment to employees of the predecessor contractor or subcontractor. See section II.B. for an in-depth discussion of the provisions of the Executive order.

#### *B. Number of Potentially Affected Contractor Firms and Workers*

##### *1. Number of Potentially Affected Contractor Firms*

To determine the number of firms that could potentially be affected by this rulemaking, the Department estimated a range of potentially affected firms. The more narrowly defined population (firms actively holding SCA-covered contracts) includes 119,700 firms (Table 1). The broader population (including those bidding on SCA contracts but without active contracts, or those considering bidding in the future) includes 449,200 firms.

##### *i. Firms Currently Holding SCA Contracts*

*USASpending.gov*—the official source for spending data for the U.S. Government—contains Government award data from the Federal Procurement Data System Next Generation (FPDS-NG), which is the system of record for Federal procurement data. The Department used these data to identify the number of firms that currently hold SCA contracts.<sup>3</sup> Although more recent data

are available, the Department used data from 2019 to avoid any shifts in the data associated with the COVID-19 pandemic in 2020. Because many Federal employees were working remotely throughout 2020 and 2021, reliance on service contracts for Federal buildings may have been reduced during those years and may not reflect the level of employment on and incidence of SCA contracts going forward.<sup>5</sup> The Department welcomes comments and data on how the COVID-19 pandemic has impacted firms and workers on SCA contracts.

To identify firms with SCA contracts, the Department included all firms with the "Labor Standards" element equal to "Y" for any of their contracts, meaning that the contracting agency flagged the contract as covered by the SCA. However, because this flag is often listed as "not applicable" and appears to be reported with error, the Department also included some other firms. Of the contracts not flagged as SCA, the Department excluded (1) those for the purchase of goods<sup>6</sup> and (2) those covered by the DBA.<sup>7</sup> The Department also excluded (1) awards for financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S. because SCA coverage is limited to the 50 states, the District of Columbia, and the U.S. territories. The firms for the remaining

services directly for the Federal Government, including certain licenses, permits, cooperative agreements, and concessions contracts, such as, for example, delegated leases of space on a military base from an agency to a contractor whereby the contractor operates a barber shop). However, the Department estimates that the number of firms holding such SCA-covered nonprocurement contracts is a small fraction of the number of firms identified based on *USASpending.gov*.

<sup>4</sup> The Department also acknowledges that prime contracts that are less than \$250,000 and their subcontracts would not be covered by this regulation but has not made an adjustment for these contracts in the estimation of covered contractors. Therefore, this estimate may be an overestimate of the number of contractors that are actually affected.

<sup>5</sup> The Department estimated the number of prime contractors using the 2021 *USASpending* data and found that there were fewer contractors in 2021 than in 2019. The number of prime contractors in 2019 was 85,987 and the number of prime contractors in 2021 was 78,347. This finding is in line with our hypothesis that remote work for federal employees could have reduced the demand for SCA contractors in 2021.

<sup>6</sup> For example, the government purchases pencils; however, a contract solely to purchase pencils is not covered by the SCA and so would not be covered by the Executive order. Contracts for goods were identified in the *USASpending.gov* data if the product or service code begins with a number (the code for services begins with a letter).

<sup>7</sup> Contracts covered by DBA were identified in the *USASpending.gov* data where the "Construction Wage Rate Requirements" element for a contract is marked "Y," meaning that the contracting agency flagged that the contract is covered by the DBA.

contracts are included as potentially impacted by this rulemaking.

In 2019, there were 86,000 unique prime contractors in *USASpending* that fit the parameters discussed above, and the Department has used this number as an estimate of prime contractors with active SCA contracts. However, subcontractors are also impacted by this proposed rule. The Department examined 5 years of *USASpending* data (2015 through 2019) and identified 33,700 unique subcontractors that did not hold contracts as prime contractors in 2019.<sup>8</sup> The Department used 5 years of data for the count of subcontractors to compensate for lower-tier subcontractors that may not be included in *USASpending.gov*.

In total, the Department estimates 119,700 firms currently hold SCA contracts and could potentially be affected by this rulemaking under the narrow definition. Table 1 shows these firms by 2-digit NAICS code.<sup>9</sup> <sup>10</sup>

##### *ii. All Potentially Affected Contractors*

The Department also cast a wider net to identify other potentially affected contractors, both those directly affected (*i.e.*, holding contracts) and those that plan to bid on SCA-covered contracts in the future. To determine the number of these firms, the Department identified firms registered in the General Services Administration's (GSA) System for Award Management (SAM) since all entities bidding on Federal procurement contracts as a prime or grants must register in SAM. The Department believes that firms registered in SAM represent those that may be affected if they decide to bid on an SCA contract as a prime in the future. However, it is also possible that some firms that are not already registered in SAM could decide to bid on SCA-covered contracts after this proposed rulemaking; these firms are not included in the Department's estimate. The proposed

<sup>8</sup> For subcontractors, the Department was unable to make restrictions to limit the data to SCA contracts because none of the necessary variables are available in the *USASpending* database (*i.e.*, the Labor Standards variable, the Construction Wage Rate Requirements variable, or the product or service code variable).

<sup>9</sup> The North American Industry Classification System (NAICS) is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a sequence of codes ranging from 2 digits (most aggregated level) to 6 digits (most granular level). <https://www.census.gov/naics/>.

<sup>10</sup> In the data, a NAICS code is assigned to the contract and identifies the industry in which the contract work is typically performed. If a firm has contracts in several NAICS, the Department has assigned it to only one NAICS based on the ordering of the contracts in the data (this approximates a random assignment to one NAICS).

<sup>3</sup> The Department recognizes that some SCA-covered contracts that would be covered by this rule are not reflected in *USASpending.gov* (*i.e.*, they are SCA-covered contracts that are not procuring

rule could also impact such firms if they are awarded a future contract.

Because SAM provides a more recent snapshot of data, the Department used February 2022 SAM data and identified 415,500 registered firms.<sup>11</sup> The Department excluded firms with expired registrations, firms only applying for grants,<sup>12</sup> government

entities (such as city or county governments),<sup>13</sup> foreign organizations, and companies that only sell products and do not provide services. SAM includes all prime contractors and some subcontractors (those that are also prime contractors or that have otherwise registered in SAM). However, the Department is unable to determine the

number of subcontractors that are not in the SAM database. Therefore, the Department added the subcontractors identified in USASpending to this estimate. Adding these 33,700 firms identified in USASpending to the number of firms in SAM results in 449,200 potentially affected firms.

TABLE 1—RANGE OF NUMBER OF POTENTIALLY AFFECTED FIRMS

Industry	NAICS	Lower-bound estimate			Upper-bound estimate		
		Total	Primes from USASpending	Subcontractors from USASpending	Total	Firms from SAM	Subcontractors from USASpending
Agriculture, forestry, fishing and hunting .....	11	2,482	2,482	0	5,389	5,389	0
Mining .....	21	145	102	43	1,010	967	43
Utilities .....	22	1,596	1,541	55	2,470	2,415	55
Construction .....	23	13,708	5,457	8,251	57,587	49,336	8,251
Manufacturing .....	31–33	13,958	5,637	8,321	52,331	44,010	8,321
Wholesale trade .....	42	1,205	564	641	18,804	18,163	641
Retail trade .....	44–45	344	317	27	8,467	8,440	27
Transportation and warehousing .....	48–49	3,387	2,998	389	17,473	17,084	389
Information .....	51	4,061	3,735	326	13,515	13,189	326
Finance and insurance .....	52	475	429	46	3,577	3,531	46
Real estate and rental and leasing .....	53	2,822	2,821	1	19,482	19,481	1
Professional, scientific, and technical services .....	54	37,739	26,103	11,636	116,120	104,484	11,636
Management of companies and enterprises .....	55	3	3	0	598	598	0
Administrative and waste services .....	56	15,120	11,509	3,611	37,613	34,002	3,611
Educational services .....	61	3,609	3,359	250	17,433	17,183	250
Health care and social assistance .....	62	7,004	6,987	17	36,376	36,359	17
Arts, entertainment, and recreation .....	71	916	915	1	5,562	5,561	1
Accommodation and food services .....	72	3,037	3,031	6	11,170	11,164	6
Other services .....	81	8,084	7,997	87	24,191	24,104	87
Total private .....		119,695	85,987	33,708	449,168	415,460	33,708

## 2. Number of Potentially Affected Workers

There are no readily available data on the number of workers working on SCA contracts; therefore, to estimate the number of these workers, the Department employed the approach used in the 2021 final rule, “Increasing the Minimum Wage for Federal Contractors,” which implements Executive Order 14026.<sup>14</sup> That methodology is based on the 2016 rulemaking implementing Executive Order 13706’s (Establishing Paid Sick Leave for Federal Contractors) paid sick leave requirements, which contained an updated version of the methodology

used in the 2014 rulemaking for Executive Order 13658 (Establishing a Minimum Wage for Contractors).<sup>15</sup> Using this methodology, the Department estimated the number of workers who work on SCA contracts, representing the number of “potentially affected workers,” is 1.4 million potentially affected workers. This number is likely an overestimate because some workers will be in positions not covered by this rule (e.g., high-level management, non-service employees).

The Department estimated the number of potentially affected workers in two parts. First, the Department estimated employees and self-employed

workers working on SCA contracts in the 50 States and the District of Columbia. Second, the Department estimated the number of SCA workers in the U.S. territories.

### iii. Workers on SCA Contracts in the 50 States and the District of Columbia

SCA contract employees on covered contracts were estimated by taking the ratio of covered Federal contracting expenditures to total output, by industry. Total output is the market value of the goods and services produced by an industry. This ratio is then applied to total private employment in that industry (Table 2).

$$\text{Potentially Affected Employees} = \frac{\text{Expenditures}}{\text{Total Output}} \times \text{Employment}$$

To estimate SCA contracting expenditures, the Department used

USASpending.gov data and the same methodology as used above for

estimating affected firms. The Department included all contracts with

<sup>11</sup> Data released in monthly files. Available at: <https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf>.

<sup>12</sup> Entities registering in SAM are asked if they wish to bid on contracts. If the firm answers “yes,” then they are included as “All Awards” in the

“Purpose of Registration” column in the SAM data. The Department included only firms with a value of “Z2,” which denotes “All Awards.”

<sup>13</sup> While there are certain circumstances in which state and local government entities act as contractors that enter into contracts covered by the

SCA, the number of such entities is minimal and including all government entities would result in an inappropriate overestimation.

<sup>14</sup> See 86 FR 38816, 38816–38898.

<sup>15</sup> See 81 FR 9591, 9591–9671 and 79 FR 60634–60733.

the “Labor Standards” element equal to “Y,” meaning that the contracting agency flagged the contract as covered by SCA. Of the contracts not flagged as SCA, the Department excluded (1) those for the purchase of goods and (2) those covered by DBA.<sup>16</sup> The firms for the remaining contracts are also included as potentially impacted by this rulemaking. The Department also excluded (1) awards for financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S. because SCA coverage is limited to the 50 states, the District of Columbia, and the U.S. territories.

To determine the share of all output associated with SCA contracts, the Department divided contracting expenditures by gross output, in each 2-digit NAICS code.<sup>17</sup> This results in 0.93 percent of output being covered by SCA contracts (Table 2). The Department then multiplied the ratio of covered-to-gross output by private sector employment for each NAICS to estimate the share of employees working on SCA contracts. The Department’s private sector employment number is primarily comprised of employment from the May 2019 Occupational Employment and Wage Statistics (OEWS), formerly the Occupational Employment Statistics.<sup>18</sup>

However, the OEWS excludes unincorporated self-employed workers, so the Department supplemented OEWS data with data from the 2019 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) to include unincorporated self-employed workers in the estimate of workers.

According to this methodology, the Department estimated there are 1.4 million workers on SCA covered contracts in the 50 States and the District of Columbia (see Table 2 below). This methodology represents the number of year-round-equivalent potentially affected workers who work exclusively on SCA contracts. Thus, when the Department refers to potentially affected employees in this analysis, the Department is referring to this conceptual number of people working exclusively on covered contracts. The total number of potentially affected workers will likely exceed this number because not all workers work exclusively on SCA contracts. However, some of the total number of potentially affected workers may not be covered by this rulemaking.

iv. Workers on SCA Contracts in the U.S. Territories

The methodology used to estimate potentially affected workers in certain

U.S. territories (American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands) is similar to the methodology used above for the 50 States and the District of Columbia. The primary difference is that data on gross output in the U.S. territories are not available, and so the Department had to make some additional assumptions. The Department approximated gross output in the U.S. territories by calculating the ratio of gross output to Gross Domestic Product (GDP) for the U.S. (1.5), then multiplying that ratio by GDP in each territory to estimate total gross output.<sup>19 20</sup> The other difference is the analysis is not performed by NAICS because the GDP data are not available at that level of disaggregation.

The rest of the methodology follows the methodology for the 50 States and the District of Columbia. To determine the share of all output associated with SCA contracts, the Department divided contract expenditures from USASpending.gov, for each territory, by gross output. The Department then multiplied the ratio of covered contract spending to gross output by private sector employment (from the OEWS) to estimate the number of workers working on covered contracts (9,900).<sup>21</sup>

TABLE 2—NUMBER OF POTENTIALLY AFFECTED WORKERS

NAICS	Total private output (billions) <sup>a</sup>	Covered contracting output (millions) <sup>b</sup>	Share output from covered contracting (percent)	Private sector workers (1,000s) <sup>c</sup>	Workers on SCA contracts (1,000s) <sup>d</sup>
11 .....	\$450	\$431	0.10	1,168	1
21 .....	577	104	0.02	699	0
22 .....	498	2,350	0.47	547	3
23 .....	1,662	7,218	0.43	9,100	40
31–33 .....	6,266	42,023	0.67	12,958	87
42 .....	2,098	183	0.01	5,955	1
44–45 .....	1,929	331	0.02	16,488	3
48–49 .....	1,289	14,288	1.11	6,215	69
51 .....	1,942	10,308	0.53	2,971	16
52 .....	3,161	12,474	0.39	6,180	24
53 .....	4,143	968	0.02	2,699	1
54 .....	2,487	151,809	6.10	10,581	646
55 .....	675	0	0.00	2,470	0
56 .....	1,141	36,238	3.18	10,158	323
61 .....	381	4,140	1.09	3,271	36
62 .....	2,648	11,130	0.42	20,791	87
71 .....	382	82	0.02	2,949	1
72 .....	1,192	1,019	0.09	14,303	12
81 .....	772	2,699	0.35	5,260	18

<sup>16</sup> Identified when the “Construction Wage Rate Requirements” element is “Y,” meaning that the contracting agency flagged that the contract is covered by DBA.

<sup>17</sup> Bureau of Economic Analysis (BEA) (2020). Table 8. Gross Output by Industry Group. <https://www.bea.gov/news/2020/gross-domestic-product-industry-fourth-quarter-and-year-2019>. The BEA provides the definition: “Gross output of an industry is the market value of the goods and services produced by an industry, including

commodity taxes. The components of gross output include sales or receipts and other operating income, commodity taxes, plus inventory change. Gross output differs from value added, which measures the contribution of the industry’s labor and capital to its gross output.”

<sup>18</sup> Bureau of Labor Statistics. OEWS. May 2019. Available at: <http://www.bls.gov/oes/>.

<sup>19</sup> GDP is limited to personal consumption expenditures and gross private domestic investment.

<sup>20</sup> For example, in Puerto Rico, personal consumption expenditures plus gross private domestic investment equaled \$73.4 billion. Therefore, Puerto Rico gross output was calculated as \$73.4 billion × 1.5 = \$110.1 billion.

<sup>21</sup> For the U.S. territories, the unincorporated self-employed are excluded because CPS data are not available on the number of unincorporated self-employed workers in U.S. territories.

TABLE 2—NUMBER OF POTENTIALLY AFFECTED WORKERS—Continued

NAICS	Total private output (billions) <sup>a</sup>	Covered contracting output (millions) <sup>b</sup>	Share output from covered contracting (percent)	Private sector workers (1,000s) <sup>c</sup>	Workers on SCA contracts (1,000s) <sup>d</sup>
Territories .....	156	1,501	<sup>e</sup>	963	9.9
Total .....	33,691	297,794	0.88%	134,761	1,376

<sup>a</sup> Bureau of Economic Analysis, NIPA Tables, Gross output. 2019. For territories, gross output is estimated by multiplying total GDP for the territory by the ratio of total gross output to total GDP for the U.S.

<sup>b</sup> *USASpending.gov*. Contracting expenditures for covered contracts in 2019.

<sup>c</sup> OEWS May 2019. Excludes Federal U.S. Postal service employees, employees of government hospitals, and employees of government educational institutions. For non-territories, added to the OWES employee estimates were unincorporated self-employed workers from the 2019 CPS MORG data.

<sup>d</sup> Assumes share of expenditures on contracting is same as share of employment. Assumes employees work exclusively, year-round on Federal contracts. Thus, this may be an underestimate if some employees are not working entirely on Federal contracts.

<sup>e</sup> Varies based on U.S. territory.

Because there is no readily available data source on workers on SCA contracts, and employment is spread throughout many industries, the Department was unable to provide any estimates of demographic information for potentially affected workers. The Department welcomes any data sources that would allow it to analyze the demographic composition of SCA contract workers, so that it can better assess any equity impacts of this rulemaking.

### C. Costs

#### 1. Rule Familiarization Costs

The proposed rule would impose direct costs on some covered contractors that will review the regulations to understand their responsibilities. Both firms that currently hold contracts that may be awarded to a successor contractor in the future and firms that are considering bidding on an SCA contract may be interested in reviewing this rule, so the Department used the upper-bound estimate of 449,168 potentially affected firms to calculate rule familiarization costs. This is an overestimate, because not all of the firms that are registered in SAM are predecessor contractors or will bid on an SCA contract. Those that are not interested in bidding would not need to review the rule.

The Department estimates that, on average, 30 minutes of a human resources staff member's time will be spent reviewing the rulemaking. Some firms will spend more time reviewing the rule, but as discussed above, many others will spend less or no time reviewing the rule, so the Department believes that this average estimate is appropriate. Many firms will also just rely on third-party summaries of the rule or the comprehensive compliance assistance materials published by the Department. This rule is also

substantially similar to the 2011 final rule implementing Executive Order 13495 (Nondisplacement of Qualified Workers Under Service Contracts), with which many firms were already familiar. Thus, this proposed regulation would not introduce an entirely novel policy that would require substantively more time for rule familiarization. This time estimate only represents the cost of reviewing the rule; any implementation costs are calculated separately below. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$50.25 per hour.<sup>22</sup> Therefore, the Department has estimated regulatory familiarization costs to be \$11,285,346 (\$50.25 per hour × 0.5 hour × 449,168 contractors). The Department has included all regulatory familiarization costs in Year 1. The Department welcomes comments on these rule familiarization estimates.

#### 2. Implementation Costs

This proposed rule contains various requirements for contractors. The proposal includes a contract clause provision requiring contracting agencies to ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include the nondisplacement contract clause. This provision comes directly from Executive Order 14055, and the Department estimates that it will take an average of 30 minutes total for contractors to incorporate the contract clause into their covered subcontracts. This estimate is similar to the one used in the

Executive Order 13495 final rule.

Additionally, a contractor must notify affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception. When an agency decides not to include a location continuity requirement or preference, the contractor must notify affected workers and their collective bargaining representatives, if any, in writing of the agency's determination and the right of interested parties to request reconsideration. Additionally, predecessor contractors are required to provide written notice to service employees employed under the contract of their possible right to an offer of employment on the successor contract. The Department estimates that these requirements would take an average of 30 minutes for each contractor. The Department believes that this average estimate is appropriate because these requirements would not apply to all potentially affected contractors; they would only apply when an agency grants an exception or when the agency decides not to include a location continuity requirement or preference.

For these cost estimates, the Department used the lower-bound of potentially affected firms (119,695), because only the firms that will have a covered contract would incur these implementation costs. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$50.25 per hour. Therefore, the Department has estimated the cost of these requirements to be \$6,014,674 (\$50.25 per hour × 1 hour × 119,695 contractors). This estimate is likely an overestimate, because many SCA contracts can last for several years. Therefore, only a fraction of these firms would need to include the required contract clause each year since firms only need to include the clause in new contracts (which under Executive Order

<sup>22</sup> This includes the median base wage of \$30.83 from the 2021 OEWS plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: <https://www.bls.gov/news.release/ocwage.t01.htm>.



14055 and this rule do not include options or other extensions). The Department does not have data on the average length of SCA contracts but welcomes comments and data to help inform this estimate.

Under this proposed rule, contracting agencies would, among other things, be required to ensure contractors provide notice to employees on predecessor contracts of their possible right to an offer of employment, and consider whether performance of the work in the same locality or localities in which a predecessor contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services. Contracting agencies would also be required to provide the list of employees on the predecessor contract to the successor contractor, to forward complaints and other pertinent information to WHD, and to retroactively incorporate the contract clause when it was not initially incorporated. Please see section II.B. for a more in-depth discussion of contracting agency requirements. The Department estimates that it will take the contracting agencies an extra 2.5 hours of work on average on each covered contract, and that the work will be performed by a GS 14, Step 1 Federal employee contracting officer, with a fully loaded hourly wage of \$97.04.<sup>23</sup> This includes the median base wage of \$52.17 from Office of Personnel Management salary tables,<sup>24</sup> plus benefits paid at a rate of 69 percent of the base wage,<sup>25</sup> and overhead costs of 17 percent. Using the USASpending data mentioned above, the Department estimated that there were 576,122 contracts. In order to estimate the share of these contracts that are new in a given year, the Department has used 20 percent (115,224), because SCA contracts tend to average about 5 years. The Department welcomes comments and data on the appropriate contract length to use in this estimate. Therefore, the estimated cost to contracting

agencies is \$27,953,342 (\$97.04 per hour  $\times$  2.5 hours  $\times$  115,224).

### 3. Recordkeeping Costs

This proposed rule would require a predecessor contractor to, no less than 30 calendar days before completion of the contractor's performance of services on a contract, furnish the contracting officer a list of the names of all service employees under the contract and its subcontracts at that time. This list must also contain the anniversary dates of employment for each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. If changes to the workforce are made after the submission of this certified list, this proposed rule would also require a contractor to furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance not less than 10 business days before completion of the contract.

This NPRM also specifies the records successor contractors would be required to maintain, including copies of or documentation of any written or oral offers of employment, 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. The NPRM would also require contractors to maintain a copy of any record that forms the basis for any exclusion or exception claimed, the employee list provided to the contracting agency, and the employee list received from the contracting agency.

The Department estimates that the extra time associated with keeping and providing these records, including the list of employees, to be an average of 1 hour per firm per year, and that the work will be completed by a Compensation, Benefits, and Job Analysis Specialist, at a rate of \$50.25 per hour. The estimated recordkeeping cost is \$6,014,674 (\$50.25 per hour  $\times$  1 hour  $\times$  119,695).

### 4. Summary of Costs

Costs in Year 1 consist of \$11,285,346 in rule familiarization costs, \$33,968,016 in implementation costs (\$6,014,674 for contractors and \$27,953,342 for contracting agencies), and \$6,014,674 in recordkeeping costs. Therefore, total Year 1 costs are \$51,268,036. Costs in the following years consist only of implementation

and recordkeeping costs and amount to \$39,982,690. Average annualized costs over 10 years are \$41.5 million using a 7 percent discount rate, and \$50.1 million using a 3 percent discount rate.

### 5. Other Potential Impacts

This proposed rule requires successor contractors and subcontractors to make a bona fide, express offer of employment to each employee to a position for which the employee is qualified, and to state the time within which the employee must accept such offer. To match employees with suitable jobs under this proposed rule, successor contractors would have to spend time evaluating the predecessor contract employees and available positions. However, those successor contractors that currently hire new employees for a contract already must recruit workers and evaluate their qualifications for positions on the contract; thus, successor contractors would likely spend an equal amount of time determining job suitability under the proposed rule as under current practices. If, in the absence of this rule, a successor contractor would need to hire an entirely new workforce when it is awarded a contract, the requirement for it to make offers of employment to the predecessor contractor's workforce could save the contractor time if the predecessor contract employees hold the same positions that the successor contractor is looking to fill. It may be easier to determine job suitability for workers already working in those positions on the contract than it would be for workers who are new to both the contract and the successor contractor. The Department welcomes comments and data on these assumptions, specifically if time spent allocating employees to available positions would change as a result of this proposed rule.

Many successor contractors may already be keeping the predecessor contractor's employees on the contract, so the Executive Order and this proposed rule would not impact any existing hiring practices for these firms. The Department welcomes comments with data on how prevalent it is for successor contractors to keep the employees of the predecessor contractor.

There may be some limited cases in which the successor contractor had existing employees that it planned to assign to a newly-awarded contract, but the requirement to offer employment to predecessor contract workers would

<sup>23</sup> Because the contracting agency may be split amongst different positions, the Department has used the wage of a more senior position for the estimate.

<sup>24</sup> The Department has used the 2021 Rest of United States salary table to estimate salary expenses. See [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/21Tables/html/RUS\\_h.aspx](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/21Tables/html/RUS_h.aspx).

<sup>25</sup> Based on a 2017 study from CBO. Congressional Budget Office, "Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015," April 25, 2017, <https://www.cbo.gov/publication/52637>.

make the successor contractor's existing employees redundant. In this situation, if the successor contractor truly could not find another position for the employee on the new contract or on any of their other existing projects, the continued employment of a predecessor contract worker could be offset by the successor contract worker being laid off. While this could potentially happen in certain circumstances immediately following the publication of this regulation, the Department expects that this situation would become relatively uncommon in the future once contractors are familiar with the requirements of the rule and can plan their staffing accordingly. Furthermore, these workers may themselves also be protected by the Executive Order. If the contract on which they are currently working is awarded to another contractor, they would also receive offers of employment from the successor contractor. The Department welcomes comments on the staffing practices of contractors, and to what extent that they have existing employees that they would not be able to find positions for if they are required to make offers of employment to predecessor contract employees following the award of a new contract.

This proposed rule would not affect wages that contractors will pay employees, because other applicable laws already establish the minimum wage rate for each occupation to be incorporated into the contract. This rule does not require successor contractors to pay wages higher than the rate required by the SCA. Executive Order 14055 and this proposed rule also do not require the successor contractor to pay workers the same wages that they were paid on the predecessor contract. Although workers' wages may increase or decrease with the changing of contracts, any change would not be a result of this proposed rule. What this rule would do is ensure that these workers have continued employment, saving them the costs of finding a new job. The requirement for successor contracts to make bona fide offers of employment could also prevent unemployment and increase job security for predecessor contract workers. This, in turn, could reduce reliance on social safety net programs and improve well-being for such workers. As discussed above, this impact could be offset in limited short-term cases in which the successor contractor has existing employees for which it is unable to find positions because of the requirements of this proposed rule.

#### D. Benefits

Executive Order 14055 states that using a carryover workforce reduces disruption in the delivery of services during the period of transition between contractors, maintains physical and information security, and provides the Federal Government with the benefits of an experienced and well-trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. A 2020 report from IBM estimated that data breaches in the public sector cost about \$1.6 million per breach, and about 28 percent of data breaches are due to human error.<sup>26</sup> Maintaining the same staff on a Federal Government contract could reduce the occurrence of these costly data breaches. The Department welcomes data on the impact of contract employee turnover on data security.

The requirements of the Executive Order and this proposed rule also would help reduce training costs, which can be costly for firms, and therefore for the agency that contracts with them. Training costs are a component of turnover costs. One study found a modest cost associated with employee turnover, finding 10 percent turnover is about as costly as a 0.6 percent wage increase.<sup>27</sup> Another paper conducted an analysis of case studies and found that turnover costs represent 39.6 percent of a position's annual wage.<sup>28</sup>

#### V. Initial Regulatory Flexibility Act (IRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies

<sup>26</sup> <https://www.govtech.com/data/ibm-government-data-breaches-becoming-less-costly.html>.

<sup>27</sup> Kuhn, Peter and Lizi Yu. 2021. "How Costly is Turnover? Evidence from Retail." *Journal of Labor Economics* 39(2), 461–496. <https://www.journals.uchicago.edu/doi/10.1086/710359>.

<sup>28</sup> Bahn, Kate and Carmen Sanchez Cumming. 2020. "Improving U.S. labor standards and the quality of jobs to reduce the costs of employee turnover to U.S. companies." Washington Center for Equitable Growth Issue Brief. <https://equitablegrowth.org/improving-u-s-labor-standards-and-the-quality-of-jobs-to-reduce-the-costs-of-employee-turnover-to-u-s-companies/>.

must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604.

#### A. Why the Department Is Considering Action

On November 18, 2021, President Joseph R. Biden, Jr. issued Executive Order 14055, "Nondisplacement of Qualified Workers Under Service Contracts." 86 FR 66397 (Nov. 23, 2021). This order explains 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. The Department is issuing this proposed rule to comply with the directives of the Executive Order.

#### B. Objectives of and the Legal Basis for the Proposed Rule

President Biden issued Executive Order 14055 pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Procurement Act. 86 FR 66397. The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 14055 directs the Secretary to issue regulations to "implement the requirements of this order." 86 FR 66399.

#### C. Estimating the Number of Small Businesses Affected by the Rulemaking

In order to determine the number of small businesses that would be affected by the rulemaking, the Department followed the same methodology laid out in section V.B.1. of the economic analysis.<sup>29</sup> For the data from *USASpending.gov*, the business determination was based on the inclusion of "small" or "SBA" in the business type. For GSA's System for Award Management (SAM) for February 2022, if a company qualified as a small business in any reported NAICS, they

<sup>29</sup> The Department also acknowledges that prime contracts that are less than \$250,000 and their subcontracts would not be covered by this regulation but has not made an adjustment for these contracts in the estimation of covered contractors. Therefore, this estimate may be an overestimate of the number of contractors that are actually affected.

were classified as small. Table 3 shows the range of potentially affected small firms by industry. The total number of

potentially affected small firms ranges from 74,097 to 329,470.

TABLE 3—RANGE OF POTENTIALLY AFFECTED SMALL FIRMS

Industry	NAICS	Lower-bound estimate			Upper-bound estimate		
		Total	Small primes from USASpending	Small subcontractors from USASpending	Total	Small firms from SAM	Small subcontractors from USASpending
Agriculture, forestry, fishing and hunting .....	11	2,198	2,198	0	3,849	3,849	0
Mining .....	21	94	72	22	888	866	22
Utilities .....	22	374	358	16	1,601	1,585	16
Construction .....	23	8,290	4,348	3,942	45,683	41,741	3,942
Manufacturing .....	31–33	6,621	4,243	2,378	39,631	37,253	2,378
Wholesale trade .....	42	516	411	105	15,810	15,705	105
Retail trade .....	44–45	227	222	5	7,500	7,495	5
Transportation and warehousing .....	48–49	2,120	1,989	131	14,854	14,723	131
Information .....	51	2,352	2,218	134	11,208	11,074	134
Finance and insurance .....	52	179	154	25	2,299	2,274	25
Real estate and rental and leasing .....	53	2,068	2,068	0	7,654	7,654	0
Professional, scientific, and technical services .....	54	24,371	20,164	4,207	90,547	86,340	4,207
Management of companies and enterprises .....	55	0	0	0	290	290	0
Administrative and waste services .....	56	10,251	9,060	1,191	30,932	29,741	1,191
Educational services .....	61	2,224	2,123	101	11,800	11,699	101
Health care and social assistance .....	62	4,060	4,054	6	16,904	16,898	6
Arts, entertainment, and recreation .....	71	546	546	0	3,944	3,944	0
Accommodation and food services .....	72	2,102	2,098	4	9,321	9,317	4
Other services .....	81	5,504	5,479	25	14,755	14,730	25
Total private .....	.....	74,097	61,805	12,292	329,470	317,178	12,292

#### D. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

The proposed rule includes a contract clause provision requiring contracting agencies to ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include the non-displacement contract clause. The rule also requires contracting agencies to incorporate the non-displacement contract clause in applicable contracts, ensure contractors provide notice to employees on predecessor contracts of their possible right to an offer of employment, and to consider whether performance of the work in the same locality or localities in which a predecessor contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services. Contracting agencies would also be required, among other things, to provide the list of employees on the predecessor contract to the successor, to forward complaints and other pertinent information to WHD, and to retroactively incorporate the contract clause when it was not initially incorporated. See Section II.B. for a more in-depth discussion of contracting agency requirements.

This proposed rule would require a contractor to, no less than 30 calendar days before completion of the

contractor's performance of services on a contract, furnish the contracting officer a list of the names of all service employees under the contract and its subcontracts at that time. This list must also contain the anniversary dates of employment for each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. If changes to the workforce are made after the submission of this certified list, this proposed rule would also require a contractor to furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance not less than 10 business days before completion of the contract. See section II.B. for a more in-depth discussion of requirements for contractors.

#### E. Calculating the Impact of the Proposed Rule on Small Business Firms

This proposed rule could result in costs for small business firms in the form of rule familiarization costs, implementation costs, and recordkeeping costs. See section V.C. for an in-depth discussion of these costs.

For rule familiarization costs, the Department estimates that on average, 30 minutes of a human resources staff member's time will be spent reviewing the rulemaking. Some firms will spend more time reviewing the rule, but many

others will spend less or no time reviewing the rule, so the Department believes that this average estimate is appropriate. This rule is also substantially similar to the 2011 final rule implementing Executive Order 13495, with which many firms were already familiar. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$50.25 per hour.<sup>30</sup> Therefore, the Department has estimated regulatory familiarization costs to be \$25.13 per small firm (\$50.25 per hour × 0.5 hour). The Department welcomes comments on these rule familiarization estimates.

For implementation costs, the Department estimates that it will take an average of 30 minutes total for contractors to incorporate the contract clause into their covered subcontracts, and another 30 minutes for the other contractor requirements discussed in Section IV.C.2. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$50.25 per hour. Therefore, the Department has estimated the cost of including the required

<sup>30</sup> This includes the median base wage of \$32.30 from the 2020 OEWS plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: <http://www.bls.gov/oes/current/oes131141.htm>.

contract clause to be \$50.25 per small firm (\$50.25 per hour × 1 hour).

For recordkeeping costs, the Department estimates that the extra time associated with keeping and providing these records to be an average of 1 hour and be completed by Compensation, Benefits, and Job Analysis Specialist of \$50.25 per hour. The estimated recordkeeping cost is \$50.25 per firm.

Therefore, the small firms that are impacted by this proposed rule could each have additional costs of \$125.63 in Year 1 (\$25.13 + \$50.25 + \$50.25).

As discussed in section V.C.5., the Department does not expect there to be additional costs for successor contracts associated with evaluating predecessor contract employees and available positions beyond what they already would have incurred. In absence of this proposed rule, the successor contractor would incur costs associated with hiring a new workforce and assigning them to positions on the contract. The benefits discussed in section IV.D. would also apply to small firms.

#### *F. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule*

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

#### *G. Alternatives to the Proposed Rule*

The Department is issuing a proposed rulemaking to implement Executive Order 14055 and cannot deviate from the language of the Executive order, therefore, there are limited instances in which there is discretion to offer regulatory alternatives. However, the Department has discussed a few specific provisions here in which limited alternatives are possible.

First, in cases where a prime contract is above the simplified acquisition threshold, but their subcontract falls below this threshold, the Department could potentially have discretion to exclude these subcontracts from the requirements of this proposed rule. However, the Department believes that based on the way the Executive Order is worded, the intent was not to exclude these subcontracts.

Second, the Department has some discretion in defining the specific analysis that must be completed by contracting agencies regarding location continuity. The Department is considering whether to require contracting officers to analyze additional factors when determining whether to decline to require location continuity. Any requirement of a more in-depth analysis could potentially increase costs for contracting agencies.

There are also a few places in this proposed rule where the Department has developed additional requirements beyond what is laid out in Executive Order 14055. For example, Executive Order 14055 does not address the issue of remote work or telework, including whether it is permissible for a successor contractor to allow its incumbent employees in similar positions to use remote work or telework but not offer remote work or telework to predecessor employees in similar positions. However, based on the Department's previous enforcement experience, lack of clarity on this issue leads to confusion on the part of stakeholders and difficulties in enforcement when trying to determine whether the successor contractor has offered different employment terms and conditions to predecessor employees to discourage them from accepting employment offers. Accordingly, the Department has proposed the additional requirement that the successor contractor must offer employees of the predecessor contractor the option of remote work under reasonably similar terms and conditions, where the successor contractor has or will have any employees in the same or similar occupational classifications who work or will work entirely in a remote capacity. The Department has also proposed specific procedural guidelines for the location continuity analysis that is generally required by the text of the Executive order. Although an alternative would be to issue a proposed rule without these types of more-specific requirements, the Department believes that they are reasonably necessary to effectively implement the Executive order.

#### **VI. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector. This rulemaking is not expected to impose unfunded mandates that exceed that threshold. See section V. for an assessment of anticipated costs and benefits.

#### **VII. Executive Order 13132, Federalism**

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding

federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### **VIII. Executive Order 13175, Indian Tribal Governments**

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### **List of Subjects**

Employment, Federal buildings and facilities, Government contracts, Law enforcement, Labor.

Signed this 8th day of July, 2022.

**Jessica Looman,**

*Acting Administrator, Wage and Hour Division.*

■ For the reasons set out in the preamble, the Department of Labor proposes to amend Title 29 of the Code of Federal Regulations by adding part 9.

### **PART 9—NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS**

#### **Subpart A—General**

Sec.

- 9.1 Purpose and scope.
- 9.2 Definitions.
- 9.3 Coverage.
- 9.4 Exclusions.
- 9.5 Exceptions authorized by Federal agencies.

#### **Subpart B—Requirements**

- 9.11 Contracting agency requirements.
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#### **Subpart C—Enforcement**

- 9.21 Complaints.
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#### **Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings**

- 9.31 Determination of the Administrator.
- 9.32 Requesting appeals.
- 9.33 Mediation.
- 9.34 Administrative Law Judge hearings.
- 9.35 Administrative Review Board proceedings.
- 9.36 Severability.

Appendix A to Part 9—Contract Clause  
Appendix B to Part 9—Notice to Service  
Contract Employees

**Authority:** 5 U.S.C. 301; section 6, E.O. 14055, 86 FR 66397; Secretary of Labor's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

## Subpart A—General

### § 9.1 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's (Department) rules relating to the administration of Executive Order 14055 (Executive order or the order), "Nondisplacement of Qualified Workers Under Service Contracts," and implements the enforcement provisions of the Executive order. The Executive order assigns enforcement responsibility for the nondisplacement requirements to the Department.

(b) *Policy.* (1) The Executive order states that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor or subcontractor hires the predecessor's employees. A carryover workforce minimizes disruption in the delivery of services during a period of transition between contractors, maintains physical and information security, and provides the Federal Government the benefit of an experienced and well-trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. Accordingly, Executive Order 14055 sets forth a general position of the Federal Government that requiring successor service contractors and subcontractors performing on Federal contracts to offer a right of first refusal to suitable employment (*i.e.*, a job for which the employee is qualified) under the contract to those employees under the predecessor contract and its subcontracts whose employment will be terminated as a result of the award of the successor contract will lead to improved economy and efficiency in Federal procurement.

(2) The Executive order provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, shall, to the extent permitted by law, ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include a clause that requires the contractor and its subcontractors to offer a right of first refusal of employment to service employees employed under the predecessor contract and its

subcontracts whose employment would be terminated as a result of the award of the successor contract in positions for which the employees are qualified. Nothing in Executive Order 14055 or this part shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive order, regulation, or law of the United States.

(c) *Scope.* Neither Executive Order 14055 nor this part creates or changes any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, or any private right of action that may exist under other applicable laws. The Executive order provides that disputes regarding the requirement of the contract clause prescribed by section 3 of the order, to the extent permitted by law, shall be disposed of only as provided by the Secretary of Labor (Secretary) in regulations issued under the order. The order, however, does not preclude review of final decisions by the Secretary in accordance with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Additionally, the Executive order also provides that it is to be implemented consistent with applicable law and subject to the availability of appropriations.

### § 9.2 Definitions.

For purposes of this part:

*Administrative Review Board (ARB)* means the Administrative Review Board, U.S. Department of Labor.

*Administrator* means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

*Agency* means an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act.

*Associate Solicitor* means the Associate Solicitor for Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

*Contract or service contract* means any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act (SCA). Contract or contract-like instrument means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services and another party to pay for them. The

term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing, to the extent such contracts and subcontracts are subject to the SCA. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications.

*Contracting officer* means an agency official with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

*Contractor* means any individual or other legal entity that is awarded a Federal Government service contract or subcontract under a Federal Government service contract. Unless the context of the provision reflects otherwise, the term "contractor" refers collectively to a prime contractor and all of its subcontractors of any tier on a service contract with the Federal Government. The term "employer" is used interchangeably with the terms "contractor" and "subcontractor" in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive order.

*Business day* means Monday through Friday, except the legal public holidays specified in 5 U.S.C. 6103, any day declared to be a holiday by federal statute or executive order, or any day with respect to which the U.S. Office of Personnel Management has announced that Federal agencies in the Washington, DC, area are closed.

*Employee or service employee* means a service employee as defined in the Service Contract Act, 41 U.S.C. 6701(3), and its implementing regulations.

*Employment opening* means any vacancy in a position on the contract, including any vacancy caused by replacing an employee from the predecessor contract with a different employee.

*Federal Government* means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. This definition does not include the District of Columbia or any Territory or possession of the United States.

*Month* means a period of 30 consecutive calendar days, regardless of the day of the calendar month on which it begins.

*Office of Administrative Law Judges* means the Office of Administrative Law Judges, U.S. Department of Labor.

*Secretary* means the U.S. Secretary of Labor or an authorized representative of the Secretary.

*Same or similar work* means work that is either identical to or has primary characteristics that are alike in substance to work performed on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract.

*Service Contract Act* means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.*, and the implementing regulations in this subtitle.

*Solicitation* means any request to submit offers, bids, or quotations to the Federal Government.

*United States* means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities. When used in a geographic sense, the United States means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

*Wage and Hour Division* means the Wage and Hour Division, U.S. Department of Labor.

### **§ 9.3 Coverage.**

(a) This part applies to any contract or solicitation for a contract with an agency, provided that:

(1) It is a contract for services covered by the Service Contract Act; and

(2) The prime contract exceeds the simplified acquisition threshold as defined in 41 U.S.C. 134.

(b) Contracts that satisfy the requirements of paragraph (a) of this section must contain the contract clause set forth at Appendix A, and all contractors on such contracts must comply, unless otherwise excluded or excepted under this part, with the requirements of §§ 9.12(e), (f), and (g).

(c) Contracts and solicitations that satisfy the requirements of paragraph (a) of this section, and that succeed a contract for performance of the same or similar work, must contain the contract clause set forth at Appendix A, and contractors on such contracts must comply, unless otherwise excluded or excepted under this part, with all the requirements of § 9.12.

### **§ 9.4 Exclusions.**

(a) *Small contracts*—(1) *General*. The requirements of this part do not apply to prime contracts under the simplified acquisition threshold set by the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 134), and any subcontracts of any tier under such prime contracts.

(2) *Application to subcontracts*. The amount of the prime contract determines whether a subcontract is excluded from the requirements of this part. If a prime contract is under the simplified acquisition threshold, then each subcontract under that prime contract will also be excluded from the requirements of this part. If a prime contract meets or exceeds the simplified acquisition threshold and meets the other coverage requirements of § 9.3, then each subcontract for services under that prime contract will also be subject to the requirements of this part, even if the value of an individual subcontract is under the simplified acquisition threshold.

(b) *Federal service work constituting only part of employee's job*. This part does not apply to 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 Executive Order 14055.

### **§ 9.5 Exceptions authorized by Federal agencies.**

(a) A contracting agency may waive the application of some or all of the provisions of this part as to a prime contract if the senior procurement executive within the agency issues a written determination that at least one

of the following circumstances exists with respect to that contract:

(1) Adhering to the requirements of the order or this part would not advance the Federal Government's interest in achieving economy and efficiency in Federal procurement;

(2) Based on a market analysis, adhering to the requirements of the order or this part would:

(i) Substantially reduce the number of potential bidders so as to frustrate full and open competition, and

(ii) Not be reasonably tailored to the agency's needs for the contract; or

(3) Adhering to the requirements of the order or this part would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

(b) Any agency determination to exercise its exception authority under section 6 of the Executive order and paragraph (c)(1) of this section must include a specific written explanation, including the facts and reasoning supporting the determination, and must be issued no later than the solicitation date. Any agency determination to exercise its exception authority under section 6 of the Executive order and paragraph (c)(1) of this section made after the solicitation date or without a specific written explanation will be inoperative. In such a circumstance, the agency must take action, consistent with § 9.11(f), to incorporate the contract clause set forth in Appendix A of this part into the relevant solicitation or contract.

(c) In exercising the authority to grant an exception for a contract because adhering to the requirements of the order or this part would not advance economy and efficiency, the agency's written analysis must, among other things, compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce. The consideration of cost and other factors in exercising the agency's exception authority must reflect the general findings in section 1 of the Executive order that the Federal Government's procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor's employees and must specify how the particular circumstances support a contrary conclusion. General assertions or presumptions of an inability to procure services on an economical and efficient basis using a carryover workforce are insufficient.

(1) Factors that the agency may consider include, but are not limited to, the following:

(i) Whether factors specific to the contract at issue suggest that the use of a carryover workforce would greatly increase disruption to the delivery of services during the period of transition between contracts (e.g., the carryover workforce in its entirety would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements as pertinent to the contract at issue and would require extensive training to learn new technology or processes that would not be required of a new workforce).

(ii) Emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the location of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Executive order.

(iii) Situations where the senior procurement executive reasonably believes, based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively to perform suitably on the job and that it is not in the interest of economy and efficiency to provide supplemental training to the predecessor's workers.

(2) Factors the senior procurement executive may not consider in making an exception determination related to economy and efficiency include any general assumption that the use of carryover workforces usually or always greatly increase disruption to the delivery of services during the period of transition between contracts; the job performance of the predecessor contractor (unless a determination has been made that the entire predecessor workforce failed, individually as well as collectively); the seniority of the workforce; and the reconfiguration of the contract work by a successor contractor. The agency also may not consider wage rates and fringe benefits of service employees in making an exception determination except in the following exceptional circumstances:

(i) In emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Executive order;

(ii) When a carryover workforce in its entirety would not constitute an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements but rather would require extensive training to learn new

technology or processes that would not be required of a new workforce; or

(iii) Other, similar circumstances in which the cost of employing a carryover workforce on the successor contract would be prohibitive.

(d) In exercising the authority to grant an exception to a contract because adhering to the requirements of the order or this part would substantially reduce the number of potential bidders so as to frustrate full and open competition, the contracting agency must carry out a market analysis. A likely reduction in the number of potential offerors indicated by market analysis is not, by itself, sufficient to except a contract from coverage under this authority unless the agency concludes that adhering to the nondisplacement requirements would diminish the number of potential offerors to such a degree that adequate competition requirements at a fair and reasonable price could not be achieved and adhering to the requirements of the order would not be reasonably tailored to the agency's needs. In finding that inclusion of the contract clause would not be reasonably tailored to the agency's needs, the agency must specify how it intends to more effectively achieve the benefits that would have been provided by a carryover workforce, including physical and information security and a reduction in disruption of services.

(e) Before exercising the authority to grant an exception to a contract because adhering to the requirements of the order or this part would otherwise be inconsistent with statutes, regulations, Executive orders, or Presidential Memoranda, the contracting agency must consult with the Department of Labor, unless the agency has regulatory authority for implementing and interpreting the statute at issue, or the Department has already issued guidance finding an exception on the basis at issue to be appropriate.

(f) Any request by interested parties for reconsideration of an agency's determination to exercise its exception authority under section 6 of the Executive order shall be directed to the head of the contracting department or agency.

(g) Section 6 of Executive Order 14055 requires that, to the extent permitted by law and consistent with national security and executive branch confidentiality interests, each agency must publish, on a centralized public website, descriptions of the exceptions it has granted under this section. Each agency must also ensure that the contractor notifies affected workers and their collective bargaining

representatives, if any, in writing of the agency's determination to grant an exception. Each agency also must, on a quarterly basis, report to the Office of Management and Budget descriptions of the exceptions granted under this section.

## Subpart B—Requirements

### § 9.11 Contracting agency requirements.

(a) *Contract Clause.* The contract clause set forth in Appendix A of this part must be included in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar work, except for procurement contracts subject to the FAR. The contract clause in Appendix A affords employees who worked on the prior contract a right of first refusal pursuant to Executive Order 14055. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement this section. Such clause will accomplish the same purposes as the clause set forth in appendix A of this part and be consistent with the requirements set forth in this section.

(b) *Notice.* Where a contract will be awarded to a successor for the same or similar work, the contracting officer must take steps to ensure that the predecessor contractor provides written notice to service employees employed under the predecessor contract of their possible right to an offer of employment, consistent with the requirements in § 9.12(e)(3).

(c) *Location Continuity.* (1) When an agency prepares a solicitation for a service contract that succeeds a contract for performance of the same or similar work, the agency must consider whether performance of the work in the same locality or localities in which the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services.

(2) If an agency determines that performance of the contract in the same locality or localities is reasonably necessary to ensure economical and efficient provision of services, then the agency must, to the extent consistent with law, include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities.

(3) Agencies must complete the location continuity analysis required under paragraph (c)(1) of this section prior to the date of issuance of the solicitation. Any agency determination to decline to include a requirement or preference for location continuity in the



solicitation must be made in writing by the agency's senior procurement executive, and the agency must include in the solicitation a statement that the analysis required by paragraph (c)(1) of this section has been conducted and that the agency has determined that no such requirement or preference is warranted. When an agency decides not to include a location continuity requirement or preference, the agency must ensure that the contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination and the right of interested parties to request reconsideration. The contracting agency must ensure that the contractor provides this notice within 5 business days after the solicitation is issued and confirms to the agency that such notice has been provided. Any request by interested parties for reconsideration of an agency's decision regarding a location continuity requirement or preference must be directed to the head of the contracting department or agency.

(4) If the successor contract will be performed in a new locality, nothing in this part requires the contracting agency or the successor contractor to pay the relocation costs of employees who exercise their right to work for the successor contractor or subcontractor under the contract clause.

(d) *Disclosures.* The contracting officer must provide the incumbent contractor's list of employees referenced in § 9.12(e) to the successor contractor no later than 21 calendar days prior to the start of performance on the successor's contract and, on request, the predecessor contractor must provide the employee list to employees or their representatives, consistent with the Privacy Act, 5 U.S.C. 552a, and other applicable law. When the incumbent contractor provides the contracting agency with an updated employee list pursuant to § 9.12(e)(2), the contracting agency will provide the updated list to the successor contractor no later than 7 calendar days prior to the start of performance on the successor contract. However, if the contract is awarded less than 30 days before the beginning of performance, then the predecessor contractor and the contracting agency must transmit the list as soon as practicable.

(e) *Actions on complaints*—(1) *Reporting*—(i) *Reporting time frame.* Within 15 calendar days of receiving a complaint or being contacted by the Wage and Hour Division with a request for the information in paragraph (e)(1)(ii) of this section, the contracting officer will forward all information listed in paragraph (e)(1)(ii) of this

section to the local Wage and Hour office.

(ii) *Report contents:* The contracting officer will forward to the Wage and Hour Division any:

(A) Complaint of contractor noncompliance 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 excepted 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]

(f) *Incorporation of omitted contract clause.* Where the Department or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 14055 or this part did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive order applies, the contracting agency will incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination). Such incorporation must happen either on the initiative of the contracting agency or within 15 calendar days of notification by an authorized representative of the Department of Labor. Where the circumstances so warrant, the Administrator may, at their discretion, require solely prospective incorporation of the contract clause from the date of incorporation.

#### **§ 9.12 Contractor requirements and prerogatives.**

(a) *General*—(1) *No filling of employment openings prior to right of first refusal.* Except as provided under the exclusion listed in § 9.4(b) or the exceptions listed in paragraph (c) of this section, a successor contractor or

subcontractor must not fill any employment openings for positions subject to the SCA 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 successor contract or the expiration of the contract under which the employees were hired. To the extent necessary to meet its anticipated staffing pattern and in accordance with the requirements described at 9.12(d), the contractor and its subcontractors must make a bona fide, express offer of employment to each employee to a position for which the employee is qualified and must state the time within which the employee must accept such offer. In no case may the contractor or subcontractor give an employee fewer than 10 business days to consider and accept the offer of employment.

(2) *Right of first refusal exists when no seniority list is 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 and subcontractor(s)' employees or if 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 the person 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 reliable 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 the predecessor contract during the predecessor's last month of performance, coupled with contracting agency staff verification, could constitute reliable evidence of an employee's entitlement to a job offer under this part. Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked or otherwise reflecting that the employee worked on the predecessor contract during the last month of performance.

(4) *Obligation to ensure proper placement of contract clause.* A contractor or subcontractor has an affirmative obligation to ensure its covered contract contains the contract

clause. The contractor or subcontractor must notify the contracting officer as soon as possible if the contracting officer did not incorporate the required contract clause into a contract.

(b) *Method of job offer*—(1) *Bona-fide offers to qualified employees*. 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 the conditions detailed in paragraph (d) of this section. A contractor may only use employment screening processes (*i.e.*, drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms) when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive order. While the results of such screenings may show that an employee is unqualified for a position and thus not entitled to an offer of employment, a contractor may not use the requirement of an employment screening process by itself to conclude an employee is unqualified because they have not yet completed that screening process.

(2) *Establishing time limit for employee response*. The contractor must state the time within which an employee must accept an employment offer. In no case may the period in which the employee has to accept the offer be less than 10 business days. The obligation to offer employment under this part will cease upon the employee's first refusal of a bona fide offer of employment on the contract.

(3) *Process*. The successor contractor must, in writing or orally, offer employment to each employee. See also paragraph (f) of this section, Recordkeeping. In order to ensure that the offer is effectively communicated, the successor contractor should make reasonable efforts to make the offer in a language that each worker understands. For example, if the successor 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. Where offers are not made in person, the offers should be sent by registered or certified mail to the employees' last known address or by any other means normally

ensuring delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier or express delivery services, or by personal service to the last known address.

(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, so long as it is one for which the employee is qualified. If a question arises concerning an employee's qualifications, that question must 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 than the employee held with the predecessor contractor is permitted provided that the offer is still bona fide, *i.e.*, the different employment terms and conditions are not offered to discourage the employee from accepting the offer. This would include changes to pay or benefits. Where the successor contractor has or will have any employees in the same or similar occupational classifications during the course of the contract who work or will work entirely in a remote capacity, the successor contractor must offer employees of the predecessor contractor the option of remote work under reasonably similar terms and conditions.

(6) *Relocation costs*. If the successor contract will be performed in a new locality, nothing in this part requires or recommends that contractors or subcontractors pay the relocation costs of employees who exercise their right to work for the successor contractor or subcontractor under this part.

(7) *Termination after contract commencement*. Where an employee is terminated by the successor contractor 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 determine whether the offer was bona fide.

(8) *Retroactive incorporation of contract clause modifies contractor's obligations*. Pursuant to § 9.11(f), in a situation where the contracting agency retroactively incorporates the contract clause, if the successor contractor already hired employees to perform on the contract at the time the clause was retroactively incorporated, the successor contractor will be required to offer a right of first refusal of employment to the predecessor's employees in accordance with the requirements of Executive Order 14055 and this part. Where, pursuant to § 9.11(f), the Administrator has exercised their discretion and required only prospective incorporation of the contract clause from the date of incorporation, the successor contractor must provide the employees on the predecessor contract a right of first refusal for any positions that remain open. In the event any positions become vacant within 90 calendar days of the first date of contract performance, the successor contractor must provide the employees of the predecessor contractor the right of first refusal as well, regardless of whether incorporation of the contract clause is retroactive or prospective.

(c) *Exceptions*. The successor contractor is responsible for demonstrating the applicability of the following exceptions to the nondisplacement provisions subject to this part.

(1) *Nondisplaced employees*—(i) A successor 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 successor 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, unless it can demonstrate a reasonable belief to the contrary based upon reliable information provided by a knowledgeable source, such as the predecessor contractor, the employee, or the contracting agency.

(2) *Predecessor contract's non-service workers*—(i) A successor contractor or subcontractor is not required to offer employment to any person working on the predecessor contract who is not a service employee as defined in § 9.2 of this part.

(ii) The successor contractor must presume that all employees hired to work under a predecessor's federal service contract are service employees, unless it can demonstrate a reasonable belief to the contrary based upon reliable 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 exception.

(3) *Employee's past performance*—(i) A successor contractor or subcontractor is not 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.

(ii) A successor contractor must presume that there would be no just cause to discharge any employees working under the predecessor contract in the last month of performance, unless it can demonstrate a reasonable belief to the contrary that is based upon reliable evidence provided by a knowledgeable source, such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency.

(A) For example, 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. Conversely, written evidence of disciplinary action taken for poor performance without a recommendation of termination would generally not constitute reliable evidence of just cause to discharge the employee. This 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.

(B) [Reserved].

(4) *Nonfederal work*—(i) A successor contractor or subcontractor is not required to offer employment to any employee working 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 who worked under a predecessor's federal service contract also worked on one or more nonfederal service contracts as part of a

single job, unless the successor can demonstrate a reasonable belief based on reliable evidence to the contrary. The successor contractor must demonstrate that its belief is reasonable and is based upon reliable evidence 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 successor 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 reliable evidence that has been provided by a knowledgeable source, such as the employee or the contracting agency.

(d) *Reduced staffing*—(1) *Contractor determines how many employees.* (i) A successor contractor or subcontractor will 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 will continue for 90 calendar 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, as described in § 9.12(b), or when 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 calendar days of the first date of contract performance, the contractor must first offer that employment opening 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 employees on the contract quit 5 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 calendar days have passed since the successor contractor's first date of performance on the contract.

(2) *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 must scrutinize each employee's qualifications in order to offer the greatest possible number of predecessor contract employees positions equivalent to those they held under the predecessor contract. 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 of persons employed as Cook IIs and Dishwashers and reducing the number of Cook I employees. The successor contractor must examine the qualifications of each Cook I to determine whether they are qualified for either a Cook II or Dishwasher position. Conversely, were the contractor to increase the number of Cook I employees, decrease the number of Cook II employees, and keep the 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.

(3) *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 requirements of other Executive orders, regulations, or Federal, state, or local laws.

(e) *Contractor obligations near end of contract performance*—(1) *Certified list of employees provided 30 calendar days before contract completion.* The contractor will, not less than 30 calendar 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 must 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(l)(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 will, 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 must 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(l)(2) to meet this provision.

(3) *Notices.* Before contract completion, the contractor must provide written notice to service employees employed under the contract of their possible right to an offer of employment on the successor contract. Such notice will be either posted in a conspicuous place at the worksite or delivered to the employees individually. Where the workforce on the predecessor contract is comprised of a significant portion of workers who are not fluent in English, the notice will be provided in both English and a language in which the employees are fluent. Multiple language notices are required where significant portions of the workforce speak different languages and there is no common language. Contractors may provide the notice set forth in Appendix B to this part in either a physical posting at the job site, or in another manner that effectively provides individual notice such as individual paper notices or effective email notification to the affected employees. To be effective, email notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice. Any particular determination of the adequacy of a notification, regardless of the method used, will be fact-dependent and made on a case-by-case basis.

(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 will apply to all records regardless of their format (e.g., paper or electronic).

(2) *Records to be retained.* (i) The contractor must 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 must maintain a copy of any record that forms the basis for any exclusion or exception claimed under this part.

(iii) The contractor must maintain a copy of the employee list received from the contracting agency and the employee list provided to the contracting agency. See paragraph (e) of this section, contractor obligations near end of contract performance.

(iv) Every contractor that makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to § 9.23(b), must:

(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 within 10 business days after payment is made.

(v) The contractor must maintain evidence of any notices that they have provided to workers, or workers' collective bargaining representatives, to satisfy the requirements of the order or these regulations, including notices of the possibility of employment on the successor contract as required under § 9.12(e)(3); notices of agency exceptions that a contracting agency requires a contractor to provide under § 9.5(g) and section 6(b) of the order; and notices that a contracting agency has declined to include location continuity requirements or preferences in a solicitation pursuant to § 9.11(c)(3).

(3) *Records retention period.* The contractor must retain records prescribed by § 9.12(f)(2) of this part for not less than a period of 3 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 must cooperate in any review or investigation conducted pursuant to this part and must 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, and also includes investigations related to other contractors (*e.g.*, predecessor and successor contractors) and subcontractors.

### **§ 9.13 Subcontracts.**

(a) *Subcontractor liability.* The contractor or subcontractor must insert in any subcontracts the clause contained in Appendix A. The contractor or subcontractor must also insert a clause in any subcontracts to require the subcontractor to include the clause in Appendix A in any lower tier subcontracts. The prime contractor is responsible for the compliance of any subcontractor or lower tier subcontractor with the contract clause in Appendix A. In the event of any violations of the clause in Appendix A, the prime contractor and any subcontractor(s) responsible will be jointly and severally liable for any unpaid wages and pre-judgment and post-judgment interest, and may be subject to debarment, as appropriate.

(b) *Discontinuation of subcontractor services.* When a prime contractor that is subject to the nondisplacement requirements of this part discontinues the services of a subcontractor at any time during the contract and performs those services itself, the prime contractor must offer employment on the contract to the subcontractor's employees who would otherwise be displaced and would otherwise be qualified in accordance with this part.

## **Subpart C—Enforcement**

### **§ 9.21 Complaints.**

(a) *Filing a complaint.* Any employee of the predecessor contractor who believes the successor contractor has violated this part, or their authorized representative, may file a complaint with the Wage and Hour Division within 120 days from the first date of contract performance. The employee or authorized representative may file a complaint directly with any office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. The Wage and Hour Division will accept the complaint in any language.

(b) *Confidentiality.* It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of

personal privacy. Accordingly, the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would tend to reveal the individual's identity, will not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements will be governed by the provisions of the Freedom of Information Act (5 U.S.C. 552, *see* 29 CFR part 70) and the Privacy Act of 1974 (5 U.S.C. 552a).

### **§ 9.22 Wage and Hour Division investigation.**

(a) *Initial investigation.* The Administrator of the Wage and Hour Division (Administrator) may initiate an investigation under this part either as the result of a complaint or at any time on the Administrator's own initiative. The Administrator may investigate potential violations of, and obtain compliance with, the Executive Order. As part of the investigation, the Administrator may conduct interviews with the predecessor and successor contractors, as well as confidential interviews with the relevant contractors' workers at the worksite during normal work hours; inspect the relevant contractors' records; make copies and transcriptions of such records; and require the production of any documents or other evidence deemed necessary to determine whether a violation of this part, including conduct warranting imposition of debarment pursuant to § 9.23(d), has occurred. Federal agencies and contractors shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all aspects of investigations.

(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 debarment is appropriate, or where the contractor has failed to comply with an order of the Secretary.

### **§ 9.23 Remedies and sanctions for violations of this part.**

(a) *Authority.* Executive Order 14055 provides that the Secretary will have the authority to issue final orders prescribing appropriate sanctions and 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 that violates any provision of this part must take appropriate action to abate the violation, which may include hiring each affected employee in a position on the contract for which the employee is qualified, together with compensation (including lost wages) and other terms, conditions, and privileges of that employment. The contractor will pay interest on any underpayment of wages and on any other monetary relief due under this part. Interest on any back wages or monetary relief provided for in this part will be calculated using the percentage established for the underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(c) *Withholding of funds—(1) Unpaid wages or other relief.* The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld in such amounts as may be necessary to pay unpaid wages or to provide other appropriate relief due under this part. Upon the final order of the Secretary that such monies are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(2) *List of employees.* If the contracting officer or the Administrator finds that the predecessor contractor has failed to provide a list of the names of service employees working under the contract and its subcontracts during the last month of contract performance in accordance with § 9.12(e), the contracting officer will, at their own discretion or as directed 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.

(3) *Notification to a contractor of the withholding of funds.* If the Administrator directs a contracting agency withhold funds from a contractor pursuant to § 9.23(c)(1), the Administrator or contracting agency must notify the affected contractor.

(d) *Debarment.* Where the Secretary finds that a contractor has failed to comply with any order of the Secretary or has committed willful violations of Executive Order 14055 or this part, the Secretary may order that the contractor

and its responsible officers, and any firm in which the contractor has a substantial interest, will be ineligible to be awarded any contract or subcontract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors will be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(e) *Antiretaliation.* When the Administrator finds that a contractor has interfered with an investigation of the Administrator under this part or has in any manner discriminated against any person because such person has cooperated in such an investigation or has attempted to exercise any rights afforded under this part, the Administrator may require the contractor to provide any relief to the affected person as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages, including interest.

#### **Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings**

##### **§ 9.31 Determination of the Administrator.**

(a) *Written determination.* Upon completion of an investigation under § 9.22, the Administrator will issue a written determination of whether a violation has occurred. The determination will contain a statement of the investigation findings and conclusions. A determination that a violation occurred will address appropriate relief and the issue of debarment where appropriate. The Administrator will notify any complainant(s); employee representative(s); contractor(s), including the prime contractor if a subcontractor is implicated; contractor representative(s); and contracting officer by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings.

(b) *Notice to parties and effect—(1) Relevant facts in dispute.* If the Administrator concludes that relevant facts are in dispute, the Administrator's determination will so advise the parties and their representatives, if any. It will further advise that the notice of determination will become the final order of the Secretary and will not be appealable in any administrative or judicial proceeding unless an interested party requests a hearing within 20

calendar days of the date of the Administrator's determination, in accordance with § 9.32(b)(1). Such a request may be sent by mail or by any other means normally assuring delivery to the Chief Administrative Law Judge of the Office of the Administrative Law Judges. A detailed statement of the reasons why the Administrator's determination is in error, including facts alleged to be in dispute, if any, must be submitted with the request for a hearing. The Administrator's determination not to seek debarment will not be appealable.

(2) *Relevant facts not in dispute.* If the Administrator concludes that no relevant facts are in dispute, the parties and their representatives, if any, will be so advised. They will also be advised that the determination will become the final order of the Secretary and will not be appealable in any administrative or judicial proceeding unless an interested party files a petition for review with the Administrative Review Board pursuant to § 9.32(b)(2) within 20 calendar days of the date of the determination of the Administrator. The determination will further advise that if an aggrieved party disagrees with the factual findings or believes there are relevant facts in dispute, the aggrieved party may advise the Administrator of the disputed facts and request a hearing by mail or by any other means normally assuring delivery. The request must be sent within 20 calendar days of the date of the determination. The Administrator will either refer the request for a hearing to the Chief Administrative Law Judge or notify the parties and their representatives, if any, of the determination of the Administrator that there is no relevant issue of fact and that a petition for review may be filed with the Administrative Review Board within 20 calendar days of the date of the notice, in accordance with the procedures at § 9.32(b)(2).

##### **§ 9.32 Requesting appeals.**

(a) *General.* If any party desires review of the determination of the Administrator, including judicial review, a request for an Administrative Law Judge hearing or petition for review by the Administrative Review Board must first be filed in accordance with § 9.31(b) of this part.

(b) *Process—(1) For Administrative Law Judge hearing—(i) General.* Any aggrieved party may request a hearing by an Administrative Law Judge by sending a request to the Chief Administrative Law Judge of the Office of the Administrative Law Judges within 20 calendar days of the determination of the Administrator. The request for a

hearing may be sent by mail or by any other means normally assuring delivery and will be accompanied by a copy of the determination of the Administrator. At the same time, a copy of any request for a hearing will be sent to the complainant(s) or successor contractor, and their representatives, if any, as appropriate; the contracting officer; the Administrator of the Wage and Hour Division; and the Associate Solicitor.

(ii) *By the complainant.* The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has not committed violation(s), or where the complainant or other interested party believes that the Administrator has ordered inadequate monetary relief. In such a proceeding, the party requesting the hearing will be the prosecuting party and the employer will be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

(iii) *By the contractor.* The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator will be the prosecuting party and the employer will be the respondent.

(2) *For Administrative Review Board review—(i) General.* Any aggrieved party desiring review of a determination of the Administrator in which there were no relevant facts in dispute, or of an Administrative Law Judge's decision, must file a petition for review with the Administrative Review Board within 20 calendar days of the date of the determination or decision. The petition must be served on all parties and, where the case involves an appeal from an Administrative Law Judge's decision, the Chief Administrative Law Judge. See also § 9.32(b)(1).

(ii) *Contents and service—(A) Contents.* A petition for review shall refer to the specific findings of fact, conclusions of law, or order at issue.

(B) *Service.* Copies of the petition and all briefs shall be served on the Administrator, Wage and Hour Division, and on the Associate Solicitor.

(C) *Effect of filing.* If a timely request for hearing or petition for review is filed, the determination of the Administrator or the decision of the Administrative Law Judge will be inoperative unless and until the Administrative Review Board issues an order affirming the determination or decision, or the determination or decision otherwise becomes a final

order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision shall be effective immediately. No judicial review will be available unless a timely petition for review to the Administrative Review Board is first filed.

### § 9.33 Mediation.

The parties are encouraged to resolve disputes by using settlement judges to mediate settlement negotiations pursuant to the procedures and requirements of 29 CFR 18.13 or any successor to the regulation. Any settlement agreement reached must be approved by the assigned Administrative Law Judge consistent with the procedures and requirements of 29 CFR 18.71.

### § 9.34 Administrative Law Judge hearings.

(a) *Authority*—(1) *General*. The Office of Administrative Law Judges has jurisdiction to hear and decide appeals pursuant to § 9.31(b)(1) concerning questions of law and fact from determinations of the Administrator issued under § 9.31. In considering the matters within the scope of its jurisdiction, the Administrative Law Judge will act as the authorized representative of the Secretary and shall act fully and, subject to an appeal filed under § 9.32(b)(2), finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review*. (i) The Administrative Law Judge will not have jurisdiction to pass on the validity of any provision of this part.

(ii) The Equal Access to Justice Act, as amended, does not apply to hearings under this part. Accordingly, an Administrative Law Judge will have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Scheduling*. If the case is not stayed to attempt settlement in accordance with § 9.33(a), the Administrative Law Judge to whom the case is assigned will, within 15 calendar days following receipt of the request for hearing, notify the parties and any representatives, of the day, time, and place for hearing. The date of the hearing will not be more than 60 days from the date of receipt of the request for hearing.

(c) *Dismissing challenges for failure to participate*. The Administrative Law Judge may, at the request of a party or on their own motion, dismiss a challenge to a determination of the Administrator upon the failure of the party requesting a hearing or their representative to attend a hearing

without good cause; or upon the failure of the party to comply with a lawful order of the Administrative Law Judge.

(d) *Administrator's participation*. At the Administrator's discretion, the Administrator has the right to participate as a party or as amicus curiae at any time in the proceedings, including the right to petition for review of a decision of an Administrative Law Judge in which the Administrator has not previously participated. The Administrator will participate as a party in any proceeding in which the Administrator has found any violation of this part, except where the complainant or other interested party challenges only the amount of monetary relief. See also § 9.32(b)(2)(i)(C).

(e) *Agency participation*. A Federal agency that is interested in a proceeding may participate as amicus curiae at any time in the proceedings. At the request of such Federal agency, copies of all pleadings in a case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

(f) *Hearing documents*. Copies of the request for hearing under this part and documents filed in all cases, whether or not the Administrator is participating in the proceeding, shall be sent to the Administrator, Wage and Hour Division, and to the Associate Solicitor.

(g) *Rules of practice*. The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18, subpart A, shall be applicable to the proceedings provided by this section. This part is controlling to the extent it provides any rules of special application that may be inconsistent with the rules in 29 CFR part 18, subpart A. The Rules of Evidence at 29 CFR 18, subpart B, shall not apply. Rules or principles designed to assure production of the most probative evidence available shall be applied. The Administrative Law Judge may exclude evidence that is immaterial, irrelevant, or unduly repetitive.

(h) *Decisions*. The Administrative Law Judge will issue a decision within 60 days after completion of the proceeding. The decision will contain appropriate findings, conclusions, and an order and be served upon all parties to the proceeding.

(i) *Orders*. Upon the conclusion of the hearing and the issuance of a decision that a violation has occurred, the Administrative Law Judge will issue an order that the successor contractor take appropriate action to remedy the violation. This may include hiring the affected employee(s) in a position on the

contract for which the employee is qualified, together with compensation (including lost wages), terms, conditions, and privileges of that employment. Where the Administrator has sought debarment, the order shall also address whether such sanctions are appropriate.

(j) *Costs*. If an order finding the successor contractor violated this part is issued, the Administrative Law Judge may assess against the contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding. This amount will be awarded in addition to any unpaid wages or other relief due under § 9.23(b).

(k) *Finality*. The decision of the Administrative Law Judge will become the final order of the Secretary, unless a petition for review is timely filed with the Administrative Review Board as set forth in § 9.32(b)(2) of this part.

### § 9.35 Administrative Review Board proceedings.

(a) *Authority*—(1) *General*. The Administrative Review Board (ARB) has jurisdiction to hear and decide in its discretion appeals pursuant to § 9.31(b)(2) concerning questions of law and fact from determinations of the Administrator issued under § 9.31 and from decisions of Administrative Law Judges issued under § 9.34. In considering the matters within the scope of its jurisdiction, the ARB acts as the authorized representative of the Secretary and acts fully on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review*. (i) The ARB will not have jurisdiction to pass on the validity of any provision of this part. The ARB is an appellate body and will decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The ARB will not receive new evidence into the record.

(ii) The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, for any proceeding under this part, the Administrative Review Board will have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

(b) *Decisions*. The ARB's final decision will be issued within 90 days of the receipt of the petition for review and will be served upon all parties by mail to the last known address and on the Chief Administrative Law Judge (in cases involving an appeal from an Administrative Law Judge's decision).



(c) *Orders.* If the ARB concludes that the contractor has violated this part, the final order will order action to remedy the violation, which may include hiring each affected employee in a position on the contract for which the employee is qualified, together with compensation (including lost wages), terms, conditions, and privileges of that employment. Where the Administrator has sought imposition of debarment, the ARB will determine whether an order imposing debarment is appropriate. The ARB's order under this section is subject to discretionary review by the Secretary as provided in Secretary's Order 01–2020 (or any successor to that order).

(d) *Costs.* If a final order finding the successor contractor violated this part is issued, the ARB may assess against the contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding. This amount will be awarded in addition to any unpaid wages or other relief due under § 9.23(b).

(e) *Finality.* The decision of the Administrative Review Board will become the final order of the Secretary in accordance with Secretary's Order 01–2020 (or any successor to that order), which provides for discretionary review of such orders by the Secretary.

#### **§ 9.36 Severability.**

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

#### **Appendix A to Part 9—Contract Clause**

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 14055 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

##### **Nondisplacement of Qualified Workers**

(a) The contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer service employees (as defined in the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3)) employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the 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 those 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 more or fewer employees than the predecessor contractor employed in connection with performance of the work solely on the basis of that determination. Except as provided in paragraph (b), there shall be no employment opening under this contract or subcontract, and the contractor and any subcontractors shall not offer employment under this contract to any person prior to having complied fully with the obligations described in this clause. The contractor and its subcontractors shall make an 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 business days.

(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors:

(1) 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

(2) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees' past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors.

(c) The contractor shall, not less than 10 business days before the earlier of the completion of this contract or of its work on 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. The contracting officer shall provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives, consistent with the Privacy Act, 5 U.S.C. 552(a), and other applicable law.

(d) 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, the Secretary may impose appropriate sanctions against the contractor or its subcontractors, as provided in Executive Order 14055, the regulations implementing that order, and relevant orders of the Secretary, or as otherwise provided by law.

(e) In every subcontract entered into in order to perform services under this contract, the contractor shall include provisions that ensure that each subcontractor shall honor

the requirements of paragraphs (a) and (b) 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. The subcontract shall also include provisions to ensure that the subcontractor shall provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph (c) of this clause. 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; provided, however, that 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 enter into such litigation to protect the interests of the United States.

(f)(1) The contractor shall, not less than 30 calendar 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 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. Where changes to the workforce are made after the submission of the certified list described in this paragraph (f)(1), the contractor shall, in accordance with paragraph (c), not less than 10 business days before completion of the contractor's performance of 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 shall have to submit a list in accordance with paragraph (c).

(2) The contracting officer shall upon their own action or upon written request of the Administrator withhold or cause to be withheld as much of the accrued payments due on either the contract or any other contract between the contractor and the Government that the Department of Labor representative requests or that the contracting officer decides may be necessary to pay unpaid wages or to provide other appropriate relief due under 29 CFR part 9. Upon the final order of the Secretary that such moneys are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement. If the contracting officer or the Administrator finds that the predecessor contractor has failed to provide a list of the names of service employees working under the contract and its subcontracts during the

last month of contract performance in accordance with 29 CFR part 9, the contracting officer may in their 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.

(3) The contractor agrees to provide notifications to employees under the contract, and their representatives, if any, in the timeframes requested by the contracting agency, to notify employees of any agency determination to except a successor contract from the nondisplacement requirements of 29 CFR part 9, or to decline to include location continuity requirements or preferences in a successor contract. The notice must include a statement explaining that any request by interested parties for reconsideration of an agency's determination regarding the matter must be directed to the head of the agency or the head of the agency's contracting department.

(g) The contractor and subcontractors shall maintain records of their compliance with this clause for not less than a period of 3 years from the date the records were created. These records may be maintained in any format, paper or electronic, provided the records meet the requirements and purposes of 29 CFR part 9 and are fully accessible. The records maintained must include the following:

(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 to covered employees, 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 exclusion or exception claimed under this part.

(3) A copy of the employee list(s) 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 within 10 days after payment is made.

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

(i) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause 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.

## **Appendix B to Part 9—Notice to Service Contract Employees**

*Service contract employees entitled to nondisplacement:* The contract for (insert type of service) services currently performed by (insert name of predecessor contractor) has been awarded to a new (successor) contractor (insert name of successor contractor). The new contractor's first date of performance on the contract will be (insert first date of successor contractor's performance). The new contractor is

generally required to offer employment to the employees who worked on the contract during the last 30 calendar days of the current contract, except as follows:

Employees who will not be laid off or discharged as a result of the end of this contract are not entitled to an offer of employment.

Managerial, supervisory, or non-service employees on the current contract are not entitled to an offer of employment.

The new contractor is permitted to reduce the size of the current workforce; in such circumstances, only a portion of the existing workforce may receive employment offers. However, the new contractor must offer employment to the displaced employees in positions for which they are qualified if any openings occur during the first 90 calendar days of performance on the new contract.

An employee hired to work under the current federal service contract and one or more nonfederal service contracts as part of a single job is not entitled to an offer of employment on the new contract, provided that the existing contractor did not deploy the employee in a manner that was designed to avoid the purposes of this part.

*Time limit to accept offer:* If you are offered employment on the new contract, you must be given at least 10 business days to accept the offer.

*Complaints:* Any employee(s) or authorized employee representative(s) of the predecessor contractor who believes that they are entitled to an offer of employment with the new contractor and who has not received an offer, may file a complaint, within 120 calendar days from the first date of contract performance, with the local Wage and Hour office.

For additional information: 1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627, <http://www.dol.gov/agencies/whd>.

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