DEPARTMENT OF LABOR

29 CFR Part 9

RIN 1235–AA42

Nondisplacement of Qualified Workers Under Service Contracts

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: This document finalizes regulations to implement Executive Order 14055, ''Nondisplacement of Qualified Workers Under Service Contracts'' (Executive order or the order), which was signed by President Joseph R. Biden, Jr. on November 18, 2021. The Executive order states that when a service contract with the Federal Government 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 Executive order, therefore, 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 Executive order directs the Secretary of Labor (Secretary) to issue regulations, consistent with applicable law, to implement the order's requirements. This final rule establishes standards and procedures for implementing and enforcing the nondisplacement protections of the order.

DATES:

Effective date: This final rule is effective February 12, 2024.

Applicability date: This final rule will apply to solicitations issued on or after the effective date of the final regulations issued by the Federal Acquisition Regulatory Council (FAR Council).

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 Wage and Hour Division (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/agencies/whd/contact/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), 41 U.S.C. 6701 *et seq.,* 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 in section 3 of the Executive order 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 at 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 at 66398. The list must also contain anniversary dates of employment of each service employee on 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, 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, 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 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 may 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 at 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 at 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 at 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 at 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 the Office of Management and Budget (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 at 66399. In addition, to the extent consistent with law, the FAR Council is to amend the Federal Acquisition Regulation (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 U.S. Department of Labor (Department). 86 FR at 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 at 66399–400. 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 at 66400. Section 8 also specifies that Executive Order 14055 creates no rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.,* 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. 86 FR at 66400.

Section 9 of Executive Order 14055 revokes Executive Order 13897 of October 31, 2019, which itself revoked Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts. 86 FR at 66400; *see also* 84 FR 59709 (Nov. 5, 2019); 74 FR 6103 (Jan. 30, 2009). Section 9 also explains that Executive Order 13495 remains revoked. 86 FR at 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 at 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 at 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 at 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. *Id.* at 66401.

A. Prior Relevant Executive Orders

As indicated, section 9 of Executive Order 14055 revoked Executive Order 13897, which revoked 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. As required by Executive Order 13897, the Department rescinded these regulations 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. *Compare* 86 FR at 66398, *with* 74 FR at 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. *Compare* 86 FR at 66398, *with* 74 FR at 6104. 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 the requirements of Executive Order 14055 apply even if the successor contract is not 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 13495 did not contain a similar requirement.

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 as grounds for exemption exists with respect to that contract. 86 FR at 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, Executive Order 14055 requires agencies 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 at 6104. Executive Order 13495 did not require notice or publication of agency exemptions. *See id.*

B. Notice of Proposed Rulemaking

On July 15, 2022, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** inviting comments for a period of 30 days on a proposal to implement the provisions of Executive Order 14055. *See* 87 FR 42552. The 30-day comment period closed on August 15, 2022. The Department received 33 timely comments in response to the NPRM from a variety of interested stakeholders, such as labor organizations, nonprofit organizations, contractors, and contractor associations.

II. Discussion of Final Rule

A. Legal Authority

President Biden lawfully 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 (citing 40 U.S.C. 101 *et seq.*). The Procurement Act's express purpose is ''to provide the Federal Government with an economical and efficient system'' for ''[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting.'' 40 U.S.C. 101. The Act empowers the President to ''prescribe policies and directives that the President considers necessary to carry out'' that objective. 40 U.S.C. 121(a). Executive Order 14055 directs the Secretary, ''to the extent consistent with law,'' to issue regulations to ''implement the requirements of this order.'' 86 FR at 66399. The Secretary has delegated the 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).

Some commenters, particularly Associated Builders and Contractors (ABC), the Professional Services Council (PSC), and an anonymous commenter, generally contended that neither Executive Order 14055 nor the proposed rule provide evidentiary support for the proposition that establishing a nondisplacement obligation would actually achieve greater economy and efficiency in federal procurement. ABC further commented that it believes the proposed rule conflicts with the plain language of the SCA, as the SCA does not require a successor contractor to hire a predecessor contractor's employees, and that neither the President nor the Department has the authority to override the SCA. Accordingly, ABC requested that the Department withdraw the proposed rule in its entirety.

As a threshold matter, the purpose of this rulemaking is to implement Executive Order 14055, and therefore the President's legal authority to issue Executive Order 14055, and the justification for doing so, are not matters within the scope of this rulemaking. Concerning the scope of the Department's rulemaking authority, the Department strongly disagrees with ABC's comment that the proposed rule is in conflict with the SCA. While ABC is correct that the SCA does not require a successor contractor to hire the predecessor contractor's workforce, the SCA does not prohibit the hiring of the predecessor contractor's workforce or address whether such hiring may be encouraged or required by another law. That Executive Order 14055 applies to SCA-covered contracts does not mean that the order and this rule must mirror the SCA's substantive provisions and that the nondisplacement provision is ''in conflict'' with the SCA because it is not required by that statute. Rather, Executive Order 14055 provides for contractual requirements that are separate and distinct from the legal obligations of the SCA—with the President's authority to issue the Executive order derived from the Procurement Act in particular. The Procurement Act empowers the President to ''prescribe policies and directives that the President considers necessary to carry out'' its objectives, and Executive Order 14055 further directs the Secretary to issue regulations to ''implement the requirements of this order.'' 40 U.S.C. 121(a); 86 FR at 66399. This final rule has been promulgated consistent with that authority and contains obligations that are independent from a contractor's responsibilities under the SCA. The SCA's requirements thus do not preclude the Department from implementing and enforcing the nondisplacement requirements of Executive Order 14055. Instead, the SCA and *Executive Order 14055* can and should be viewed as complementary and co-existing rather than in conflict because it is possible for contractors to comply with both authorities; the SCA does not reflect an intent to preclude application of a nondisplacement requirement established by another legal authority. Thus, the Department declines ABC's request to withdraw the proposed rule.

After considering all timely comments received to the proposed rule, the Department is issuing this final rule to implement the provisions of Executive Order 14055.

B. Overview of the Rule

This final rule, which amends Title 29 of the Code of Federal Regulations (*CFR*) by adding part 9, sets forth standards and procedures for implementing and enforcing Executive Order 14055. 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. Subpart B establishes requirements for contracting agencies and contractors to comply with the Executive order. Subpart C specifies standards and procedures related to complaint intake, investigations, and remedies. Subpart D specifies standards and procedures related to administrative enforcement proceedings.

The following section-by-section discussion of this rule presents the contents of each section in more detail.

Part 9 Subpart A—General

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.

1. Section 9.1 Purpose and Scope

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

Proposed § 9.1(b) explained the underlying policy of *Executive Order 14055.* First, the provision repeated 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. Like the order, the proposed rule elaborated 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 explained 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 clarified 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) outlined the scope of the regulations and provided 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 restated 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, must be disposed of only as provided by the Secretary in regulations issued under the Executive order. This paragraph also clarified that neither the Executive order nor the regulations 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.*

The Department did not receive any comments directly related to § 9.1. The Department has addressed comments directed at specific elements of the nondisplacement requirements, such as the scope of the right of first refusal, in the preamble sections for the relevant elements of the order's requirements. The final rule accordingly adopts the § 9.1 provisions as proposed.

2. Section 9.2 Definitions

Proposed § 9.2 defined 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 noted that, while the definitions discussed in the proposed rule would govern the implementation and enforcement of Executive Order 14055, nothing in the proposed rule was 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 proposed to define *agency* to mean an executive department or agency, including an independent establishment subject to the Procurement Act. *See* 86 FR 66397. The Department explained that, for the purpose of this definition, ''an executive department or agency'' means any executive agency as defined 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. The Department explained that the proposed definition would include independent regulatory agencies. The Department did not receive any comments addressing the term *agency* and the final rule adopts the definition of that term as proposed.

The Department proposed 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. The Department did not receive any comments addressing the definition of *Associate Solicitor,* and the final rule adopts the definition of that term as proposed.

The Department proposed to define *business day* as Monday through Friday, except Federal holidays declared under 5 U.S.C. 6103 or by 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. The Department did not receive any comments addressing the definition of *business day.* The final rule therefore adopts this definition as proposed, with one technical edit to correct the alphabetical order of definitions that is not intended to reflect a change in the substance of this section.

Consistent with section 2(a) of the Executive order, the Department proposed 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. *See* 86 FR 66397. PSC commented that the proposed definition of *contract or service contract* would wrongly expand the coverage of the SCA to ''contract-like instruments,'' while others, such as the Coalition,[1] submitted comments supporting the proposed rule's broad scope and coverage.

PSC recommended removing ''contract-like instrument'' from the definition of *contract* on the grounds that, among other reasons, the use of ''contract-like instrument'' might ''create confusion by suggesting that a 'contract-like instrument' can be subject to the SCA.'' The Department acknowledges that the term ''contract-like instrument'' is not used in the SCA. However, the term ''contract-like instrument'' was expressly used in the definition of *contract* and *service contract* in Executive Order 14055, was used in both of the previous Executive orders requiring a minimum wage for Federal contractor employees (Executive Orders 13658 and 14026), and is defined, collectively with the term *contract,* in the Department's regulations implementing both Executive Order 13658 and Executive Order 14026. *See* 29 CFR 10.2; 29 CFR 23.20. Therefore, the Department expects that most contracting agencies and contractors affected by this rulemaking are already familiar with the use of this term.

Furthermore, the use of the term ''contract-like instrument'' in Executive Order 14055 neither expands SCA coverage nor expands coverage under Executive Order 14055 to contracts not subject to the SCA. Rather, consistent with the SCA's scope of coverage, the term simply reflects that the order is intended to cover all agreements of a contractual nature (*i.e.,* all agreements between two or more parties creating obligations that are enforceable or otherwise recognizable at law, including those agreements that may not be universally regarded as a *contract* in other contexts) that qualify as contracts under the SCA. Licenses, permits, and similar instruments may qualify as contracts under the SCA 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.,* 29 CFR 4.110, the Department views the term ''contract-like instrument'' as simply reinforcing the breadth of contract coverage under the SCA, and

[1] As reflected in their comment, ''the Coalition'' refers collectively to the following organizations that submitted a joint comment in response to the NPRM: The American Association of People with Disabilities; the Autistic Self Advocacy Network; Communications Workers of America; the International Brotherhood of Teamsters; the Laborers' International Union of North America; the National Employment Law Project; and the Service Employees International Union.

hence under Executive Order 14055. The Department further believes that the use of the term ''contract-like instrument'' in Executive Order 14055 is intended to prevent disputes or extended discussions between contracting agencies and contractors regarding whether a particular legal arrangement qualifies as a *contract* for purposes of coverage by the order and this part. In sum, the use of the term ''contract-like instruments'' in Executive Order 14055 and in this rule is consistent with previous Executive orders and will help facilitate more efficient determinations by contractors, contracting officers, and the Department as to whether a particular legal instrument is covered. The Department therefore declines to delete the term ''contract-like instrument'' from the definition of *contract.* Separately, however, to reduce ambiguity in the definition of *contract or service contract,* the Department is clarifying that SCA-covered temporary interim contracts are also included within the definition of *contract and service contract.* This technical clarification will ensure that temporary interim contracts are understood to be fully included within the definition. To effectuate the order, temporary interim contracts must be within that definition to prevent workforce displacement during any such contracts.

PSC also recommended removing the term ''exercised contract options'' from the illustrative list of terms defining *contract,* noting that the inclusion of the term in the definition is inconsistent with the Department's statements in the preamble to § 9.3 regarding coverage. Under § 9.3, when an option is exercised and no solicitation is issued for a follow-on contract, the original contract is not considered expired for purposes of Executive Order 14055, and the requirements of the order and this rule do not apply at that time as a result of the exercised contract option. The Department agrees with PSC's recommendation and therefore, to maintain consistency and reduce confusion, is not including ''exercised contract options'' in the definition of *contract.*

The Department proposed to substantially adopt the definition of *contracting officer* in section 2.101 of the FAR, which defines the term to mean an agency official with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term, as proposed, would include 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 did not receive any comments addressing the definition of *contracting officer,* and the final rule adopts the definition of that term as proposed.

The Department proposed 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 noted 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. The proposed definition incorporated 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 noted that the fact that an individual or entity is a *contractor* under the Department's definition does not mean that such an individual or entity has legal obligations under the Executive order. Thus, an individual or entity that is awarded a service contract with the Federal Government will qualify as a ''contractor'' pursuant to the Department's definition, but that individual or entity may only be subject to the nondisplacement requirements of the Executive order in connection with a particular contract if the contract is one that is covered under § 9.3(a). For example, an employment contract providing for direct services to a Federal agency by an individual is not covered by the SCA. 41 U.S.C. 6702(b)(6); 29 CFR 4.121. As a result, an individual who enters into such a contract may be a ''contractor'' under the definition of contractor in the nondisplacement rule, but the contract will not be covered by the nondisplacement requirements. The Department did not receive any comments addressing the definition of *contractor,* and the final rule adopts the definition of that term as proposed.

Consistent with the definition provided in Executive Order 14055, the Department proposed to define *employee* to mean a service employee as defined in the SCA. *See* 86 FR 66397 (citing 41 U.S.C. 6701(3)). Accordingly, *employee* ''means an individual engaged in the performance of'' an SCA-covered contract. *See* 41 U.S.C. 6701(3)(A). The term ''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 is identified as an independent contractor on the contract. *See* 41 U.S.C. 6701(3)(B). It ''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. *See* 41 U.S.C. 6701(3)(C).

The Coalition submitted a comment supporting the Department's proposed inclusion of individuals identified as independent contractors in the definition of *employee.* They stated that given the significant volume of work performed by such individuals, the purposes of the Executive order will be promoted by inclusion of such workers. The Department received no other comments about the proposed definition of *employee,* and therefore the final rule adopts the definition as proposed in the NPRM, with an edit to remove ''or service employee'' from the regulatory text. This edit is not intended to reflect a change in the substance of the definition, but is made to reduce redundancy, as Executive Order 14055 already states that *employee* means service employee as defined by the SCA.

The Department proposed to define *employment opening* to mean any vacancy in a position on the successor contract. This is consistent with the definition of *employment opening* in the regulations that implemented Executive Order 13495. The Department did not receive any comments on the proposed definition of *employment opening,* and the final rule adopts the definition as proposed.

The Department proposed 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 was 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* included 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 included 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 would not include the District of Columbia or any Territory or possession of the United States. The Department did not receive any comments on the proposed definition of *Federal Government,* and the final rule adopts the definition as proposed.

The Department proposed 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 proposed defining the term to clarify how to address partial months and to balance calendar months of different lengths. The proposed definition was consistent with the definition of *month* in the regulations that implemented Executive Order 13495. The Department did not receive any comments addressing the definition of *month,* and the final rule adopts the definition of that term as proposed.

The Department proposed 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 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.

PSC requested the Department further define how the definition of *same or similar work* would be applied to Multiple Agency Contracts, especially with regard to competition at the task-order level and completion of task orders over years-long performance periods on the master contract as a whole, as well as best-in class contracts. PSC's question also implicates the overall subset of contracts for indefinite delivery indefinite quantity (IDIQ), including the Multiple Award Schedule (MAS) and the Federal Supply Schedule program. *See* 48 CFR 8.401.

Whether work is ''same or similar'' is only relevant when specific work on an expiring contract is going to be replaced by work under another contract, such that one contract can reasonably be considered to be a successor contract and the other a predecessor contract. In that situation, the contracting agency must compare the expiring work and the anticipated work to determine whether they share primary characteristics. Thus, where a contracting agency is considering the use of an order under an IDIQ contracting vehicle for a specific scope of work, the nondisplacement requirements of the Executive order—including the determination of whether a contract involves the *same or similar work*—would apply at the task order level in the same manner as for any other contract. For example, an agency may have an expiring non-MAS contract for security services at an individual federal facility and may seek to use the MAS program to identify a contractor to take over the same or similar security services at that facility. In such a circumstance, any new MAS program task order would need to include the nondisplacement clause to be a permissible contracting vehicle for the successor contract and the MAS contractor would need to provide job offers to qualified employees on the expiring non-MAS contract.

The Coalition recommended the Department modify the definition of *same or similar work* to make it clear that the definition applies regardless of whether the successor changes in size. However, such a change would be redundant to the existing use of the term ''similar,'' which encompasses contracts of varying monetary amounts or other material changes in size. Furthermore, the rule addresses reductions in staffing in detail at § 9.12(d), and the Coalition's suggested revisions to the definition of *same or similar work* might add confusion to that existing framework. Although the Department therefore declines to modify the definition of *same or similar work* in the manner requested, the Department has revised the definition for purposes of clarity. As noted, the NPRM defined 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 either by the Federal Government or a contractor on a Federal service contract.'' However, the portion of this proposed definition beginning with ''that is being replaced'' does not address whether the work at issue is the ''same or similar,'' but rather concerns the distinct (though related) issue of whether a predecessor-successor relationship exists. As a result, in the interest of clarity, the Department defines same or similar work in the final rule as ''work that is either identical to or has primary characteristics that are alike in substance to work performed on another service contract.'' This change is intended to be nonsubstantive, as it preserves the operative language regarding whether the work under a predecessor and successor contract is the same or similar.

The Department proposed to define the term *Service Contract Act* 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 part 4 (SCA implementing regulations); 29 CFR 4.1a(a) (defining the SCA for the purpose of the implementing regulations). The Department did not receive comments about this proposed definition and the final rule adopts the definition as proposed.

The Department proposed 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 did not receive any comments addressing the definition of *solicitation,* and the final rule adopts the definition of that term as proposed.

The Department proposed 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 proposed 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 was 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).

The Coalition expressed support for this proposed definition, stating that it appropriately defines the geography it covers broadly and consistently with the SCA and its implementing regulations. The Coalition stated that they support such consistency because the Federal Government will obtain the most economy and efficiency benefits from Executive Order 14055 if it is applied broadly, and that uniform coverage between Executive Order 14055 and the SCA provides clarity for Federal agencies, contractors, and Federal

service contractor workers. The Department did not receive any other comments about the proposed definition of *United States,* and therefore the final rule adopts the definition as proposed.

Finally, the Department proposed to use the definitions of the terms *Administrative Review Board, Administrator, Office of Administrative Law Judges, Secretary,* and *Wage and Hour Division* that were set forth in the regulations that implemented Executive Order 13495. The Department did not receive comments on these proposed definitions, and the final rule adopts these definitions as proposed with one technical edit to correct the alphabetical order of *Secretary* that is not intended to reflect a change in the substance of this section.

3. Section 9.3 Coverage

Proposed § 9.3 addressed the coverage provisions of Executive Order 14055. It explained 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 (and solicitations for such contracts and subcontracts) that succeed a contract for performance of the same or similar work include a specific nondisplacement clause. This clause must state that the successor contractor and its subcontractors, except as otherwise provided in the order, must, in good faith, offer service employees employed under the predecessor contract and its subcontracts a right of first refusal of employment under the successor contract in positions for which those employees are qualified, if those service employees' employment would otherwise be terminated as a result of the award of the successor contract or the expiration of the contract under which the employees were hired. Section 2 of the order 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 of the order specifies that the order does not apply to contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134.

Section 9.3(a) of the NPRM proposed to implement these coverage provisions by stating 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 § 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 related requirements of paragraphs (e), (f), and (g) of § 9.12, regarding contractor obligations near the end of contract performance, recordkeeping, and cooperation with investigations. Proposed § 9.3(c) would require all contracts that satisfy the requirements of § 9.3(a) and that also succeed a contract for performance of the same or similar work, to contain the contract clause set forth in Appendix A. It also would require all contractors on such contracts to comply, without limitation, with all the requirements of § 9.12. As in the NPRM, several issues relating to the coverage provisions of the Executive order and § 9.3 are discussed below.

i. Coverage of Agencies

Section 9.3 of the NPRM proposed to apply the nondisplacement requirements to contracts or solicitations for contracts with ''an agency.'' This language reflects that Executive Order 14055 applies to contracts and solicitations with the ''Federal Government'' that meet the other coverage requirements of the order. In § 9.2 of the NPRM, the Department proposed 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.'' And, consistent with section 2(c) of the Executive order, the Department proposed to define ''agency'' as an ''[e]xecutive department or agency, including an independent establishment subject to the [Procurement Act].'' The Department noted in discussing the proposed definitions in § 9.2 that it would interpret the terms ''executive departments'' and ''agencies'' consistent with the definition of ''executive agency'' provided in section 2.101 of the FAR. *See* 48 CFR 2.101. Thus, the Department stated that the proposed rule would apply 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. *See* 48 CFR 2.101 (definition of ''executive agency''). The NPRM stated that this proposed definition would be interpreted to 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. 101 *et seq.* Thus, for example, contracts awarded by the U.S. Postal Service are not 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 ''Federal Government,'' contracts awarded by the District of Columbia and any Territory or possession of the United States would not be covered by the order.

No comments were received regarding coverage of agencies. The Department therefore affirms its discussion of coverage of agencies in the final rule.

ii. Coverage of Contracts

Proposed § 9.3(a) provided that the requirements of the Executive order generally would apply to ''any contract or solicitation for a contract with an agency.'' 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 [SCA] and its implementing regulations.'' In § 9.2, the Department proposed 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.'' *Cradle of Forestry in Am. Interpretive Ass'n,* ARB No. 99–035, 2001 WL 328132, at *3 (Mar. 30, 2001) (quoting Restatement (Second) of Contracts section 1 (Am. L. Inst. 1979)). As discussed above with regard to the definition of ''contract'' in § 9.2, 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.

Proposed § 9.3(a) provided that part 9 would also apply to ''any . . . solicitation for a contract'' that meets the other requirements for coverage. In § 9.2, the Department proposed to define ''solicitation'' to mean ''any request to submit offers, bids, or quotations to the Federal Government.'' In keeping with the definition proposed in that section, 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 are not ''solicitations'' for purposes of the Executive order. If the solicitation is for a contract that is covered by part 9, then the solicitation will also be covered.

Consistent with section 2(a) of Executive Order 14055, proposed § 9.3(a)(1) clarified 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'' 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. *See, e.g.,* 29 CFR 4.130(a) (providing a nonexclusive list of examples). 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.* SCA coverage, 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 FLSA regulations at 29 CFR part 541. Similarly, a contract for services performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA and thus is not covered by the Executive order or part 9. *See* 41 U.S.C. 6702(a)(3); 29 CFR 4.113(a); WHD Field Operations Handbook (FOH) 14c07. No comments were received regarding § 9.3(a)(1). Aside from adding language to make clear that only contracts or solicitations issued or entered on or after the applicability date of part 9 are covered, the final rule adopts that provision as proposed.

iii. Coverage of Contracts at or Above the Simplified Acquisition Threshold

Proposed § 9.3(a)(2) provided 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 proposed 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. As the Department noted in the NPRM, 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 sought comment from the public on the potential impact, including any unintended consequences, of covering subcontracts below the simplified acquisition threshold.

PSC advocated to exclude subcontracts with a value less than the simplified acquisition threshold, noting, as the Department also did, that Executive Order 14055 defines ''contract'' to include ''contract or subcontract.'' PSC also commented that applying the rule's nondisplacement requirements to subcontracts below the current simplified acquisition threshold would be unreasonable, calculating that a 5-year service subcontract that has a value below the current simplified acquisition threshold might only employ one person. Nakupuna Companies (Nakupuna) also opposed coverage of subcontracts below the simplified acquisition threshold, positing that the costs of compliance with Executive Order 14055 will be burdensome on small subcontractors.

Conversely, multiple commenters supported covering subcontracts for amounts below the simplified acquisition threshold where the prime contract meets or exceeds the simplified acquisition threshold. The Coalition supported coverage of these subcontracts because such an approach maximizes the reach of Executive Order 14055 and avoids incentivizing circumvention of the order's requirements through subcontracting. Likewise, the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) supported coverage of subcontracts below the simplified acquisition threshold as an ''important tool for ensuring that the contractors do not evade the nondisplacement requirements,'' and noted that the proposed rule appropriately specified that non-service subcontracts, such as supply subcontracts, were excluded. Relatedly, the Center for American Progress (CAP) supported the ways in which Executive Order 14055 ''clos[ed] loopholes,'' thereby ''preventing low road firms from undermining the rules.''

The final rule adopts the regulatory language at § 9.3(a)(2) as proposed in the NPRM, with a limited addition for clarity explained below. As in the NPRM, the final rule is not excluding subcontracts that fall below the simplified acquisition threshold where the prime contract is itself covered. While section 2(a) of the Executive order defines the term ''contract'' as ''any contract . . . or subcontract for services,'' the order includes a different textual indication that the exclusion in section 5(a) for ''contracts'' below the simplified acquisition threshold is only intended to exclude prime contracts below that level, not subcontracts. Notwithstanding the expansive definition of the word ''contract'' in section 2(a), section 3(a) of the order expressly requires the incorporation of the contract clause into contracts ''and subcontracts.'' In section 5(a), however, the order provides an exclusion only for ''contracts'' below the threshold and does not mention subcontracts. This comparison (in addition to the change in language from previous Executive Order 13495) supports limiting the interpretation of the term ''contract'' in section 5 to mean ''prime contract.''

This interpretation is consistent with the Executive order's stated policy goals. The example provided by PSC—wherein a subcontractor employing a single person for 5 years might still be below the simplified acquisition threshold—supports, rather than

undercuts, extending nondisplacement protections to workers employed on subcontracts below the simplified acquisition threshold. This is because where, as in that example, an individual provides services to the government for a period as long as 5 years, displacing that well-trained and experienced employee when a new subcontract occurs would undermine the policies of Executive Order 14055, such as uninterrupted delivery of services, physical and informational security, and familiarity with operations. PSC's example demonstrates that such goals are equally operative whether a particular service employee happens to be employed under a high-dollar-amount subcontract or not. Consistent application of these goals outweighs the compliance costs to subcontractors even where subcontracts are for amounts below the simplified acquisition threshold.

In reaching this conclusion, the Department also considered that the existing exclusions in the rule limit the real-world scenarios in which the commenters' concerns regarding such compliance costs could be applicable. The Executive order's nondisplacement requirements do not apply to small prime contracts (and any subcontracts of those small prime contracts) that fall below the simplified acquisition threshold, nor (in keeping with the SCA) to non-service contracts, nor to contracts for services performed essentially by bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541, with the use of service employees being only a minor factor in contract performance. Likewise, the Executive order 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.'' As a result, many subcontracts below the simplified acquisition threshold will be excluded from coverage for other reasons.

Finally, as indicated by commenters, extending coverage to subcontracts below the simplified acquisition threshold will avoid the creation of subcontracts for the purpose of circumventing the requirements of Executive Order 14055, helping to maintain the efficacy and consistent application of the order.

Separately, the Department is modifying the language of § 9.3(a)(2) to clarify the coverage of contracts at the simplified acquisition threshold. Proposed § 9.3(a)(2) provided that part 9 would apply only to prime contracts that exceed the simplified acquisition threshold. However, section 5 of Executive Order 14055 provides that the order does not apply to contracts under the simplified acquisition threshold. To avoid ambiguity, the Department is adding language to § 9.3(a)(2) to include prime contracts equal to the simplified acquisition threshold. The Department did not receive any comments on this issue. This clarification is consistent with the intent of the order and ensures that prime contracts equal to the simplified acquisition threshold are covered by part 9.

Accordingly, the final rule adopts § 9.3(a)(2) as proposed with an amendment to clarify that part 9 applies to prime contracts equal to the simplified acquisition threshold.

iv. Coverage of Successor Contracts

Proposed § 9.3(c) provided that all of the nondisplacement requirements would apply only to contracts that satisfy the requirements of paragraph (a) of § 9.3 and that ''*succeed*'' a contract for performance of the same or similar work. 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 due to the completion of performance or is terminated. In contrast, if a term of an existing contract is simply extended pursuant to an option clause, and no solicitation is issued for a follow-on contract, then the original contract is not considered expired for purposes of Executive Order 14055, the extended term of the contract is not considered a new or 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 considers 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 § 9.3(a). Thus, for example, when the term of a contract ends and a follow-on contract is awarded, a predecessor-successor relationship exists for purposes of Executive Order 14055 if the two contracts are for the same or similar work. This includes circumstances where a temporary interim contract is the successor to a full-term predecessor contract and circumstances where a temporary interim contract is a predecessor to a full-term successor contract. Similarly, if a contract is terminated, a solicitation for a follow-on contract is issued, and a follow-on contract is awarded, then a predecessor-successor relationship exists for purposes of Executive Order 14055 (again if the two contracts are for the same or similar work). The identity of the contractor awarded the successor contract does 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 apply. Similarly, the successor contract does not need to be awarded by the same contracting agency as the predecessor contract to be covered by the Executive order and this part.

PSC commented that the exclusion of options from the type of contract event that creates a successor contract under the Executive order conflicted with the Department's inclusion of ''exercised contract options'' in the list of terms in § 9.2 that define ''contract'' for purposes of the order. As explained in the discussion of § 9.2, to resolve this inconsistency in accordance with the Executive order's scope of coverage, the Department is removing the term ''exercised contract options'' from the definition in § 9.2 of the final rule. This change to § 9.2 reduces the potential for confusion identified by PSC and no change is necessary to § 9.3. No other comments were received regarding coverage of successor contracts, and the final rule adopts the language regarding those provisions of § 9.3 as proposed. For clarity, the Department has switched the order of § 9.3(b) and (c) and has revised the text for technical accuracy and to reflect that (b) applies to covered contracts that succeed a contract for performance of the same or similar work, whereas (c) applies to covered contracts and solicitations that do not succeed a contract for the same or similar work (*i.e.,* SCA-covered contracts that are strictly predecessor contracts). Revised (b) and (c) thus reflect more clearly that contractor requirements under this rule may depend on whether a contractor is a predecessor contractor, a successor contractor, or both. For example, a predecessor contractor that is not succeeding a contract for the same or similar work will be required to provide the certified list of employees under § 9.12(c) but would not be required to offer employment to any service employees because the contractor is not succeeding another contract.

v. Coverage of Contracts for Same or Similar Work

Consistent with section 3 of Executive Order 14055, proposed § 9.3(c) would require successor contracts to be for the ''performance of the same or similar work'' in order to be covered by the nondisplacement requirements. As explained in the discussion of proposed § 9.2, the Department proposed to define ''same or similar work,'' in relevant part, as ''work that is either identical to or has primary characteristics that are alike in substance.'' This definition requires 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 is not considered to be same or similar work where it only shares characteristics incidental to performance 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, the work on the successor contract would be considered to be ''same or similar work.'' This is 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 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 to determine whether the prior and new contracts involve the same or similar work. Although such a circumstance-specific evaluation may be complex in certain instances, nondisplacement requirements can be expected to apply when a larger SCA-covered contract expires and is re-bid as several individual SCA-covered contracts, as well as when two covered contracts expire and the new solicitation combines the work previously performed under those two contracts into a new contract. 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.

PSC expressed concern that various federal acquisition initiatives, including the category management initiative, are leading to an increase in the consolidation of smaller contracts and having a negative effect on small business contractors that are less able to compete for the resulting larger contracts. PSC stated that if nondisplacement rules apply in these situations, ''small business employees may be retained by successor contractors'' and ''small businesses themselves may suffer from employee attrition to follow-on successors.'' However, PSC also stated that ''such hiring is commonplace in many instances'' already even without the nondisplacement order. The Department understands that the Federal Government is carefully monitoring small business participation levels and implementing strategies to help ensure that new contracting initiatives such as category management do not undermine small business contracting. The Department believes this strikes the right balance for both small businesses and workers on service contracts even though there may be the potential for employee attrition from a small business predecessor to a successor contract.

As noted above, in the final rule, the Department has switched the order of § 9.3(b) and (c) and made edits for clarity, so that the proposed § 9.3(c) is now, with minor revisions, located at § 9.3(b).

vi. 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 noted 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. As a corollary, the Executive order does not apply to non-service subcontracts. 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. No comments were received about the coverage of subcontracts, other than those related to the discussion of subcontracts below the simplified acquisition threshold.

vii. Geographic Scope

The Executive order and this part apply to contracts that are both: (1) with the Federal Government; and (2) require performance in whole or in part within the United States. Performance in whole or in part within the United States means within 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 these regulations do 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 these regulations, the order and the regulations apply to the contract and require a right of first refusal for any workers who 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 are not covered by the order, as neither the District of Columbia nor any Territory or possession of the United States constitutes the ''Federal Government'' under these regulations. The Coalition expressed support for the scope of geographic coverage under the proposed rule; no other comments were received regarding the geographic scope of coverage.

4. Section 9.4 Exclusions

Pursuant to section 5(a) of Executive Order 14055, proposed § 9.4(a) addressed 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 regulations, as finalized, omit that amount from the regulatory text in the event that a future statutory amendment changes the amount. Any such change would automatically apply prospectively to new contracts subject to part 9.

Proposed § 9.4(a)(2) clarified 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 in the discussion of § 9.3, section 5(a) of Executive Order 14055 excludes only ''contracts under the simplified acquisition threshold[.]'' The proposed rule explained that this language differs from Executive Order 13495, which excluded ''contracts *or subcontracts* under the simplified acquisition threshold.'' *See* Executive Order 13495, 74 FR 6103 (Feb. 4, 2009) (emphasis added). Accordingly, proposed § 9.4(a)(2) explained that subcontracts would be excluded under § 9.4(a)(1) only if the prime contract is under the simplified acquisition threshold. The Department sought comment on the potential impact, including any unintended consequences, of covering subcontracts below the simplified acquisition threshold.

As described in the preamble to § 9.3(a)(2), the Coalition and the AFL–CIO commented in support of coverage of subcontracts below the simplified acquisition threshold where the prime contract exceeds the simplified acquisition threshold. Conversely, PSC and Nakupuna suggested excluding subcontracts with a value less than the simplified acquisition threshold from the requirements of Executive Order 14055 and this part. For the reasons given in the preamble to § 9.3(a)(2), the final rule does not exclude subcontracts below the simplified acquisition threshold where the prime contract meets or exceeds that threshold, and the final rule adopts paragraphs § 9.4(a)(1) and 9.4(a)(2) as proposed.

In § 9.4(b), the Department proposed to 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. The Department did not receive any comments on proposed § 9.4(b), and the final rule adopts the provision as proposed.

Proposed § 9.4 did not include an exclusion for contracts awarded for services produced or provided by persons who are blind or have severe disabilities. The proposed rule explained that section 3 of Executive Order 13495 specifically excluded ''contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act,'' ''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,'' and ''agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act[.]'' In contrast, section 5 of Executive Order 14055 does not enumerate any such exclusions. For this reason, proposed § 9.4 did not exclude such contracts from the requirements of part 9.

The proposed rule explained, however, that 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'' to an agency and directs that the order be ''implemented consistent with applicable law.'' The applicable law encompassed by these sections includes the statutes that were excluded explicitly from Executive Order 13495, such as the Javits-Wagner-O'Day (JWOD) Act, 41 U.S.C. 8501 *et seq.,* and the Randolph-Sheppard Act, 20 U.S.C. 107. These laws establish requirements for contracts awarded for services produced or provided by persons who are blind or have severe disabilities, and the laws may conflict with the requirements of Executive Order 14055 in that the laws may impose staffing requirements that in many cases would preclude, in whole or in part, offering employment to the employees on the predecessor contract. For example, under the JWOD Act, a qualified nonprofit agency operating under the AbilityOne Program is required to employ blind or severely disabled individuals for at least 75 percent of the direct labor hours required for the particular nonprofit agency's production or provision of services. *See* 41 U.S.C. 8501(6)(C). If there are few blind or severely disabled workers on a predecessor contract, it could be impossible for a successor contractor to make offers to all incumbent workers and also comply with the JWOD Act 75-percent requirement. The proposed rule explained that where direct legal conflicts squarely exist between the requirements of Executive Order 14055 and the requirements of another statute, regulation, Executive order, or presidential memorandum under the particular factual circumstances of a specific situation, the requirements of this part would not apply. Under the proposed rule, a contracting agency would be obligated to follow the procedures proposed at § 9.5 to make a case-by-case exception for contracts on the basis of a determination that the requirements of this part did not apply to a particular contract because of a direct legal conflict.

In the NPRM, the Department also recognized that contracting agencies award contracts under a wide variety of programs, including those mentioned above, some of which have, by law, specific processes and requirements that may make it challenging to fully implement the requirements of Executive Order 14055. The Department invited comments on how Executive Order 14055 and its implementing regulations should be applied to any specific programs that are subject to contracting requirements that may conflict with Executive Order 14055 or the provisions of the proposed rule.

Several commenters supported the Department's approach in the proposed rule. The Coalition commented that they supported the proposed rule's coverage of contracts covered by the JWOD Act and awarded under the AbilityOne Program, indicating that coverage of AbilityOne contracts is consistent with modern disability policy and promotes ''integrated employment in which workers with disabilities work alongside nondisabled workers and enjoy the same rights and protections.'' In its comment, Jobs to Move America thanked the Department for ''providing equal treatment to disabled workers by covering'' these contracts.

Several other commenters expressed opposition to the proposed treatment of contracts covered by the JWOD Act. These commenters requested an across-the-board exclusion for contracts or subcontracts awarded pursuant to the JWOD Act, in line with the exclusion previously granted in Executive Order 13495. These commenters criticized the proposed exception process in § 9.5 that contracting agencies would need to use for AbilityOne contracts if the Department did not provide an express exclusion. Peckham Inc., Didlake Inc., and Nobis Enterprises, which are AbilityOne contractors, commented that making ''case-by-case determinations on AbilityOne contracts will lead to inconsistent management of the AbilityOne Program, unnecessary contract award delays, and adverse impacts on the employment of individuals with disabilities.'' Source America, an AbilityOne contractor network, noted that the lack of an

express exclusion puts the burden of decision-making on procurement officers, possibly leading to inconsistent application for contracts covered by the AbilityOne Program. Source America further noted that the exception process in the proposed rule does not apply to subcontracts and that there are several instances where a JWOD Act contractor may operate as a subcontractor instead of a prime contractor.

National Industries for the Blind (NIB), a nonprofit agency designated by the AbilityOne Commission to distribute Federal Government orders for products and services on the AbilityOne Procurement List, wrote that the potential need for a case-by-case exception for AbilityOne contracts may not even be recognized by the contracting agency. Melwood Horticultural Training Center, Inc. (Melwood), an AbilityOne contractor, commented that if the rule, as finalized, applies to AbilityOne authorized contractors, it would be extremely unlikely that those contractors would be able to maintain compliance with the AbilityOne program when a predecessor workforce does not have individuals who meet the required AbilityOne labor criteria. Melwood further explained that ''[i]f AbilityOne authorized contractors are not explicitly exempted from the requirements of the rule, they will be compelled to hire the incumbent workforce instead of offering up meaningful, steady opportunities to people with significant disabilities.'' Melwood recommended that the final rule explicitly exclude contracts under the JWOD Act. In the alternative, Melwood suggested that the Department codify an arrangement specifically for successor contracts awarded under the JWOD Act that would (1) create a right of nondisplacement for jobs constituting 25 percent of the direct labor hours on a contract; (2) require the successor contractor to offer positions to displaced predecessor contract workers on other contracts to the extent doing so would not affect AbilityOne compliance; (3) require the successor contractor to offer to displaced predecessor contract workers a right to be recalled for up to two years should a vacancy occur in roles performing the 25 percent of direct labor hours performed by people without disabilities; and (4) require the successor contractor to take a neutral position should a displaced worker accept an offer at a non-unionized site and attempt to organize it.

Other commenters similarly requested exemptions from the nondisplacement requirements based on a perceived inconsistency between the requirements and other statutes. PSC, in response to the Department's question about location continuity and HUBZones, as well as other procurement preference programs,[2] urged a broad exemption from the nondisplacement requirements whenever they would ''impact internal organizational or federal Diversity, Equity, Inclusion and Accessibility goals.'' The Council on Federal Procurement of Architectural & Engineering Services (COFPAES) asserted that architecture, engineering (A/E) and related services (including surveying and mapping) should be exempted from the rule because these services are governed by the Brooks Act, 40 U.S.C. 1101 *et seq.* COFPAES stated that the Brooks Act is inconsistent with the right of first refusal, because it requires that evaluation and selection of firms for A/E services be based on ''demonstrated competence and qualification,'' including award to the ''most highly qualified'' firm.

After consideration of these comments, the Department is amending the contract clause to give effect to the requirements and goals of Executive Order 14055 to the maximum extent possible in light of the requirements and policy objectives of the HUBZone program statute, the JWOD Act, and the Randolph-Sheppard Act. Specifically, the Department has added paragraph (j) to the contract clause in Appendix A, which sets forth a requirement that, to the maximum extent possible, contractors that are awarded contracts under the HUBZone program statute, the JWOD Act, or the Randolph-Sheppard Act must comply with both the relevant requirements under those statutes and the requirements of Executive Order 14055. Paragraph (j) clarifies that nothing in the contract clause will be construed to permit a contractor or subcontractor to fail to comply with any applicable provision of the HUBZone program statute, the JWOD Act, or the Randolph-Sheppard Act. Consistent with paragraph (j) of the contract clause, when the requirements of such laws would conflict with the requirements of Executive Order 14055 in connection with a particular contract, then the requirements of such laws may be satisfied in tandem with and, if necessary, prior to the requirements of Executive Order 14055 and this part. In the contract clause, the Department has not included reference to section 505 of the Treasury, Postal Services and General Government Appropriations Act, because the requirements of that Act are covered already by the reference to the JWOD Act.

Under this framework, for example, a successor AbilityOne contractor will be required to provide a right of first refusal to workers from the predecessor contract who have significant disabilities or visual impairment, as defined by the JWOD Act. The AbilityOne successor contractor could then hire non-predecessor contract workers with significant disabilities or visual impairment to the extent necessary to satisfy the employment threshold requirements of the AbilityOne Program. Specifically, the JWOD Act requires that 75 percent of direct labor hours be performed by workers with significant disabilities or visual impairment. *See* 41 U.S.C. 8501(6)(c). After ensuring that this programmatic threshold requirement is met, the AbilityOne successor contractor will be required under paragraph (j) of the nondisplacement contract clause in Appendix A to provide the right of first refusal to as many of the remaining predecessor contract employees (*i.e.,* those who do not have significant disabilities or visual impairment) as necessary to fill any remaining positions on the successor contract for which those employees are qualified.

Similarly, the HUBZone program statute requires small business concerns (SBCs) to have 35 percent of all of their employees reside in a HUBZone to be certified under the program, and to attempt to maintain this percentage when they are awarded contracts on the basis of a HUBZone preference. *See* 14 U.S.C. 657a(c) and (d). When both the successor and the predecessor contractors are SBCs, the residence requirement threshold normally could be met through a standard application of this final rule where the successor contractor is required to offer a right of first refusal to employees on the predecessor contract. Under circumstances where the successor is an SBC but the predecessor is not, HUBZone SBCs can meet both the requirements of the HUBZone program and the Executive order in accordance with paragraph (j) of the contract clause. For instance, the successor SBC contractor would first have to extend

[2] The HUBZone program, established by title VI of the Small Business Reauthorization Act of 1997, is one of several procurement-related preference programs for small businesses, and it is designed to aid small businesses that are located in economically distressed areas. *See* 15 U.S.C. 657a. HUBZone is an acronym for Historically Underutilized Business Zone Empowerment Contracting (HUBZone). The other small business preference programs include preferences for small businesses generally, Women-Owned Small Businesses, Service-Disabled Veteran-Owned Small Businesses, and Small Disadvantaged Businesses. *See generally* Congressional Research Service, Small Business Administration HUBZone Program, R41268, (Updated July 29, 2022), *https://sgp.fas.org/crs/misc/R41268.pdf.*

offers of employment to the qualified predecessor contractor's employees who reside in a HUBZone. If necessary to reach the residency threshold, the successor HUBZone SBC would next extend offers of employment to qualified residents of a HUBZone who are not employees of the predecessor. The HUBZone SBC would next extend offers for the remaining employment openings to non-HUBZone-resident qualified employees of the predecessor contractor. Under such an approach, the HUBZone SBC would first ensure that it meets the statutory requirements of the HUBZone program so that it is not decertified, and then would be required to offer employment to the predecessor's employees pursuant to Executive Order 14055 to the maximum extent possible without violating HUBZone program requirements. This approach would also apply in other circumstances, such as where the predecessor HUBZone SBC did not maintain the HUBZone residence requirement but was permitted to remain in the program. While the HUBZone SBC must maintain the 35 percent HUBZone residency requirement at all times while certified in the program, there is an exception: an SBC may ''attempt to maintain'' this requirement when performing on a HUBZone contract. When that occurs and the HUBZone SBC is permitted to fall below the 35 percent threshold, it still must meet the requirement any time it submits a subsequent offer and wins a HUBZone contract. Where a non-SBC successor follows a HUBZone SBC predecessor, the non-SBC successor would be required to comply without limitation with the requirements of the nondisplacement contract clause and implementing regulations by offering a right of first refusal to all qualified predecessor contract employees. This framework is consistent with the Department's treatment of HUBZones in the 2011 final rule for Executive Order 13495. *See* 76 FR 53720, 53723.

The Department believes that this framework recognizes contractors' obligations to comply with the requirements of the HUBZone program statute, the JWOD Act, and the Randolph-Sheppard Act while satisfying Executive Order 14055 by providing the nondisplacement benefit to workers employed on predecessor contracts to the greatest extent permissible. Consistent with Executive Order 14055, this part also applies to covered contracts in which the predecessor contractor, but not the successor contractor, is covered by the HUBZone program statute, the JWOD Act, or the Randolph-Sheppard Act. Similarly, this part applies to covered contracts in which both the predecessor and successor contracts are covered by the HUBZone program statute, the JWOD Act, the Randolph-Sheppard Act.

In light of new paragraph (j) in the contract clause, there is no need for contracting agencies to authorize an exception under the agency exception procedure in § 9.5 of these regulations for contracts because of the potential application of the HUBZone program statute, the JWOD Act, or the Randolph-Sheppard Act. Paragraph (j) operates to provide an exception to the requirements of Executive Order 14055 where necessary (and only to the extent necessary) to enable compliance with these statutory provisions. The Department believes that the approach reflected in the final rule will promote consistency in applying the requirements of Executive Order 14055 to contracts subject to the HUBZone program statute, the JWOD Act, and the Randolph-Sheppard Act. The approach in the final rule thus is preferable to an approach under which some such contracts would nominally be fully subject to Executive Order 14055's requirements even where application of those requirements would conflict with these statutory preference programs, while others would be entirely exempt from Executive Order 14055's requirements even though certain positions on the successor contract could be filled with predecessor contract employees without any conflict with these preference programs. In this manner, the final rule strikes an important balance by retaining the nondisplacement benefit for many workers on predecessor contracts while enabling successor contractors to maintain compliance with these other statutes.

The Department declines to create a broader exemption from the nondisplacement requirements wherever they might impact a contractor's ''internal organizational'' or Federal Diversity, Equity, Inclusion, and Accessibility (DEIA) goals, as requested by PSC. There is no basis in the order to allow exceptions from the nondisplacement requirements to pursue internal corporate goals however laudable, and such an exemption would not be administrable. With regard to other Federal procurement preference and nondiscrimination programs, PSC did not identify any inconsistency between the nondisplacement requirements and such programs, other than the HUBZone employment requirements addressed in this preamble and contract clause. As noted in § 9.12(d)(3), contractors are required to carry out their responsibilities and exercise their discretion under the nondisplacement requirements in a manner consistent with non-discrimination laws and regulations.

The Department also considered COFPAES's assertion that there is a direct conflict between the Brooks Act and the nondisplacement requirements. COFPAES commented that a conflict exists because the Brooks Act requires that evaluation and selection of firms for architecture and engineering services be based on ''demonstrated competence and qualification'' and be awarded to the ''most highly qualified'' firm. *See* 40 U.S.C. 1101, 1103(d). COFPAES further stated that the Brooks Act requires selection of contractors based on the qualifications of ''key employees'' who will work on the contract and that firms compete by submitting a Standard Form (SF) 330 with the resumes of proposed personnel. *See* 48 CFR 36.603. The Department does not agree that these requirements create direct conflicts. The nondisplacement requirements do not conflict with a requirement to contract with the most highly qualified firm or with a firm based on its qualifications or demonstrated competence. Moreover, the order does not require a right of first refusal for employees who are exempt under the professional exemption in part 541 of the FLSA regulations and who therefore are not service employees within the meaning of the SCA. *See* Executive Order 14055, section 3(b). The Department's FLSA regulations state that the ''traditional professions'' of architecture and engineering are ''field[s] of science or learning'' such that employees performing work requiring advanced knowledge in those fields generally meet the duties requirements for the learned professional exemption. *See* 29 CFR 541.301(a) and (c). Accordingly, these individuals will generally not be ''service employees'' under the definition in the Executive order and thus there will generally not be any duty under the nondisplacement rule to provide a right of first refusal to these individuals or any reason that a bidder cannot list its own professional employees on its SF 330 form.[3]

[3] While the order does not require a right of first refusal for professional architects and engineers, Brooks Act contracts may still be covered by the nondisplacement requirement. As discussed in § 9.3, the order applies to contracts that are covered by the SCA and are at or above the simplified acquisition threshold. *See also* Executive Order 14055, section 2(a), 3(a). The SCA, and therefore the order, does not extend to contracts for services ''to be performed exclusively by persons who are not service employees—*i.e.,* persons who are bona fide executive, administrative or professional

Continued

While there is no direct conflict between the Brooks Act and the nondisplacement requirements so as to justify an across-the-board exemption, an agency exception may be appropriate depending on the specific facts of a particular contract under the nondisplacement regulations in § 9.5(a)(1) or (a)(2). *See* section II.B.5. below. These agency exceptions apply 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 or 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. Where a contract is largely performed by SCA-exempt professional services employees, it may still be covered by the order even if only a relatively small percentage of the employees on the project would be provided with a right of first refusal. In such a situation, where the agency's overriding interest may be in fostering creative competition between the professional employees on the project, it may not make sense to impose the nondisplacement requirements if their inclusion would adversely affect the ability of the agency to maximize the number of such firms that might participate while providing a benefit only to a limited number of covered service employees on the contract.

Accordingly, the final rule adopts the paragraph at § 9.4 as proposed, along with the amendments specified above to the contract clause in Appendix A.

5. Section 9.5 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 proposed to implement this procedure through language in § 9.5 of the regulations. Under section 6 of the order, and in § 9.5 as proposed and as adopted in this final rule, 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.

Proposed § 9.5(a) listed the qualifying circumstances for an agency exception, as provided for in the agency exceptions provision in section 6(a) of the order. These included (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; and (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 proposed to interpret section 6(a) of the order as allowing agencies to make exceptions only for prime contracts and not for individual subcontracts. The proposed language in § 9.5(a) carried out this interpretation by authorizing contracting agencies to waive nondisplacement provisions only ''as to a prime contract.'' The Department's proposed interpretation of section 6(a) followed 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'' and does not reference subcontracts. In the NPRM, the Department also noted that section 2(a) of Executive Order 14055 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 that reason, the Department sought comment from the public on the potential impact, including any unintended consequences, of not allowing agency exceptions for particular subcontracts or classes of subcontracts.

In response to the Department's request for comments, the Coalition responded in support of the proposed limitation that would allow exceptions to be granted only for prime contracts and not separately for subcontracts. The Coalition expressed concern that permitting exceptions for particular subcontracts could ''create opportunities for circumvention'' of the nondisplacement requirements by ''pushing more work to the subcontractor.'' The Coalition described an example of how contractors use subcontracting arrangements to evade contract requirements. In the example, a New Jersey state law required certain services to be provided only by nonprofits; a contractor evaded the law by using a shell nonprofit prime contractor and then subcontracting to a for-profit entity.

No commenter specifically opposed the Department's proposed interpretation. PSC's comment, however, contained a more general legal argument that paralleled the Department's discussion in the NPRM. PSC opposed the Department's proposed limitation on the application of the simplified acquisition threshold exclusion (which appears in section 5(a) of the order) to subcontracts. In making its argument, PSC referenced the order's definition section at section 2(a) that includes ''subcontract'' within the definition of the term ''contract.'' PSC asserted that, because of this definition, the order requires the exclusion for prime contracts below the simplified acquisition threshold in section 5(a) of the order to apply to subcontracts as well. Although PSC did not extend its argument to the interpretation of section 6(a) of the order, the same logic would apply there too, given that section 6(a) provides for agency exceptions for ''a particular contract.''

NIB expressed concern that if the agency exception process only applies to prime contracts, then the regulations might not be able to adequately account for potential conflicts between the nondisplacement requirements and the requirements of the JWOD Act and the AbilityOne Program. NIB noted that the FAR recognizes ''[t]he statutory obligation'' under the JWOD Act ''also applies when contractors purchase the supplies or services for Government use,'' 48 CFR 8.002(c)—*i.e.,* including

personnel[.]'' 29 CFR 4.113(a)(2). However, SCA (and therefore nondisplacement) coverage extends to contracts ''which may involve the use of service employees to a significant or substantial extent,'' even if there is ''some use of bona fide executive, administrative, or professional employees[.]'' 29 CFR 4.113(a)(3)*; see also Nat'l Cancer Inst.,* BSCA No. 93–10, 1993 WL 832143 (Dec. 30, 1993) (discussing the meaning of ''significant or substantial extent''). Many employees who work on Brooks Act-covered contracts may be nonexempt service employees. The Brooks Act contemplates that covered work may include ''incidental services'' carried out by architects and engineers ''and individuals in their employ.'' 40 U.S.C. 1103(2)(C)). Accordingly, some Brooks Act contracts could be covered by the SCA and therefore the nondisplacement order.

when contractors subcontract for services. Likewise, SourceAmerica noted that Marine Corps Food Service contracts are ''mandatory subcontracts'' under the JWOD Act, so there would be a direct conflict between the JWOD Act and the Executive order if JWOD-covered subcontracts are not given an exception. To remedy this concern, NIB recommended providing an express exemption for AbilityOne contracts and subcontracts so that contracting agencies would not need to follow the procedures in § 9.5 of the nondisplacement regulations to except these contracts and subcontracts.

Finally, PSC raised questions about the application of the Executive order and the regulations to Multi-Agency Contracts (MACs) and the individual task orders that may be made from them. For MACs, as well as for similar MAS/IDIQ contracts, there are at least two separate moments in which a contracting agency takes an action to enter into a contract: First, when the General Services Administration (GSA) (or other coordinating agency) negotiates the underlying umbrella contract with the contractor; and second, when the individual contracting agency issues a task order under the umbrella contract. As a general matter, an umbrella IDIQ contract should include the nondisplacement clause with appropriate modification (or some mechanism for its later inclusion at the task order level) if there is any reasonable possibility that a future task order under the contract could be found to be a covered successor contract. Unless a mechanism exists to add the nondisplacement clause to individual task orders at the time of their issuance, the fact that such a possibility is unknown at the time of the solicitation for the underlying MAS/IDIQ contract would not be sufficient reason to exempt the entire umbrella contract from coverage under the procedure in § 9.5.

Having considered these comments, the final rule retains the language that authorizes agency exceptions for ''a prime contract'' and not subcontracts. As noted in the NPRM, this approach follows from a comparison between Executive Order 14055 and its predecessor, Executive Order 13495. Executive Order 13495 expressly included the term ''subcontracts'' in its authorization for agency exceptions, while section 6(a) of Executive Order 14055 does not. While it is true, as PSC noted, that the definition of ''contract'' in section 2(a) of Executive Order 14055 includes subcontracts, Executive Order 13495 contained this same definition. The Department therefore believes the better interpretation of Executive Order 14055 is to give weight to the fact that Executive Order 14055 eliminated the express reference to ''subcontracts'' that was included in the agency exemptions provision of Executive Order 13495. A comparison between section 3(a) and section 6(a) supports this interpretation. Notwithstanding the expansive definition of the word ''contract,'' section 3(a) of the order expressly requires the incorporation of the contract clause into ''contracts and subcontracts.'' In 6(a), however, the order provides an exception process only for ''contracts.'' In addition, the potential division of contract work through subcontracts is often only clear after prime contractors have submitted bids in response to a solicitation and not before it is issued. It would be impractical or impossible in many cases for contracting agencies, prior to the solicitation date for a prime contract, to identify ''particular'' subcontracts which could appropriately be excepted from coverage.

The Department is mindful of NIB's concern regarding the application of the § 9.5 agency exception procedure to JWOD Act-covered contracts and subcontracts. However, as discussed in section II.B.4., the Department has separately addressed these concerns by including language in the contract clause that applies to all such contracts and subcontracts and instructs contractors that they must implement the JWOD Act and the nondisplacement provisions in tandem and to the maximum extent possible.

To account for the unique structure of MAS/IDIQ contracts, the Department has added a new sentence to § 9.5(b) that provides for a bifurcated exception process. The provision provides that for IDIQ contracts, an exception must be granted prior to the solicitation date if the basis for the exception cited would apply to all orders. Otherwise, exceptions must be granted for each order by the time of the notice of the intent to place an order. The appropriate entity to analyze and grant an agency exception at the time of a task order may often be the ordering agency, as the ordering agency will usually be best placed to make the initial determination of whether a task order is a successor contract that would be covered by the order and therefore whether it is relevant to consider an agency exception to coverage. As a general matter, however, the agency responsible for the umbrella contract may determine the procedure through which task orders may be excepted (and whether the contracting agency can overrule an ordering agency's determination regarding an agency exception), as long as that procedure is consistent with the nondisplacement order, these regulations, and any applicable FAR provisions.

Accordingly, the final rule adopts the language limiting section 6(a) to prime contracts as proposed, with a limited amendment to account for MAS/IDIQ contract task orders. The Department has also added a sentence to § 9.5(b) to clarify that when an agency determines that a prime contract is excepted under this section, the nondisplacement requirements will not apply to any subcontracts under that prime contract.

Section 6(a) of Executive Order 14055 also 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 proposed regulatory text at § 9.5(a) that identifies the senior procurement executive as the senior official who must make an exception decision. In the NPRM, the Department explained that, because the order specifically requires the decision to be made by a senior official, the decision cannot be delegated by the senior procurement executive to a lower-level official. This same non-delegation principle was applied in the 2012 FAR rule that implemented Executive Order 13495. *See* 77 FR at 75773.[4]

The Coalition approved of the Department's interpretation of the term ''senior official'' in § 9.5(a), stating that the required approval of the senior procurement executive will ensure that exceptions are ''subject to consistent, rigorous levels of review.'' The Coalition noted that an agency's senior procurement executive is ''well positioned to assess whether the need for any particular service contract is sufficiently unusual to justify waiving the nondisplacement requirement.'' The Coalition agreed with the Department that prohibiting any further delegation of this duty is consistent with use of the term ''senior official'' in section 6(a) of the order. The Coalition, however, also recommended that the Department add a consultation requirement, such that the senior procurement executive would have to make the determination ''in consultation with the agency head.'' The Coalition noted that such a requirement

[4] 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.''

would be consistent with the FAR, which permits individual deviations from FAR requirements when authorized by the agency head. *See* 48 CFR 1.403. The AFL–CIO stated that they supported the requirement that any exception decision be made by the senior procurement executive.

In contrast, Nakupuna expressed concern that the exception process in § 9.5(a) is ''too arduous'' and may result in agencies not granting exceptions that would have been in the best interest of the Federal government. Nakupuna also stated that the head of a contracting department or agency should have the authority to exempt contracts from the requirements of the order if justified. Several other commenters expressed more general concerns about the requirements for senior-level decision-making. PSC, in a response to the Department's proposal regarding location continuity, stated that requiring the senior procurement executive to make a determination ''would cause needless delay'' because such decisions ''require time, consideration, and decision capital'' that may ''bottleneck solicitations.'' NIB, in requesting a blanket exemption for contracts awarded under the JWOD Act, suggested that exception decisions by senior procurement executives would be ''superfluous'' and ''time-consuming.'' Several other entities involved in contracting under the JWOD Act expressed similar concerns. These comments, however, did not address the express language in section 6(a) of the Executive order that limits the exception authority to a ''senior official within an agency'' or suggest that the Department was incorrect to interpret that language as limiting the decision to the senior procurement executive.

The final rule adopts the senior-procurement-executive requirement in § 9.5(a) as proposed. As the Coalition noted, this language is consistent with the requirement in the order that the decision must be made by a ''senior official,'' and the involvement of the senior procurement executive will promote consistency in agency exception decisions. The requirement is also consistent with the implementation of Executive Order 13495 in the 2012 FAR final rule, which adopted language at 48 CFR 22.103–3 authorizing the senior procurement executive to waive nondisplacement requirements. *See* 77 FR at 75767. The Department declines to implement the Coalition's proposal to require consultation with the agency head. While such consultation may be appropriate and should be encouraged, it is not required by the order and may not be warranted in every instance.

NIB also suggested that the word ''may'' in § 9.5(a) should be replaced with the word ''shall,'' to more effectively require a contracting agency to grant an exception to the nondisplacement requirements in certain circumstances. While acknowledging that section 6(a) of the order itself uses the term ''may,'' NIB asserted that replacing it with the word ''shall'' in the regulations would eliminate any implication that a contracting agency has any ''discretion'' to apply the nondisplacement requirements even when that would be inconsistent with another law such as the JWOD Act. The Department agrees with NIB that in circumstances in which the application of the nondisplacement requirements would directly conflict with an express provision of another statute, such that compliance with the nondisplacement requirements set forth in this final rule would necessarily result in a violation of another statute, the agency should authorize the exception. But the Department interprets the order's use of the term ''may'' to suggest only that (consistent with Nakupuna's suggestion) the senior procurement executive's determination can still be subject to review and revision by the contracting agency head or otherwise pursuant to an individual contracting agency's procurement procedure. Accordingly, the final rule continues to authorize, but not require, the agency to waive the application of nondisplacement provisions after the determination of the senior procurement executive. The final rule therefore adopts the language of § 9.5(a) as proposed.

Proposed § 9.5(b) reiterated the procedural requirements that section 6(a) of the order states must be satisfied for an exception to be effective. The proposed language stated that the action to except a contract from some or all of the requirements of the Executive order or the regulations must 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) stated that this written explanation must 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) provided that any determination by an agency to exercise its exception authority that is made after the solicitation date or without the timely and specific written explanation would be inoperative. In such a circumstance, the contract clause would have been wrongly omitted and the agency would be required to take action consistent with paragraph § 9.11(f) of this part, which sets forth the requirements for incorporating missing contract clauses.

The Coalition and the AFL–CIO expressed general support for the proposed procedural requirements in § 9.5(b). The Coalition noted that the requirement for a specific written explanation, including the facts and reasoning, will promote thorough analyses and consistent decision-making. They also noted that this requirement is in accordance with the FAR's requirement that documentation in contract files be sufficient to constitute a complete history of the contractual action, including support for actions taken. *See* 48 CFR 4.801(b). The Coalition, however, recommended modifying the language of § 9.5(b) to also require an ''attestation'' by the incoming contractor that ''no service disruption will occur due to the displacement of predecessor contract employees.'' They explained that the attestation could be requested in the solicitation.

The Department declines to require an additional ''attestation'' condition. Such an attestation requirement could be an effective mechanism in a particular contract to maximize the use of predecessor employees and limit disruption even when the nondisplacement contract clause is not included in the solicitation. However, the order does not impose this blanket requirement, and the Department did not propose one in the NPRM. Thus, while agencies are encouraged to take alternative and contract-specific measures to protect against service disruption where the nondisplacement provisions do not apply—including an attestation requirement on a contract-by-contract or agency-wide basis—the Department is not imposing such a requirement in this final rule.

Multiple commenters noted potential challenges from the requirement in § 9.5(b) that the exception determination and written analysis must be carried out no later than the solicitation date. One entity, Professional Contract Services, Inc. (PCSI), requested a modification of these timing requirements to accommodate the potential for interaction between bidders and the contracting agency. PCSI noted that the regulations do not provide for a ''process for a bidder or contractor to interact with the contracting agency and explain its need for such an exception.'' PCSI suggested that such a procedure would be particularly useful with regard to the AbilityOne program, where ''a contracting agency may not understand

the conflict in laws posed without such an interaction with the selected [AbilityOne contracting entity].'' PCSI did not suggest how exactly the timeframe should be modified—whether by providing a pre-solicitation procedure or by allowing exceptions to be requested and provided after the solicitation date.

The Coalition discussed the challenge of the exception deadline in the context of a comment about the proposed reconsideration process. Under their suggestion, agencies would be required to notify workers and their representatives of a proposed exception no later than 120 days before the solicitation, providing time for comment from interested parties. The deadline for the agency to make an initial exception decision would be 60 days prior to the solicitation date, to accommodate time for interested parties to then request reconsideration and for that reconsideration to be resolved before any bid solicitation goes out. The AFL–CIO expressed agreement with the Coalition's proposed timeframe.

The Department acknowledges that the solicitation-date deadline for an agency exception decision may be challenging in some circumstances because it requires agencies to collect relevant information regarding the need for an exception prior to the solicitation date, and because any decision that is made close to or on the solicitation date leaves little to no time for interested parties to assist the agency in correcting any mistakes before the solicitation is issued. Notwithstanding these concerns, the Department declines to extend the deadline for agency exceptions beyond the solicitation date, which would be contrary to the specification in the order itself that the exception may be granted ''no later than the solicitation date.'' This language does not allow a procedure in which exceptions are granted after the solicitation date, unless the solicitation is subsequently canceled and reissued. Such a rule strikes a reasonable balance, as allowing exceptions after the solicitation date would not make sense procedurally and could invite abuse of the exceptions provision.

The Department also declines to impose a procedural framework that would require agency exception decisions to be made 60 days before the solicitation date for all contracts. The Department agrees with the Coalition that agencies will be able to make better-informed decisions and avoid errors if they engage with stakeholders—including workers on predecessor contracts or their collective bargaining representatives—as early as possible in the acquisition planning process. The order, however, requires only that the exception decision be made no later than the solicitation date, which allows, but does not require, agency exception decisions to be made at an earlier date. In responding to the Coalition's suggestion, the Department considered that the FAR contains broad requirements for acquisition planning prior to the issuance of solicitations. *See generally* 48 CFR 7.102 (''Agencies shall perform acquisition planning and conduct market research . . . for all acquisitions[.]''). It is during this advance planning process that agencies should be identifying whether an exception from the nondisplacement provisions is necessary—and engaging workers and their representatives if possible—and not at the last minute before a solicitation is issued. The language of the order allows agencies to address exceptions in this way, and agencies are encouraged to carry out the exceptions decision as early as possible. At this time, however, the Department declines to impose by regulation an earlier deadline for agency exceptions determinations. As noted below, however, the Department has included new language in § 9.5(d) that requires contracting agencies, to the extent consistent with mission security, to include employee representatives in any pre-solicitation market-research-related industry exchanges that are specific to the nondisplacement requirements and conducted for the purpose of analyzing whether to impose an agency exception under § 9.5.

For the foregoing reasons, the final rule adopts § 9.5(b) as proposed.

i. Bases for Agency Exceptions

In the NPRM, the Department also proposed 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.

In § 9.5(c), the Department proposed language to address the first of the three circumstances under which an agency may authorize an exception from the nondisplacement provisions: where adhering to the requirements of the order would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. The proposed language in § 9.5(c) is consistent with the language in section 6(a)(i) of Executive Order 14055. 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 nondisplacement 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 the Executive Order 13495 and Executive Order 14055 versions of this exception 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 at 53726–29 (discussion of comments); 29 CFR 9.4(d)(4) (2012) (regulatory text). The Department has not received information suggesting that, during the several years in which the prior regulations were in effect, these factors were over- or under-prescriptive or abused by contracting agencies. The AFL–CIO noted in its comment that the prior nondisplacement procedure was a ''resounding success.''

In § 9.5(c), as it did in the regulations implementing Executive Order 13495, the Department proposed 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 proposed to include the same requirement as under the prior regulations 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. Thus, if the agency finds that costs or other factors support an exception from the nondisplacement requirements, it must specify how the particular circumstances support a conclusion contrary to the general findings of the order.

In § 9.5(c)(1), the Department proposed to include a non-exhaustive list of 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 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 replacement workforce. They also include emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees. Finally, they 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.

As the Department explained in the NPRM, a determination that the entire workforce failed cannot be made lightly. A senior agency official who 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. 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 proposed 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 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 appropriate 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 proposed in § 9.5(c)(2), 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 to minimize displacement. Thus, any potential for reconfiguration cannot justify excepting the entire contract from coverage.

The Department also proposed in § 9.5(c)(2), 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 employees.

Finally, the Department proposed in § 9.5(c)(2) to limit 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 the Executive orders governing minimum wage and sick leave for Federal contractors, and these rates will therefore apply regardless of whether the predecessor workforce is rehired. 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(c) (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.

The AFL–CIO expressed general support for the Department's approach to agency exceptions, including the Department's decision to provide a set of specific factors in § 9.5(c) that the agency may and may not consider in determining whether an exception is appropriate. The Coalition stated that the Department's proposed agency exception process was a ''good start.'' The Coalition in particular supported the requirement in § 9.5(c) that an agency justify its deviation from the order's assessment of the benefits of nondisplacement if it seeks to rely on costs as a basis for exception. The Coalition stated that this requirement would promote a thorough and consistent analysis across agencies. They also stated that this requirement is in line with general principles under the Procurement Act, under which, they explained, ''economy and efficiency are not necessarily promoted by contracting with the lowest bidder or seeking to minimize costs with a less effective workforce.''

The Coalition also suggested a number of changes to the procedural requirements in § 9.5(c). As an initial matter, the Coalition recommended that the required comparison of anticipated outcomes should include a cost-benefit analysis in a standard format, as

determined by the Secretary, that estimates the direct and indirect costs of employee turnover during the first year of the successor contract. The Coalition also suggested amending the discussion of relevant factors in § 9.5(c)(1) and exceptional circumstances in § 9.5(c)(2) to require that any conclusions about potential disruptions or workforce failures must be based on ''documented incidents'' during the predecessor contract's period of performance ''such as at least two consecutive annual past performance ratings of 'unsatisfactory' as defined by FAR 42.1503(b)(4).''

The Department declines to adopt the Coalition's suggestion that § 9.5(c) include a requirement to carry out a standardized cost-benefit analysis in a format designated by the Secretary. As the Coalition noted, § 9.5(c) already requires agencies to carry out a written analysis that compares the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce; and the proposed regulation already provides guidance for how to consider costs as part of that analysis, as well as guidance about factors that are not appropriate. The Department believes the scope of the current § 9.5(c) is sufficient to assist agencies in a way that will lead to consistent decision-making across agencies. Under paragraphs 6(b) and 6(c) of the Executive order, agencies are also required to publish descriptions of the exceptions they have granted on a centralized website and to report to OMB descriptions of these exceptions on a quarterly basis. The Department intends to analyze use of the agency exception process as these regulations are implemented and may consider in the future whether additional procedural requirements (such as the suggested standardized cost-benefit analysis) are necessary.

The Department also declines to adopt the Coalition's suggestion regarding additional guideposts for the discussion of factors in § 9.5(c)(1) and (c)(2). The existence of two consecutive annual ''unsatisfactory'' past performance ratings, as suggested by the Coalition, would certainly be relevant evidence for a determination made with reference to the factor at § 9.5(c)(1)(iii). That factor provides for agency exceptions in situations where there is a reasonable belief ''based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively to perform suitably on the job[.]'' However, as the Department noted in the NPRM, a contractor's past performance alone will generally not be sufficient basis to invoke an exception, because poor performance may result from poor management decisions of the predecessor contractor (and not from failures of the predecessor's service employees), and the management failures could be addressed by awarding the contract to another entity. Instead, as the Department proposed in the NPRM, the specific reasons for such poor performance ratings would need to be considered. The Department is concerned that adopting the Coalition's suggested language could give the impression that past performance ratings alone can justify an exception. Thus, the Department declines to adopt the Coalition's suggested amendments. For the reasons discussed, the final rule adopts § 9.5(c) as proposed.

In § 9.5(d), the Department proposed language to address the second of the three circumstances under which an agency may authorize an exception from the nondisplacement provisions: where their application 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. This exception is provided for in section 6(a)(ii) of Executive Order 14055. The proposed language of § 9.5(d) clarified that a reduction in the number of potential bidders is not, alone, sufficient to except a contract from coverage under this authority; the senior procurement executive 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 stated 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 requires that any exercise of this authority must be based on a market analysis. This requirement was addressed in proposed § 9.5(a)(2) and (d). This market analysis requirement is consistent with existing requirements in the FAR. 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(b)(1). To justify the exception from the nondisplacement requirements, the order requires that the market analysis show that adherence to the requirements would ''substantially'' reduce the number of potential bidders so as to frustrate full and open competition. In proposed § 9.5(d), the Department clarified that 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.

As with any of the exceptions, where an agency seeks to except a particular contract under this competition-related analysis, the agency is required, consistent with section 6(a) of Executive Order 14055 and proposed § 9.5(b), 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—must 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).

The AFL–CIO stated their general support for the Department's proposed specific requirements in § 9.5(d). As noted above, however, the AFL–CIO and the Coalition also sought a process by which employees for incumbent contractors would be notified of the potential for an exception 120 days before the solicitation date and allowed to submit comments. The final rule adopts § 9.5(d) as proposed with a slight and nonsubstantive change to the wording of one sentence, and with two limited additions. In a nonsubstantive change, the Department has streamlined the language that explains that a potential reduction in the number of bidders alone is not sufficient to justify the exception. The final rule clarifies that such a reduction is not sufficient ''unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price'' and adhering to the nondisplacement requirements would not be reasonably tailored to the agency's needs for the contract.

In the first addition to this paragraph, the Department has included a sentence to provide additional detail regarding

the requirement that the agency determine whether ''a fair and reasonable price'' can be achieved in order to justify this exception. The new sentence states that ''[w]hen determining whether a fair and reasonable price can be achieved, the agency must consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the nondisplacement requirements (*e.g.,* costs of labor or materials, supply chain costs).'' The consideration of current market conditions in a price analysis is consistent with agency approaches under FAR subpart 15.4 (Contract Pricing). *See Nomura Enter., Inc.,* B–271215 (May 24, 1996).

Second, the Department has added language to § 9.5(d) to require contracting agencies, to the extent consistent with mission security, to include employees' representatives in any market-research-related exchanges with industry that are specific to the nondisplacement requirement. *See* 48 CFR 10.002(b)(2) (discussing market research techniques involving industry outreach); 48 CFR 15.201 (encouraging ''early exchanges'' of information with industry and other interested parties to identify concerns about acquisition strategy). As the Department noted in the NPRM, to satisfy the Executive order's requirement for an agency exception, the market analysis must be an objective, contemporary, and proactive examination of the market conditions. Accordingly, it would not be appropriate for the agency to except a contract from the nondisplacement requirements on the basis of a market analysis without a proactive effort to determine whether sufficient bidders may exist so as to satisfy full and open competition, including through communication with other knowledgeable sources (such as, where feasible, the representatives of employees currently working in that industry) regarding the services to be provided.

In § 9.5(e), the Department proposed to address the third circumstance in which an agency exception would be appropriate: where adhering to the requirements of the order would otherwise be inconsistent with statutes, regulations, Executive orders, or Presidential Memoranda. This exception basis is articulated in section 6(a)(iii) of Executive Order 14055 and restated in § 9.5(a)(3) of the regulations. In § 9.5(e), the Department proposed 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 proposed this requirement to provide consistency, to the extent possible, in the application of the order.

NIB commented that the exception process described in § 9.5(e) is, at least as to the legal questions around the JWOD Act, ''unnecessary and likely to negatively impact the AbilityOne Program.'' NIB noted that unless the Department issues guidance as referenced in the proposed § 9.5(e) regarding the AbilityOne Program, contracting agencies would always be required to consult with the Department before invoking this exception. For this reason, among others, NIB advocated for an express exemption for AbilityOne contracts to remove these steps from the procurement process. Melwood expressed a different but related general concern—that the determination of legal conflicts by contracting agencies ''on a case-by-case basis'' may lead to inconsistent application or exceptions for AbilityOne authorized contractors. Several other commenters, including SourceAmerica, Peckham Inc., ServiceSource, and Didlake Inc., expressed similar concerns.

The Coalition, on the other hand, commented in support of the proposed consultation requirement in § 9.5(e). In their comment, however, the Coalition advocated that the rule should further require that the Department approve any exception before a contracting agency is allowed to proceed. They also advocated that the Department's approval should be contingent on a finding that such an exception would be ''consistent with the federal government's interest in promoting competitive integrated employment for people with disabilities, as defined by the Workforce Innovation and Opportunity Act and applicable implementing regulations and guidance issued by the Rehabilitation Services Administration.''

Having considered the comments received regarding the procedure in proposed § 9.5(e), the final rule adopts the text of this paragraph as proposed. Section 6(a) of the Executive order itself provides for a default procedure of individual case-by-case determinations regarding potential legal conflicts with the nondisplacement requirements. The Department agrees with the various commenters that it makes sense to ensure, as much as possible, that these agency exception decisions are not made on an inconsistent basis or with inconsistent outcomes. The proposed consultation procedure in § 9.5(e) is intended to ensure that these case-by-case determinations are as consistent as possible.

The Department declines to adopt the Coalition's suggestion that agencies be required to receive approval from the Department, in addition to seeking consultation, before issuing an exception for a contract under § 9.5. The procedure in § 9.5(e) provides an appropriate balance. In most cases, the procedure will require consultation with the Department if a potential conflict is identified. Consultation will allow the Department to share any resources or information with the contracting agency, including how the specific potential conflict has been treated by other agencies. This should decrease the potential for inconsistency, about which commenters expressed concern. Section 9.5(e) also seeks to increase efficiency, without cost to consistency, by eliminating the consultation requirement where the Department has already issued guidance on the potential conflict.

If an agency itself has the authority to interpret and implement a particular law or policy that potentially conflicts with the requirements of Executive Order 14055 or this regulation, the procedure in § 9.5(e) defers in the first instance to that agency and does not require consultation with the Department. Although no consultation is required, the Department encourages communication because the determination of whether a conflict exists between two legal requirements necessarily involves interpreting both legal requirements—and the Department itself has authority to interpret and enforce nondisplacement requirements.

Finally, with regard to the potential conflicts with contracts covered by the JWOD Act, as discussed in section II.B.4. above, the Department has separately addressed these concerns by including a contract clause that applies to all such contracts and subcontracts and instructs contractors that they must implement the JWOD Act (and certain other statutory procurement preference programs) and the nondisplacement provisions in tandem and to the maximum extent possible.

ii. Reconsideration of Agency Exceptions

In the NPRM, the Department proposed language at § 9.5(f) to provide a procedure for interested parties to request reconsideration of agency exception determinations. This proposed language mirrored 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 stated that it intended to extend the opportunity to request reconsideration to affected workers or their representatives, in addition to actual or prospective bidders. The Department stated that it did 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 sought input from commenters regarding the proposed procedure.

PSC expressed concerns about the reconsideration process that the Department proposed for both the location continuity decision described in § 9.11 and the agency exception decision in § 9.5. The PSC noted that the Executive order does not expressly provide for a reconsideration process and stated that the process could have negative outcomes, such as by allowing a broad set of individuals or entities to ''potentially delay the implementation of business judgments of agency acquisition personnel'' and thereby delay acquisitions. PSC warned that the Department's intent to give a broad meaning to the term ''interested parties'' could have unforeseen results, like potentially allowing formal requests for reconsideration by governmental jurisdictions that might be competing to be the location of a successor contract.

The Coalition and the AFL–CIO, on the other hand, expressed general support for the concept of a reconsideration provision, but with significant amendments. As noted above, these commenters suggested that agency exception decisions should be made 60 days before a solicitation is issued so that reconsideration could be sought and resolved before the solicitation date. The Coalition also advocated that requests for reconsideration be directed to the Department, not to the contracting agency that proposed the exception. The Coalition noted that this suggestion is ''consistent with the fundamental principle of fairness that appeals should not be directed to the original decisionmaker.''

The Department considered these comments within the larger context of the agency exceptions determination and finds that it is not necessary at this time to include the proposed formal reconsideration provision in § 9.5. When an agency seeks to waive the nondisplacement requirements for a particular contract, there are several safeguards to ensure that this procedure is not misused. As adopted in this final rule, § 9.5(b) of the regulations requires the agency, through its senior procurement executive, to make a written explanation, ''including the facts and reasoning supporting the determination,'' and to make that determination no later than the solicitation date. Paragraphs 9.5(c) and (d) contain specific additional requirements regarding the factors that must be considered and those that cannot be considered for the first two exception provisions, and § 9.5(e) contains additional procedural requirements where an agency seeks to waive the nondisplacement provisions based on a perceived conflict with another law or policy. If the agency does not issue a timely specific written explanation, then the exception will be inoperative, and the agency will be required to either terminate the contract or cancel the solicitation and properly reissue it or to modify the existing contract to incorporate the nondisplacement contract clause consistent with the procedure outlined in § 9.11(f) of the regulations.

Even without a formal reconsideration provision in the regulations, the Department expects and encourages workers and their representatives to communicate with contracting agencies (and the Department, as appropriate) about any potential agency exception decision. Decisions regarding agency exceptions should be rare. But when they occur, they will generally be fact-specific, and workers and their representatives will likely have important information that can assist agencies in weighing the potential outcomes of a decision regarding an agency exception. Moreover, section 6(b) of the Executive order itself requires agencies to provide notice of an agency exception decision to workers and any collective bargaining representatives. The implication of that notice provision is that contracting agencies should welcome communications from workers or their representatives about an exception decision, and agencies should be prepared to reconsider any decision if they are provided with material facts or persuasive legal arguments that they had not previously considered.

In light of these safeguards—and in particular the availability of the retroactivity mechanism at § 9.11(f)—the Department finds that it is not necessary at this time to implement the formal reconsideration procedure that was previously proposed for § 9.5(f). However, the Department will carefully analyze the publication and reporting of exception decisions that is required under the order, along with feedback from workers, their representatives, and contractors. If appropriate, the Department may engage in a future notice and comment rulemaking to implement a more formal reconsideration procedure or take other appropriate action such as issuance of subregulatory guidance.

The Department therefore is removing the reconsideration provision that was at § 9.5(f) of the proposed rule and is removing from the contract clause, set forth in Appendix A, the language that required notices of agency exceptions to include reference to the manner of directing a request for reconsideration.

iii. Notification, Publication, and Reporting of Agency Exceptions

In the NPRM, the Department proposed to include in the regulations at § 9.5(g) a recitation of the notification, publication, and reporting requirements contained in sections 6(b) and 6(c) of the order. 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.

The Department received comments from the Coalition and the AFL–CIO regarding these notice and publication provisions. The commenters proposed revisions to the timeframe for notice of agency exceptions decisions so that agencies would have to notify workers and their representatives of a proposed exception no later than 120 days before a bid solicitation goes out to give workers time to comment on the proposed exception, the agency to respond, and the workers to request reconsideration (from the Department). The Coalition and Jobs to Move America also encouraged the Department to provide guidance to agencies about the form, content, and accessibility of the required publications on agency websites that are required by section 6(b) of the order, and to periodically monitor their compliance. They also stated that the Department could also promote the purposes of the order and transparency into government decision-making by coordinating with OMB to ensure that the quarterly reports that it receives from agencies are compiled and

published on a centralized public website.

The Department acknowledges these comments, but notes that section 7(a) of the Executive order does not provide the Department with the authority to issue implementing regulations regarding the notice and publication requirements in paragraphs 6(b) and (c) of the order. 86 FR at 66399. For that reason, the Department's proposed regulations at § 9.5(g), which are finalized in § 9.5(f) of the final rule, are recitations of the text of the Executive order itself and do not include any additional detail. For contracts that are subject to the FAR, the regulations that are implemented by the FAR Council may include additional instructions regarding the notice, publication, and reporting requirements.

Accordingly, the final rule adopts the language regarding notice, publication, and reporting provisions as proposed, except that the language now appears in § 9.5(f) of the final rule instead of § 9.5(g) to account for the removal of the reconsideration language previously proposed for § 9.5(f).

Subpart B—Requirements

6. Section 9.11 Contracting Agency Requirements

As proposed, § 9.11 would implement sections 3 and 4 of *Executive Order 14055.* Section 3 of the order directs agencies to ensure that covered contracts and solicitations include the nondisplacement contract clause. 86 FR at 66397–98. Section 4 of the order directs agencies to consider, during the preparation of a covered solicitation, 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—and, if so, to include a requirement or preference for location continuity in the solicitation. *Id.* at 66398–99.

Proposed § 9.11 specified contracting agency responsibilities to incorporate the nondisplacement contract clause in covered contracts, to ensure notice is provided 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 specified contracting agency responsibilities to provide the list of employees working under the predecessor contract and its subcontracts to the successor, to forward complaints and other pertinent information to WHD when there are allegations of contractor non-compliance with the nondisplacement contract clause or this part, and to incorporate the contract clause when it has been erroneously omitted from the contract.

i. Section 9.11(a) Incorporation of Contract Clause

Section 3(a) of Executive Order 14055 specifies the 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) provided a regulatory requirement to incorporate the contract clause specified in Appendix A into covered service contracts, and solicitations for such contracts, except for procurement contracts subject to the FAR. For procurement contracts subject to the FAR, contracting agencies would use the relevant clause developed to implement this rule set forth in the FAR. As the proposed rule explained, 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, as the Department noted in the proposed rule, 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 the 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,* No. C86–2188, 1988 WL 125784, at *4 (N.D. Ohio 1988) (finding SCA clause was enforceable where the SCA contract clause was not incorporated ''verbatim,'' but the contract incorporated by reference a GSA form that set forth the provisions of the SCA); *Progressive Design & Build, Inc.,* WAB No. 87–31, 1990 WL 484308, at *2 (Feb. 21, 1990) (finding subcontractor liable for Davis-Bacon Act (DBA) back wages where the DBA contract clause was not physically incorporated into subcontracts, but was incorporated by reference). The Department specifically noted in the proposed rule that the full contract clause will be deemed to have been incorporated by reference in a covered contract when 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. Similarly, under the FAR, a contract that contains a provision expressly incorporating contract clauses by reference gives those clauses the same force and effect as if they were given in full text. *See* 48 CFR 52.107, 52.252–2.

ii. Appendix A Contract Clause

Appendix A contains the nondisplacement contract clause that must be inserted in covered contracts as required by § 9.11(a). The proposed language of the contract clause in Appendix A is based on the language of the clause that appears in the Executive order itself. Contract clause paragraphs (a) through (e) of proposed Appendix A repeat the language in paragraphs (a) through (e) of the Executive order's contract clause verbatim, with one exception. The Department proposed to modify the contract clause by inserting 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.

As 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 was for employees who are not service employees and the other was 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 would 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) provided 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 honor the requirements of paragraphs (a) through (c) and would 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 set forth additional provisions necessary to implement the Executive order. As the proposed rule explained, 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) provided 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 on the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Proposed paragraph (f)(1) further explained 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.

Proposed contract clause paragraph (f)(2) provided notice that under certain circumstances the contracting officer would, 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 (f)(3) provided that contractors would deliver notices to their employees of an agency determination to except a successor contractor from the nondisplacement requirements of 29 CFR part 9, or to decline to include location-continuity requirements or preferences in a successor contract.

In contract clause paragraph (g), the Department proposed to require the contractor to maintain certain records to demonstrate compliance with the substantive requirements of part 9. As proposed, this 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 specified that the contractor would be required to maintain the particular records (regardless of format, *e.g.,* paper or electronic) for 3 years. The proposed paragraph further specified that such 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, and the date of payment, along with a copy of any receipt form provided by or authorized by WHD. The proposed clause also stated 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) provided 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.

The Coalition requested that the Department explicitly provide in the contract clause a statement that covered employees are intended third-party beneficiaries of the contract clause. The Coalition explained that this would give employees the ability to pursue private litigation to enforce Executive Order 14055. The Department does not adopt the Coalition's suggestion. Section 12(c) of Executive Order 14055 states that 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 66400. The Department interprets this language to limit its discretion to create or authorize a private right of action. *Accord* 86 FR 67192 (interpreting identical language to similarly limit discretion under Executive Order 14026). The Department declines to amend the contract clause to expressly designate workers as third-party beneficiaries of the contract's nondisplacement requirements. While the Coalition noted that Executive Order 14055 ''explicitly create[s] particular nondisplacement rights for workers,'' the Department believes that section 12(c) of the order is clear in limiting the Department's ability to create or authorize a private right of action under Executive Order 14055. As explained in § 9.1(c), however, neither Executive Order 14055 nor this part creates or changes any private right of action that may exist under other applicable laws. Thus, nothing is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Likewise, whether a worker could make a third-party beneficiary claim under relevant state law would be determined by such state law.

The Department did not receive additional comments on proposed § 9.11(a) or on the proposed contract clause in Appendix A, and thus the final rule adopts them as proposed, with the following exceptions. The Department has added language to § 9.11(a) to reflect that the application of the FAR nondisplacement clause will take place under the procedures set forth in the FAR, as well as paragraph (f)(3) of Appendix A to add reference to the requirement from § 9.12(e)(3) that predecessor contractors provide notice to employees of their possible right to an offer of employment on the successor contract. The Department also made several revisions to the contract clause

for purposes of clarity and to reflect revisions to the regulations that are discussed elsewhere in this final rule.

iii. Section 9.11(b) Notices

Proposed § 9.11(b) specified 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). The Department did not receive any comments on proposed § 9.11(b). Comments addressing the other notice requirements contained in this rule are addressed in the preamble sections corresponding to where they appear in the regulatory text. The final rule adopts § 9.11(b) as proposed, other than, for clarity, adding a cross-reference to the other employee notice provisions found at § 9.11(c)(4) (relating to notice to employees' representatives to provide information relevant to the location continuity analysis), and where relevant, § 9.5(f) (relating to agency exceptions).

iv. Section 9.11(c) Location Continuity

Section 9.11(c) implements the location continuity requirements in section 4 of Executive Order 14055. Section 4(a) of the order states that, in preparing covered solicitations, contracting agencies 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. 86 FR at 66398. Section 4(b) states 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. 86 FR at 66399. For IDIQ contracts under the MAS and other similar programs, the location continuity determination would be made by the ordering agency prior to issuing the RFQ. *See* 48 CFR 8.405–1(d)(2), 8.405–2(b)–(c), 8.405–3(b)(ii) (requiring statements of work and/or RFQs for proposed orders and blanket purchase agreements exceeding the simplified acquisition threshold).

These requirements represent a different approach to location considerations than the prior nondisplacement provisions in Executive Order 13495. The new requirements seek to increase the government's opportunity to benefit from carryover workforces even where a contract location changes, but the requirements also place significantly more emphasis on the potential benefits of keeping contract locations constant. Executive Order 13495 limited the application of the nondisplacement requirements to contracts for similar services at the ''same location.'' 74 FR at 6104. Executive Order 14055, in contrast, does not contain such a limitation. As a result, Executive Order 14055 applies the nondisplacement requirements regardless of the location of the successor contract. Even if the place of performance for a successor contract will be in a different locality from the predecessor contract, the successor contract will still be required to include the nondisplacement contract clause and the successor contractor will 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 Executive Order 14055, however, clarifies that these requirements should not be construed to require or recommend the payment of relocation costs to workers who exercise their right to take a new position when a contract location is moved. 86 FR at 66398. Executive Order 14055 recognizes this through the location continuity requirements in section 4 of the order, as well as in a discussion of location continuity in section 1 of the order. *Id.* at 66397–99. The central location continuity provisions, in section 1 and section 4 of Executive Order 14055, reflect the basic but important conclusion that the right of first refusal in the contract clause may have a more limited effect in many circumstances 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. 86 FR 66397. The benefits of using a carryover workforce and location continuity are intertwined because for many contracts, in particular those on which workers cannot or may not be allowed to work in a fully remote capacity, 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, the provisions of section 4 of the order require that for each covered contract, the contracting officer consider whether to include a requirement or preference for location continuity. *See* 86 FR at 66398–99. The Department proposed to restate these requirements from the order in § 9.11(c)(1) and § 9.11(c)(2), respectively.

The Department received several general comments regarding the location continuity requirements in the order and in the proposed text of § 9.11(c). The AFL–CIO and the Coalition expressed strong support for the requirements. The Coalition stated that the benefits of retaining experienced workers are no different for contracts that change locations. They provided the example of a 2008 decision by the State Department to move a call center contract for the National Passport Center to Michigan from New Hampshire, where it had been operating for 12 years. The decision resulted in the termination of hundreds of trained workers and allegations of significant service disruptions.[5] The AFL–CIO agreed with the NPRM that the benefits of using a carryover workforce and location continuity are intertwined. They stated that absent a location continuity requirement, there is ''significant risk that the broader benefits of the nondisplacement rule will not be realized.''

In contrast, ABC and Nakupuna opposed the location continuity provision in its entirety. ABC commented that the combination of the location continuity provisions and the elimination of the ''same location'' requirement from the prior nondisplacement order ''will needlessly limit successor contractors from performing the work in a new locality with employees who are familiar with the new location.'' Nakupuna expressed concern that the required location continuity analysis will be burdensome for agencies and that ''any subsequent final decision will severely constrain the government if labor market

[5] *See* ''Call Center to Close in Dover; 300 Jobs Cut,'' Associated Press (Dec. 3, 2008), *https://www.seacoastonline.com/story/news/2008/12/03/call-center-to-close-in/52169521007/;* ''Local AT&T Worker Claims Mich. Call Center Backed Up,'' Fosters Daily Democrat (Mar. 11, 2009), *https://www.fosters.com/story/news/2009/03/11/local-at-t-worker-claims/52067699007/.*

conditions change rapidly throughout the solicitation, award, and hiring/staffing process.'' Nakupuna thus advocated for limiting coverage of the nondisplacement rule only to the same location, and ''specifically the same Federal facility.''

The Department reviewed and considered the above general comments regarding the location continuity provisions and declines to eliminate these provisions in the final rule. The Executive order expressly requires agencies to consider location continuity and include location continuity requirements or preferences where reasonably necessary. 86 FR at 66398–99. Accordingly, § 9.11(c)(1) and (c)(2), as finalized, include these requirements within the subpart of the regulations that addresses contracting agency requirements.

The Department, however, also disagrees with ABC and Nakupuna that the location continuity requirements will have adverse effects. Even though there is no express requirement to do so in the FAR, agencies already in many cases require contracts to be performed at specific locations or otherwise consider whether to include location continuity requirements in solicitations. For example, where the services at issue 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., Novad Mgmt. Consulting, LLC,* B–419194.5, 2021 WL 3418798, at *3–4 (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 or preference may be reasonably necessary to ensure economical and efficient provision of services.

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. 86 FR at 66398–99. 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. One commenter, PSC, while opposing several of the procedural safeguards that the Department proposed for the location continuity requirement, noted its general agreement that location continuity might be appropriate where related to ''efficiency in facilities or with regard to classified information management.''

The Department also noted in the NPRM that there will be other cases in which changed agency needs may outweigh the basic interest in a carryover workforce. 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. The Coalition provided another example in their comment. If workers under the predecessor contract have been primarily working in a fully remote capacity, location continuity may be less necessary to obtain the goals of the order, particularly if the solicitation contemplates the continued availability of remote work on the successor contract. As discussed below, the Department is not limiting contracting agencies from considering any aspects of agency requirements in making location continuity determinations. Accordingly, the Department does not agree with ABC or Nakupuna that the location continuity provisions will unnecessarily limit or constrain agency decision-making.

(A) ''Same Location'' and ''Same Locality''

COFPAES requested clarification regarding the meaning of the Executive order's statement in section 1 that the same benefits of the nondisplacement order are also realized when the successor contractor performs the work at ''the same location where the predecessor contract was performed.'' *See* 86 FR 66397. COFPAES stated that this reference was confusing because the NPRM explained that the order's coverage applies coextensively with the SCA, and therefore applies irrespective of where the contractor performs the work. *See* 29 CFR 4.133(a).[6] COFPAES also stated that the nondisplacement requirements would be ''unworkable and impractical'' if applied to mapping or engineering design firms where ''a deliverable of plans and specifications is prepared on the contractor's site and delivered to the government.''

The order uses two slightly different terms to discuss the same concept: ''same location'' (in section 1) and ''same locality'' (in section 4). 86 FR at 66397–98. The operative requirement of the order is in section 4 of the order and in § 9.11(c)(1) and (c)(2) of the regulations, all of which require consideration of whether performance of the work in the ''same locality or localities'' is reasonably necessary for economy and efficiency. *See* 86 FR at 66398. The Department interprets this language to mean performance within a reasonable commuting distance of the specific facility at which the predecessor contract employees worked or were based, or, where relevant, within commuting distance of the locality in which most of the predecessor contract employees live. As noted in the NPRM, the language about contract ''location'' and ''locality'' and sections 1 and 4 of the order reflect the basic conclusion that the right of first refusal in the nondisplacement contract clause may have a more limited effect if a contract is moved beyond commuting distance from the predecessor contract, such that predecessor employees may be less likely to accept an offer of employment on the successor contract. Accordingly, a ''same locality'' preference or requirement generally means a preference or requirement that the location of the facility at which employees will be working or operations will be headquartered (if covered employees work remotely) be sufficiently within the same general geographic area such that employees on the predecessor contract could continue to work on the successor contract without having to move their residences.

The Department's understanding of the concept of ''location'' and ''locality'' in Executive Order 14055 is consistent with the FAR Council's interpretation of

[6] COFPAES also stated that the nondisplacement provisions are inconsistent with the Brooks Act, 40 U.S.C. 1101 et seq, and its implementing regulations and stated that these types of contracts should be exempted from coverage. The Department has addressed this request for an exemption above in section II.B.4.

the term ''same location'' as it was used in Executive Order 13495.In its final rule implementing Executive Order 13495, the FAR Council refrained from narrowly defining the term to mean the ''same building, base, city, command'' or something else. *See* 77 FR 75766, 75768–69. Instead, it stated that what constitutes the ''same location'' in that context ''will depend upon the geographic area in which performance under the predecessor and successor contracts occur'' and can be resolved with reference to the statement of work or similar contract provision. *Id.* at 75769. The Department's understanding of these terms is also consistent with the interpretation of the term ''locality'' as it is used in the SCA to define the geographic unit within which prevailing wages are calculated. *See* 41 U.S.C. 6703(1). In the SCA context, the Department and reviewing courts have given the word ''locality'' a flexible but not unlimited meaning, *see S. Packaging & Storage Co.* v. *United States,* 618 F.2d 1088 (4th Cir. 1980), such that a ''locality'' typically encompasses a metropolitan statistical area (MSA) or similar grouping of nonmetropolitan counties.[7]

(B) Location-Continuity Factors

In the NPRM, the Department sought comment on whether § 9.11(c) should provide additional guidance on the relevant factors that an agency should consider when it is considering location continuity, and, if so, which factors to include and whether to provide guidance regarding any particular weight that should be given to each of them. The Department sought comment on whether contracting agencies should be required to start with a presumption in favor of location continuity, and regarding when, if ever, it is appropriate for contracting officers to consider costs as a reason to decline to require location continuity. The Department also sought comment on how the HUBZone program or other procurement-related programs[8] should factor into a location-continuity analysis, how an agency should weigh the history of remote work or telework by incumbent contractor employees, and whether there are 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.

The AFL–CIO and the Coalition encouraged the Department to apply a presumption in favor of location continuity. The AFL–CIO further proposed that contracting agencies should have to identify clear and convincing evidence to rebut such a presumption. They noted that it may be appropriate to presume that the contracting agency chose the location of the predecessor contract for a substantial reason, and that keeping the same location increases the benefits of the nondisplacement provisions by making it more likely that predecessor employees will be able to accept an offer from the successor contractor. Accordingly, they suggested, the burden should be on the contracting agency to explain why the location of a contract should be moved.

The Coalition also urged the Department to provide additional guidance to contracting agencies in the final rule regarding relevant factors for a location-continuity determination and regarding the consideration of cost. The Coalition proposed several factors, including (1) the size of the workforce under the new contract; (2) the level of experience and training of the incumbent workforce; (3) whether workers on the predecessor contract have access to any sensitive, privileged, or classified information; and (4) prior successful performance by the predecessor workforce. The Coalition urged a general prohibition on the consideration of labor costs, asserting that the policy of the Executive order prefers the benefits of worker nondisplacement over potential reduction in labor costs.

PSC, on the other hand, urged the Department not to impose a presumption in favor of location continuity or to provide guidance regarding factors to consider. They commented that a presumption would ''put[ ] agencies in the position of having to prove a negative'' and would ''intrude[ ] on acquisition judgements.'' They expressed concern that guidance regarding factors to consider would lead to a ''check-the-box exercise on factors that may be irrelevant to the agency, and potentially downplay factors that really matter to the agency,'' and that, even if the factors are framed as optional, they ''may not be optional in practice.'' PSC stated that costs must always be a permissible consideration with regard to location continuity, ''with the scope of other potential considerations left to the contracting officer's discretion.'' They added that if ''economy and efficiency are realized by requiring successors to offer employment to predecessor employees by location, those efficiencies must be balanced with costs that may result from imposing that requirement.''

The Department does not agree with PSC that the provision of guidance regarding factors to consider in the location-continuity analysis will confuse contracting officers or undermine their business judgement. The provision of nonexclusive lists of factors for contracting officers to consider is a routine aspect of contract formation. *See, e.g.,* 48 CFR 15.304 (Evaluation factors and significant subfactors). In addition, as the Department noted in the NPRM, many covered contracts will not require consideration of factors related to nondisplacement because the location of the services must be fixed for other reasons. For example, an agency drafting a solicitation for a successor contract for janitorial or security services for a specific federal facility would not need to consider nondisplacement factors as part of a location-continuity analysis because there is no reasonable possibility that the location of the services could be moved. However, where the agency believes the services could possibly (nondisplacement factors aside) be carried out at a different location, the location-continuity analysis required by the Executive order should include consideration of the nondisplacement factors. The final rule, therefore, includes at § 9.11(c)(3) a nonexclusive list of factors that are important to consider when there is a possibility that the successor contract could be performed in a locality other than where the predecessor contract has been performed.

The list of factors in § 9.11(c)(3) includes: (i) whether factors specific to the contract at issue suggest that the employment of a new workforce at a new location would increase the potential for disruption to the delivery of services during the period of transition between contracts (*e.g.,* the large size of workforce to be replaced or the relatively significant level of experience or training of the predecessor workforce); (ii) whether factors specific to the contract at issue suggest that the employment of a new workforce at a new location would unnecessarily increase physical or informational security risks on the contract (*e.g.* whether workers on the contract have had and will have access to sensitive, privileged, or classified information); (iii) whether the workforce on the predecessor contract has

[7] The Office of Management and Budget designates counties or groups of counties as MSAs as part of its core based statistical area (CBSA) standards. *See* 86 FR 37770 (July 16, 2021).

[8] The HUBZone program, 15 U.S.C. 657a, is one of several procurement-related preference programs for small businesses, and it is designed to aid small businesses that are located in economically distressed areas. *See supra* footnote 2 in section II.B.4. Of all existing small business preference programs, the HUBZone program is the only one that has a geographic component.

demonstrated prior successful performance of contract objectives so as to warrant a preference to retain as much of the current workforce as possible; and (iv) whether program-specific statutory or regulatory requirements govern the method through which the location of contract performance must be determined or evaluated, or other contract-specific factors favor the performance of the contract in a particular location.

The listed factors added in § 9.11(c)(3) of the final rule follow directly from the policy and purpose of the Executive order as described in section 1 therein. *See* 86 FR at 66397. The first three factors will generally weigh in favor of location continuity.

The Coalition expressed concern about successor contractors eliminating or significantly reducing the options of remote work or telework where it has existed on predecessor contracts. If workers on a predecessor contract have been provided the option of remote work or significant telework, the removal of that option on the successor contract may make it difficult for the successor contractor to maintain a carryover workforce, even if the contract stays in the same location and even if the workers are provided with a nondisplacement right-of-first-refusal offer. Any reduction in the option for remote work, the Coalition asserted, ''should be treated as a change in location that is presumed to be disruptive.''

The Department agrees that the removal of telework options by a successor contractor could cause significant disruptions, and consideration of the availability of remote work could therefore be relevant to location continuity determinations. Congress has specifically encouraged the use of telework by Federal contractors. *See* 41 U.S.C. 3306(f) (authorizing telecommuting for Federal contractors); *see also* 48 CFR 7.108 (requiring agencies make a specific determination regarding security or other requirements before prohibiting telecommuting or unfavorably evaluating proposals involving telecommuting). In addition, § 9.12(b)(5) of these regulations limits successor contractors from changing the terms and conditions of predecessor contractors for the purpose of discouraging employees from accepting the offer of employment on the successor contract. That paragraph states that successor contractors generally must offer employees of the predecessor contractor the option of remote work under reasonably similar terms and conditions to those that the successor contractor offers to any employees it has or will have in the same or similar occupational classifications who work in an entirely remote capacity.

The fourth factor in § 9.11(c)(3) of the final rule reminds contracting officers that it is appropriate to consider any program-specific statutory or regulatory requirements governing the method by which location of performance must be determined or evaluated, or other contract-specific factors that favor the performance of the contract in a particular location. For example, the FAR regulations regarding the architectural and engineering services under the Brooks Act contain their own location preference. *See* 48 CFR 36.602(a)(5). Under this regulation, one of five enumerated selection criteria is: ''Location in the general geographical area of the project and knowledge of the locality of the project; provided, that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project.'' *Id.* Because the Brooks Act already determines that location is to be factored into the solicitation by way of this specific location-continuity preference, it generally would not be appropriate to impose a location-continuity requirement (as opposed to this preference) because of the location-continuity provision in the nondisplacement regulation. This factor is consistent with the Executive order's mandate in section 4(b) that, upon determining that location continuity is reasonably necessary to ensure economical and efficient provision of services, agencies must include location-continuity requirements or preferences ''to the extent consistent with law.'' 86 FR at 66399.

The language at § 9.11(c)(3) of the final rule that introduces the relevant location-continuity factors clarifies that the list is nonexclusive. It states that the location-continuity analysis ''should generally include, but not be limited to'' the listed considerations. The final rule does not contain a required presumption in favor of location continuity, and it does not restrict consideration of costs. Having considered the comments submitted regarding these additional proposed provisions, the Department finds at this time that they are not necessary to achieving the purpose of the order. The final rule requires agencies to approach the location-continuity analysis on a case-by-case basis, while providing guidance regarding the critical benefits that carryover workforces provide and the possibility that changing a contract's location may have adverse effects on contract performance, physical or information security, or other proprietary interests of the Federal government.

In this case-by-case analysis, in addition to considering whether a location-continuity requirement is reasonably necessary, the contracting agency must also consider the option of including a location-continuity preference instead of a requirement. Inclusion of a preference still allows the agency to weigh proposals that involve moving a contract to a different location and award the contract to such a bidder if the benefits from moving outweigh the nondisplacement-related and other benefits of maintaining the same contract location. However, in some circumstances where the need for a carryover workforce is stronger (for example, where retaining a carryover workforce may limit risks related to information and physical security), it may be more important to ensure workforce continuity and thus suggest that a location-continuity requirement may be more appropriate than a preference. Ultimately, the decision regarding whether to use a requirement or a preference, like the determination of reasonable necessity, will be a case-by-case determination based on the agency's analysis of its needs.

PSC responded to the Department's request for comment about how the HUBZone program or other similar procurement programs should factor into the location-continuity analysis. In their response, PSC suggested that ''these considerations would greatly factor into such an analysis.'' Though they did not suggest a specific method of balancing the programs or goals, PSC noted that 35 percent of employees of HUBZone contractors must live within a HUBZone.[9] They also raised the question of whether ''equity [would] be realized'' if a successor contractor offered a right of first refusal to a HUBZone contractor's employees ''and relocated employees from that HUBZone.'' [10]

[9] To benefit from the sole-source awards, set-asides, or price-evaluation preferences under the HUBZone program, a contractor must become certified as a HUBZone small business concern (SBC), which requires that ''the principal office of the business is located in a HUBZone and not fewer than 35 percent of its employees reside in a HUBZone.'' 15 U.S.C. 657a(d)(1). The SBC also must certify that it will attempt to maintain the 35 percent employment ratio during the performance of any contract awarded on the basis of one of these HUBZone mechanisms. *Id.*

[10] In addition to commenting on the location continuity analysis, PSC also recommended an exemption to the right-of-first refusal requirement when such a right would ''impact internal organizational or federal Diversity, Equity, Inclusion and Accessibility goals.'' The Department

Continued

The Department agrees that aspects of the HUBZone program could be relevant to whether an agency imposes a location-continuity requirement, depending on the facts and circumstances of the particular contract. As an initial matter, if a predecessor contract is located in a HUBZone, a location-continuity requirement or preference for a successor contract would be consistent with the goals of the HUBZone program. And even where the predecessor contract is outside of a HUBZone, a location-continuity requirement or preference would not necessarily be inconsistent with the program, as there is no requirement under the HUBZone program that contracts set aside for or awarded to HUBZone-certified contractors must themselves be performed within a HUBZone. *See Cont. Mgmt., Inc.* v. *Rumsfeld,* 434 F.3d 1145, 1149 (9th Cir. 2006); *see generally* 48 CFR subpart 19.13. There is also a possibility that a HUBZone-certified contractor could be awarded a contract outside of the sole-source or set-aside processes, instead using only the HUBZone price-evaluation preference or in open competition. Given the breadth of contracts in which this can be the case, it would not be appropriate to give any significant weight against a location-continuity requirement or preference because of this possibility.

However, there may also be circumstances in which a location-continuity requirement for a successor contract at a non-HUBZone location could make it challenging for HUBZone contractors to complete the successor contract while complying with the 35-percent employee-residency requirement. This could be the case, for example, where the contract location is outside of commuting distance from any HUBZone and the workers cannot perform the contract remotely. In such a situation, where an agency identifies the potential for a HUBZone sole-source award or a set-aside, this fact might reasonably weigh against imposing a location-continuity requirement. In that circumstance, however, the contracting agency would still also need to consider whether other aspects of the contract, such as the handling of classified or confidential information, may justify a location-continuity requirement and therefore instead make the contract not suitable for a HUBZone set-aside.

Finally, while there may be circumstances in which the potential for a HUBZone set-aside weighs against a location-continuity requirement, such a potential will not weigh against the inclusion of a location continuity preference. As a general matter, there is no conflict where a solicitation contains multiple different preferences mandated by different statutes or regulations, as ''[e]ach preference can be given its due.'' *Automated Commc'n Sys., Inc.* v. *United States,* 49 Fed. Cl. 570, 577–79 (2001) (finding HUBZone preference and Randolph-Sheppard Act preference can both be applied in the same solicitation). Moreover, the inclusion of a location continuity preference will generally be compatible with the HUBZone program procedures even where a set-aside is used. Where a set-aside is used, the inclusion of a location continuity preference may lead to location continuity if feasible for one of the SBCs, but not limit the contract from being performed at a new location if continuity is not feasible for any bidders.

(C) Location-Continuity Procedural Safeguards

In the NPRM, the Department proposed language in § 9.11(c)(3) to implement several procedural safeguards for the location continuity determination. The Department proposed to require that agencies complete the location continuity analysis prior to the date of issuance of the solicitation. The Department proposed that any agency decision not to include a location continuity requirement or preference in a particular contract must be made in writing by the agency's senior procurement executive. In addition, the Department proposed that when an agency determines that no such requirement or preference is warranted, the agency must include a statement to that effect in the solicitation and also ensure that the incumbent contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination and of the workers' right to request reconsideration.

In the NPRM, the Department also proposed further requirements related to notice to predecessor workers and requests for reconsideration. Under the proposed text, the notice would need to occur within 5 business days after the solicitation is issued, and the incumbent contractor would need to provide confirmation to the contracting agency that the notification has been made. The Department proposed language in the nondisplacement contract clause set forth in Appendix A of the NPRM to require contractors to agree to provide this notification. The NPRM also provided that any request by an interested party for reconsideration of an agency's location continuity decision would have to be directed to the head of the contracting department or agency. Finally, the Department sought comment regarding whether there should be a remedy for an agency's failure to follow location continuity procedures, such that a procedurally deficient location-related determination would be ineffective as a matter of law. The Department also requested comment on whether there should be specific remedies for workers or sanctions for contractors in the circumstances in which a contractor fails to timely provide the required notice of a location continuity determination.

The Coalition and the AFL–CIO commented that the Department should require the same or similar procedural safeguards for location continuity as for agency exception decisions under the provisions set forth in § 9.5, and for the same reasons. These commenters thus supported the Department's proposed requirement that decisions be made in writing, by an agency's senior procurement executive, and before the solicitation date. As they did for § 9.5 exceptions, however, the commenters also advocated that the Department amend the timing requirement for the determination, notice, and reconsideration, to provide ample time before the solicitation for interested parties to comment on the determination and request reconsideration if necessary. These commenters also advocated that the rule should include a right to appeal to the Secretary, who would be ''an independent arbiter.''

The Coalition and the AFL–CIO advocated that the final rule require agencies to notify workers and their representatives of their location continuity determinations no later than 120 days before a bid solicitation goes out, and, with the notice, also provide the agency's written analysis and supporting evidence. They suggested that interested parties be given 30 days to comment on the determination, that agencies be required to respond no fewer than 60 days before the bid solicitation, and that interested parties be given 15 days to file an appeal with the Secretary, who would have to decide the appeal within 45 days and before any solicitation is issued. The AFL–CIO strongly urged the Department to treat procedurally deficient location-continuity determinations in the same manner as exception determinations, by making such determinations ineffective as a matter of law.

had addressed this request for an exemption above in section II.B.4.

Conversely, PSC and Nakupuna advocated against the Department's proposed procedural safeguards. PSC stated that the Department's interpretation of section 4 of the Executive order and proposed § 9.11(c) would be ''unworkable.'' PSC suggested that requiring a case-by-case analysis by the senior procurement executive could ''bottleneck solicitations'' and cause ''needless delay.'' PSC said the procedure would ''make it difficult for contracting agencies to decide for themselves whether they really need performance to be in the same location,'' thereby inviting contractor bid protests. Nakupuna commented that the subsequent notification of affected workers and their collective bargaining representatives is burdensome for both agencies and contractors. PSC likewise opposed, as unnecessary and burdensome, the Department's proposed requirement that agencies must include language in the solicitation affirmatively stating that the location continuity analysis has been completed. PSC stated that the order only requires agencies to ''consider'' location continuity, and that this obligation should be satisfied by acquisition teams with ''[a] (brief) notation in the acquisition plan or equivalent, commensurate with the size and complexity of the acquisition.''

PSC also opposed the Department's proposed reconsideration language for the same reasons that they opposed the proposed provision discussing reconsideration of agency exceptions in § 9.5. PSC stated that the order itself does not provide for such reconsideration, and that allowing ''catch-all 'interested parties' to speculate on . . . business judgments . . . will delay acquisitions needlessly and would undermine economy and efficiency in Government contract performance.'' PSC stated that it recognizes workers must have a fair say in matters of their employment, but that ''interested parties'' could include ''a wide variety of entities or even a community in which many incumbent employees reside.'' Finally, PSC recommended against including remedies or enforcement in circumstances where the predecessor contractor does not relay performance location determinations to employees.

The final rule includes amended procedural safeguards for location continuity that are reorganized into a new paragraph at § 9.11(c)(4). In response to the comments received, the Department is narrowing the requirements to focus on ensuring that contracting agencies benefit from information that employees may have that would be helpful and relevant to the analysis. The Department is not adopting some of the proposed requirements that were not provided for expressly by the order—including the requirements that certain determinations be made by the senior procurement executive, that an affirmative statement regarding the analysis be made in the solicitation, and that requests for reconsideration be directed to the head of the contracting department or agency. Instead, the Department is amending the provision to require that agencies, to the extent consistent with mission security, ensure that employees covered by a collective bargaining agreement on the predecessor contract have an opportunity prior to the issuance of the solicitation to provide information relevant to the location continuity analysis. Thus, the final rule states that, at the earliest reasonable time in the acquisition planning process, the agency must direct the incumbent contractor to notify any collective bargaining representative(s) for affected employees of the appropriate method to communicate such information (*i.e.,* contact information for a specific member of the agency's acquisition team). The provision includes requirements regarding the methods of the notice that must be provided and model language that contracting agencies may use. While the final rule reflects the Department's decision that a reconsideration process is not necessary at this time, the absence of a formal process from the regulations should not deter interested parties from communicating with contracting agencies or the Department if they believe that a location-continuity decision may have failed to consider important information.[11]

The Department agrees with the Coalition and the AFL–CIO that it is important to build into the program's procedures ''a role for workers and their representatives to provide input''—and for this process to occur before bid solicitation. As the Coalition noted, interested parties ''are likely to have information on the benefits of nondisplacement for any given service contract'' and ''are well positioned to identify any errors or omissions'' in the contracting agency's analysis. In addition, seeking feedback from affected workers accords with the PSC's recognition that workers should have ''a fair say in matters of their employment.'' While the Department declines to adopt the specific timeframes for agency determinations and submissions that the Coalition and the AFL–CIO requested, the requirement that agencies seek information from predecessor employees prior to the solicitation date, if practicable, will help to ensure that the policies of the order are built into solicitations and are not dependent on convincing an agency to reconsider a solicitation it has already issued. Accordingly, the final rule includes revised language in § 9.11(c)(4) requiring pre-solicitation notice, to the extent consistent with mission security, instead of the proposed requirement for notice of a location continuity determination within 5 business days after the solicitation.

In addition to the revised pre-solicitation notice requirement, the Department considered whether to retain the requirement in the proposed rule that incumbent contractors must provide confirmation to contracting agencies that the notification has been made. The Department is not including this requirement, given that § 9.12(f)(2) already requires contractors to maintain evidence of any notices that they provide to employees, or employees' collective bargaining representatives, to satisfy the requirements of the order or these regulations—which includes the pre-solicitation notice regarding location continuity. The Department also considered whether to include specific required sanctions for contractors that fail to provide the notice. The final rule does not include a specific sanction. However, where a contractor fails to provide the notice, even after receiving a timely request from a contracting agency, evidence of this fact could support (in addition to other evidence) a lower past performance rating on the contract or a debarment decision.

(D) Relocation Costs

In the NPRM, the Department proposed language at § 9.11(c)(4) that restated, in part, the language from section 3(b) of the Executive 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. *See* 86 at FR 66398. The Department proposed similar language, directed at contractors and

[11] For similar reasons, the final rule does not contain the provision discussed in the NPRM that would result in a procedurally deficient contract-location decision being inoperative as a matter of law. However, interested parties who believe that a location-continuity determination was made in a procedurally defective manner—or was not made at all—may communicate this concern to the Department, so that the Department may follow up with the contracting agency or take other appropriate action.

subcontractors specifically, in § 9.12(b)(6). In the final rule, as noted above, the Department is moving the location continuity procedural safeguards and notice provisions from § 9.11(c)(3) to § 9.11(c)(4). The Department therefore is moving the relocation costs language to § 9.11(c)(5). The Department did not receive any comments seeking to amend this language. Accordingly, the final rule adopts it as proposed.

v. Section 9.11(d) Disclosures

Proposed § 9.11(d) would require that the contracting officer 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. Proposed § 9.12(e)(1) required the predecessor contractor to provide the list of employees to the contracting officer no later than 30 calendar days prior to before completion of the contractor's performance of services on a contract. Under proposed § 9.11(d), the contracting officer would have to provide the predecessor contractor's list of employees to the successor contractor 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 contracting officer would have to provide the updated list to the successor contractor within 7 calendar days of the beginning of performance on the contract. However, if the contract is awarded fewer than 30 days before the beginning of performance, then the predecessor contractor and the contracting agency would be required to 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 deadlines set forth in proposed § 9.11(d) took such circumstances into account while also providing specific deadlines by which the seniority list must be transmitted to the successor contractor 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.

One commenter, PCSI, recommended extending the timeframes in § 9.12(e) and § 9.11(d) to allow the predecessor contractor not less than 90 days to furnish the contracting officer with their certified list of employees and in turn allow contracting officers not less than 60 days before the start of performance to provide this list to successor contractors. PCSI stated that the shorter proposed time frames were too short to provide enough time for successor contractors to ensure they have the employees to perform contracts on their start dates. The Department has considered this comment but declines to extend the timeframes. Longer time frames for furnishing the certified list will decrease the accuracy of the lists and may not always be in accord with procurement schedules. The timeframes, as proposed, best balance the need to provide an accurate and timely certified list of predecessor employees with the need to afford successors time to ensure continuity of performance. The final rule therefore adopts § 9.11(d) without change.

vi. Section 9.11(e) Actions on Complaints

Proposed § 9.11(e) addressed contracting officers' responsibilities regarding complaints of alleged violations of part 9. The proposal stated 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 elaborated that the contracting officer would have to 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 any other relevant facts known to the contracting officer or other information requested by WHD. The Department did not receive any comments on this provision; accordingly, the final rule adopts the provision as proposed.

vii. Section 9.11(f) Incorporation of Omitted Contract Clause

Proposed § 9.11(f) provided that when the nondisplacement contract clause is erroneously omitted from a contract, a contracting agency must retroactively incorporate the contract clause on its own initiative or within 15 calendar days of notification by an authorized representative of the Department. Proposed § 9.11(f) explained that there may be 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 the predecessor contractor would be the sole bidder on the contract and the contracting officer erroneously believed that it was not a successor contract for that reason. Proposed § 9.11(f) thus would have permitted the Administrator, at their discretion, to determine that the circumstances warrant prospective, rather than retroactive, incorporation of the contract clause. The NPRM explained that proposed § 9.12(b)(8) set forth 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. As noted in the NPRM, if the erroneous omission of the contract clause from a solicitation is discovered before contract award, proposed § 9.11(f) also would require the contracting agency to amend the solicitation.

The Department did not receive any comments addressing § 9.11(f), but PSC expressed general concern about the disruption to the procurement process where an agency could be forced to reissue a solicitation after ''missing a procedural step,'' which could generate ''additional administrative burden and cost.'' Having considered this comment, the Department is modifying the language of § 9.11(f) to require the Administrator to determine that retroactive incorporation of the nondisplacement contract clause is warranted in a manner consistent with retroactive incorporation of contract clauses and wage determinations under the SCA. Pursuant to 29 CFR 4.5(c), where the Department determines that a contracting agency made an erroneous determination that the SCA did not apply to a particular contract or failed to include an appropriate wage determination in a covered contract, the contracting agency must incorporate into the contract the required

stipulations and/or any applicable wage determination, which, at minimum, apply prospectively. Under 29 CFR 4.5(c), the Administrator may require retroactive application of a wage determination. *See also* 48 CFR 22.1015 (applying the error-correction and retroactivity provisions of 29 CFR 4.5 to contracts awarded under the FAR). This language effectively requires the Administrator to determine that retroactive application is appropriate, considering various factors, including whether there may be an ''overly onerous administrative and economic burden'' on the contracting agency that may constitute a ''severe disruption in the agency's procurement practices.'' *Raytheon Aerospace,* ARB Nos. 03–017, 03–019, 2004 WL 1166284, at *8–11 (May 21, 2004) (identifying three reasonable factors the Administrator appropriately considered in exercising discretion to not apply the SCA retroactively). In this final rule, the Department is amending § 9.11(f) to more closely parallel the language used in 29 CFR 4.5(c), modified to fit the nondisplacement context. The Department believes that such consistency will provide clarity and streamline the incorporation process both for contracting agencies and contractors. As the terms of § 9.11(f) and 29 CFR 4.5(c) are similar, the Department notes that the case law interpreting 29 CFR 4.5(c) would be persuasive regarding retroactive application of the contract clause under § 9.11(f). *See, e.g., Raytheon Aerospace,* 2004 WL 1166284, at *8–11; *FlightSafety Def. Corp.,* ARB Nos. 2021–0071, 2022–0001, 2022 WL 20100986, at *9–10 (Feb. 28, 2022) (holding that the Administrator reasonably declined to retroactively apply the SCA). As such, the final rule states that the Administrator will consider the administrative and economic burdens on contracting agencies, among other factors, when determining whether retroactive application is appropriate in a given case.

The Coalition generally approved of proposed § 9.11 but recommended adding a paragraph that would require contracting agencies to include training on the requirements of § 9.11 to existing acquisition training courses for the Federal acquisition workforce. The Coalition further recommended that compliance with § 9.11 should be a factor considered in evaluations of contractor performance pursuant to 48 CFR 42.1502. The Coalition stated that these steps would promote compliance with Executive Order 14055. While the Department agrees training on the nondisplacement requirements will be important for promoting compliance and that past performance evaluations appropriately evaluate regulatory compliance (including compliance with labor regulations), these recommendations are outside the scope of this rulemaking.

7. Section 9.12 Contractor Requirements and Prerogatives

As proposed, § 9.12 would implement contractors' requirements and prerogatives under Executive Order 14055. The proposed section detailed a successor contractor's general obligation to offer employment to qualified service employees from the predecessor contract, the method of making job offers, exceptions to the nondisplacement requirement, implementation of the nondisplacement requirement in the context of reduced staffing, obligations near the end of the predecessor contract, recordkeeping, and obligations to cooperate with reviews and investigations.

i. Section 9.12(a) General

Proposed § 9.12(a)(1) included the Executive order's central requirement that employees on a predecessor contract receive offers of employment on the successor contract before any employment openings for service employees on the successor contract are otherwise filled. Specifically, the proposal provided that, unless an exception or exclusion applies, a successor contractor or subcontractor may not fill any employment openings for service employees under the contract prior to making ''good faith offers'' of employment to employees on the predecessor contract. Employees on the predecessor contract must only receive such offers in positions for which they are qualified, and only if their employment would be terminated as a result of award of the contract or the expiration of the contract under which they were hired. Because the order states that the term *employee* ''includes an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor,'' *see supra* section II.B.2., the contractor would be obligated to make good faith offers to any service employee under the predecessor contract, regardless of whether the service employee was classified as an employee or independent contractor on the predecessor contract. To the extent necessary to meet the successor contractor's anticipated staffing pattern and in accordance with the requirements of the rule, proposed § 9.12(a)(1) would require the successor contractor and its subcontractors to make a bona fide, express offer of employment to each service employee in a position for which the employee is qualified and state the time within which the employee must accept such offer. As discussed in proposed § 9.12(b)(4), although the offer would have to be for a position for which the employee is qualified, it would not necessarily have to be for the same or similar position as the employee held on the predecessor contract. The proposed rule specified that in no case could the contractor or subcontractor give an employee fewer than 10 business days to consider and accept the offer of employment.

Comments received regarding proposed § 9.12(a)(1) are discussed below, in conjunction with related comments received regarding § 9.12(b). To emphasize the relationship between this section and other sections, a notation was added to the text of § 9.12(a)(1) that all offers must be made in accordance with the requirements described in this part. Otherwise, the final rule adopts the language of § 9.12(a)(1) as proposed.

Proposed § 9.12(a)(2) clarified that the successor contractor's obligation to offer a right of first refusal would exist even if the successor contractor was not provided a list of the predecessor contractor's employees or if the list did not contain the names of all service employees employed during the final month of contract performance. The Coalition commented in support of the proposed rule's job protections for employees on the predecessor contract, including under circumstances as described in § 9.12(a)(2). Conversely, an anonymous commenter pointed to circumstances such as those described in § 9.12(a)(2) as part of that commenter's general contention that the proposed rule would be burdensome to contractors. However, even where a predecessor fails to provide the required list on a timely basis, the successor contractor may still determine which employees should be given offers by relying upon the types of evidence described in § 9.12(a)(3). Moreover, Executive Order 14055 does not make the obligation to provide a right of first refusal contingent upon receipt of a list of predecessor contract employees. Therefore, the final rule adopts the language of § 9.12(a)(2) as proposed.

Proposed § 9.12(a)(3) discussed determining an employee's eligibility for a job offer even when their name was not included on the certified list of all service employees working under the predecessor's contract or subcontracts

during the last month of contract performance. As proposed, § 9.12(a)(3) would require a successor contractor to accept other reliable evidence, in addition to the certified list, of an employee's right to receive a job offer. Under the provision as proposed, the successor contractor would be allowed to verify any such information before relying on it as a basis to extend a job offer. For example, even if a person's name did not appear on the list of employees on the predecessor contract, an employee's assertion of an assignment to work on the contract during the predecessor's last month of performance, coupled with contracting agency staff verification, would 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 were unable to verify the claim, the paycheck stub still would be considered sufficient to demonstrate eligibility absent evidence from the predecessor contractor indicating otherwise.

The Coalition supported the proposed framework of § 9.12(a)(3) because it would provide several ways for an employee to establish eligibility for an offer of employment on the successor contract. The Coalition further encouraged the Department to clarify that the examples provided in the proposed rule are not exclusive and that other reliable data may be provided to determine whether a service employee is eligible to receive an offer of employment on the successor contract. The Department agrees that the examples are not exclusive and believes the proposed regulatory text made that sufficiently clear. Thus, after considering the comments, the final rule adopts the proposed language of § 9.12(a)(3) without change.

Proposed § 9.12(a)(4) clarified that contractors and subcontractors have an affirmative obligation to ensure that any covered contracts they hold contain the contract clause. In keeping with the related requirements at § 9.13(a) (relating to the insertion of required clauses into subcontracts), proposed § 9.12(a)(4) stated that the contractor must notify the contracting officer as soon as possible if the contracting officer did not incorporate the required contract clause into a covered contract. No comments were received on § 9.12(a)(4) and the final rule adopts § 9.12(a)(4) as proposed.

ii. Section 9.12(b) Method of Job Offer

Proposed § 9.12(b) discussed the method of communicating the job offer. Proposed § 9.12(b)(1) required that, except as otherwise provided elsewhere 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 service employee. Under proposed § 9.12(b)(1), in determining whether an employee is entitled to a bona fide, express offer of employment, a contractor could consider the exceptions set forth in proposed § 9.12(c) and the conditions detailed in § 9.12(d). Proposed § 9.12(b)(1) clarified that a contractor could 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 could 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 clarified that while the results of such screenings could show that an employee is unqualified for a position and thus not entitled to an offer of employment, a contractor could 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 could not deem predecessor employees unqualified solely because they had not completed the specific background check the successor contractor requires before receiving a job offer. However, the Department has edited § 9.12(b)(1) to clarify that an employee's unreasonable failure to complete a screening process could be grounds to conclude an employee is unqualified. No comments were received regarding § 9.12(b)(1). Other than the clarification already noted, replacing the word ''person'' with ''service employee'' to make clear that a successor contractor may make offers of employment to non-service employees (for example, to hire an executive team) before extending offers to qualified employees on the predecessor contract, and replacing the phrase ''by itself'' with ''solely'' for clarity, the final rule adopts § 9.12(b)(1) as proposed.

Proposed § 9.12(b)(2) discussed the time limit in which the employee has a right to accept the offer. Under the proposed language, the contractor has the discretion to determine the time limit for an acceptance, provided that the time limit is not shorter 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. ABC commented that this requirement was burdensome. Similarly, an anonymous commenter stated that in light of § 9.12(a)(1)'s requirement that employees on a predecessor contract receive offers of employment on the successor contract before any employment openings for service employees on the successor contract are otherwise filled, the 10-business-day time period for acceptances might prevent contractors from having a full staff when the contract commences. The commenter noted that in practice, employers may be caught off guard by how many employees do not accept offers and be left with insufficient time to fill vacancies. Conversely, the Coalition supported the inclusion of the requirement that employees be given 10 business days to accept or reject an offer.

Section 3 of the Executive order specifies that ''in no case shall the period within which the employee must accept the offer of employment be less than 10 business days.'' 86 FR at 66398. Therefore, the Department does not have discretion to reduce the amount of time that employees must be given to consider offers of employment, and that time commences at the employee's receipt of the offer. The Department also notes that, given the changes to proposed § 9.12(e)(1) set forth in this final rule, successor contractors will be provided with a list of employees' addresses, lessening any delays contractors might face prior to making and receiving responses to offers. For these reasons, the final rule adopts § 9.12(b)(2) as proposed.

Proposed § 9.12(b)(3) set forth the process for making the job offer. Under the proposed provision, the successor contractor would have had the option of making a specific oral or written employment offer to each employee. Proposed § 9.12(b)(3) would require successor contractors to make reasonable efforts to make the offer in a language each worker understands, to ensure the offer was effectively communicated. Written offers would be

required to be sent by registered or certified mail to the employees' last known address or by any other means normally ensuring delivery. Proposed § 9.12(b)(3) provided examples of such other means, including, but not limited to, email to the last known email address, delivery to the last known address by commercial courier or express delivery service, or personal service to the last known address.

Regarding proposed § 9.12(b)(3), the Coalition suggested the Department require job offers be provided in writing, and not verbally, to lessen disputes between contractors and employees as to the existence and adequacy of offers. The comment noted that requiring offers in writing also would lessen the degree of employees' reliance on the accuracy of contractors' interpreters. AFL–CIO echoed the Coalition's views regarding the benefit of requiring that offers be made in writing.

The Department agrees that requiring offers to be made in writing would reduce the risk of such factual disputes between contractors and employees (including disputes about the accuracy of translations), and for that reason, the final rule amends proposed § 9.12(b)(3), as well as the corresponding recordkeeping requirements of § 9.12(f)(2)(i), to require that offers be made in writing. In regard to translation, the Department notes that, pursuant to § 9.12(e)(3), where the predecessor contractor's workforce is comprised of a significant portion of workers who are not fluent in English, notice of their possible right to an offer of employment on the successor contract must be provided in both English and a language in which the employees are fluent. Therefore, as it relates to the offer of employment to an individual, the Department is removing the requirement to translate the written offer into different languages. The final rule also removes as moot the example related to a bilingual coworker providing interpretation of an oral offer. Under the final rule, if a contractor makes an oral offer of employment, it must accompany such an offer with a communication of the offer in writing (and both the oral and written offers in this example would be subject to the requirement that the employee receive at least 10 business days to consider the offer).

Proposed § 9.12(b)(4) stated that the employment offer may be for a different job position on the successor contract. More specifically, the proposed provision stated that 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 the offer were for a position for which the employee is qualified. If a question arose 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. Under the proposed language of § 9.12(b)(4), a contractor could only 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 would be credible information.

Regarding proposed § 9.12(b)(4), the Coalition commented that the successor should only be able to rely upon information a predecessor kept in the regular course of business to determine an employee's qualifications. In considering this comment, the Department notes that adopting this approach might unnecessarily limit reliance on sources of information that could otherwise lead to employment opportunities for predecessor employees, as well as impose a potentially difficult burden on successors to determine which of its predecessors' records were kept in the ''regular course of business.'' For this reason, the Department declines to adopt this suggestion, and the final rule adopts § 9.12(b)(4) as proposed.

Proposed § 9.12(b)(5) stated that the offer of employment may be to a position providing different terms and conditions of employment than those the employee held with the predecessor contractor, where the difference is not related to a desire that the employee refuse the offer, or a desire that other employees be hired. The Coalition commented that the final regulations should establish a presumption that an offer is not bona fide if positions are available under the successor contract with similar or better terms and conditions for which an employee is qualified, but the successor only makes an employee an offer for a position with worse terms or conditions. However, as discussed below regarding § 9.12(d)(2), when a contractor reduces the number of contract positions in an occupation, that provision already would require the contractor to scrutinize each employee's qualifications ''to offer the greatest possible number of predecessor contract employees positions equivalent to those held under the predecessor contract.'' Given this framework, the Department believes the rule provides sufficient safeguards as proposed.

The Department also proposed language in § 9.12(b)(5) that addressed terms and conditions related to remote work or telework. Under proposed § 9.12(b)(5), if a successor contractor places limitations on telework or remote work for predecessor employees that it did not consistently place on other, similarly situated workers, that could indicate that those limitations are intended to cause the predecessor employees to refuse the offer, and thus, would likely be impermissible. Accordingly, under proposed § 9.12(b)(5), where the successor contractor had or will have had 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 would be required to include the option of remote work under reasonably similar terms and conditions. The proposed language was based on the premise that such employment, where permitted on a successor contract and consistent with security and privacy requirements, would generally assist with workforce carryover, even in circumstances where the location of contract performance is changing.

The Coalition supported the Department's provision in proposed paragraph 9.12(b)(5) regarding remote work, while PSC voiced concerns. PSC commented that the proposed provision should be revised to require offers of remote work only when the successor contractor allows any worker in the same or similar classification to work remotely in performing on the same Federal contract, rather than permitting comparisons with any of the successor's employees who are not working on that contract, because different types of contracts might involve different requirements. PSC further commented that because specific constraints, such as employees working in differing time zones, might interfere with contract performance, remote work should only be offered consistent with the requirements of the contract and its deliverables, and then no more than in proportion to the percentage of employees who worked remotely under predecessor contracts or other successor contracts. In response, the Department notes that where material differences

between employees' job requirements on different contracts result in workers under each contract working in dissimilar occupational classifications, then these employees would (under the language of § 9.12(b)(5) as proposed) not be apt comparators for purposes of determining whether a contractor has limited remote work in order to discourage predecessor employees from accepting an offer. Furthermore, the proposed rule provided that even when the successor is required to offer the option of remote work, the successor's obligation is subject to the qualifier that successor contractors are only required to offer remote work to employees of the predecessor under ''reasonably similar terms and conditions.'' Thus, where a contractor's existing workers are granted remote work only as an accommodation, pursuant to certain preconditions, or subject to limitations that workers will be available during certain hours (defined in relation to a particular time zone), then that contractor could also place the same limitations on the remote working conditions of any predecessor employee—so long as the contractor's intent was not to evade the nondisplacement mandates of the Executive order. Finally, PSC's suggestion that the requirement for remote work be limited to certain percentages of the workforce would allow successor contractors to impose limits on remote work that are inconsistent with the Executive order. Thus, the Department declines to adopt all of PSC's suggested change in the final rule, but has made edits in order to clarify that successor contractors may change remote working arrangements based on a legitimate business rationale.

As already discussed in relation to § 9.11(c), regarding location continuity, remote work plays a recognized role in the efficacy of federal contracting. Given the significance of remote work in avoiding potential workforce disruptions, absent a legitimate operational rationale, a contractor that eliminates the remote working arrangements under which employees successfully performed their jobs during the predecessor contract, or who does not offer employees of the predecessor contractor remote working arrangements available to other employees, should be presumed to be doing so to circumvent the Executive order. This is because, as is evident from the importance placed on location continuity considerations in the Executive order, enabling an employee to work in the same general place where they have worked before (be it in a particular commuting area or in their own home, remotely) is often a key factor in the retention of an experienced and well-trained workforce. *See* 86 FR at 66397–99.

Therefore, while largely adopting the final rule language regarding terms and conditions as proposed, the Department amends § 9.12(b)(5) to clarify that a successor may offer different remote working arrangements than those the employee held with the predecessor contractor, so long as the change is not made for the purpose of discouraging acceptance of offers to work on the successor contract. In other words, a successor contractor may not capriciously end a predecessor's remote working arrangements without contravening the requirements of the Executive order and this final rule. Likewise, the final rule reflects that a contractor must generally—absent a legitimate operational rationale to do otherwise—offer remote work to predecessor employees on a reasonably similar basis as it does for its other employees in the same or similar occupational classifications. This use of a rebuttable presumption framework is appropriate because successor contractors possess the information necessary to articulate and substantiate an operational reason for limiting remote working arrangements. Requiring contractors to support and justify their decisions in this context will enable the Department and interested parties to evaluate whether or not declining to offer remote working arrangements was intended to circumvent the nondisplacement requirement.

In § 9.12(b)(6), the Department proposed 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 pay relocation costs for employees of predecessor contractors hired pursuant to their exercise of their rights under the order. *See* 86 FR at 66398. The Department proposed similar language, directed at contracting agencies specifically, in § 9.11(c)(3). The Department noted that this language would not forbid the voluntary payment of relocation expenses or the payment of any such expenses if they are otherwise required by contract or law. No comments were received regarding § 9.12(b)(6), and the final rule adopts § 9.12(b)(6) as proposed.

Proposed § 9.12(b)(7) provided 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. No comments were received regarding § 9.12(b)(7), and the final rule adopts § 9.12(b)(7) as proposed.

Proposed § 9.12(b)(8) provided requirements for successor contractors 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 is erroneously excluded from a contract, contracting agencies may be required to retroactively incorporate it, depending on the circumstances. 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. Proposed § 9.12(b)(8) also provided requirements where the omitted contract clause has been incorporated only prospectively. In such cases, the successor contractor and its subcontractors would only be required to provide employees on the predecessor contract a right of first refusal for any positions that remain open. Regardless of whether incorporation of the contract clause is retroactive or prospective, in the event of an employment opening 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 nondisplacement right of first refusal to employees from the predecessor contract. The Department stated that these requirements struck an appropriate balance between the interests of the employees on the predecessor and successor contracts.

In the final rule, the Department slightly modifies the language of § 9.12(b)(8) for clarity and consistency with the final text of § 9.11(f), which is being amended, as discussed in section II.B.7.vii. above. In § 9.12(b)(8), the Department is replacing the proposed phrase ''the Administrator has not exercised their discretion and required only prospective incorporation of the contract clause'' with the phrase ''the Administrator has required only prospective application of the contract clause.'' The Department has also modified the phrase in the title of this paragraph from ''[r]etroactive incorporation of contract clause'' to ''[p]ost-award incorporation of omitted contract clause'' because the paragraph also addresses contractor obligations when the contract clause is incorporated

only prospectively. For clarity and consistency with the definition of ''employment opening,'' the Department has also replaced the phrase ''positions become vacant'' with the phrase ''of an employment opening.'' Other than the modifications described above, the final rule adopts § 9.12(b)(8) as proposed.

iii. Section 9.12(c) Contractor Exceptions

Proposed § 9.12(c) addressed the exceptions to the general obligation to offer employment under Executive Order 14055. As proposed, these exceptions detailed circumstances in which, although a contract or subcontract as a whole is covered by the nondisplacement requirements, a contractor or subcontractor would not need to make a bona fide offer of employment to certain employees. These proposed exceptions were therefore distinct from the ''exceptions authorized by agencies'' detailed in proposed § 9.5, which explained the circumstances in which contracts as a whole may be excepted from coverage through the actions of a contracting agency. As stated in the NPRM, the contractor bears the burden of proof regarding the appropriateness of claiming any exception in § 9.12(c).

At the outset of § 9.12(c) in the final rule, for clarity, the Department is changing the phrase ''[t]he successor contractor is responsible for demonstrating the applicability of the following exceptions to the nondisplacement provisions subject to this part,'' to ''[t]he successor contractor is responsible for demonstrating the applicability of the following exceptions to the nondisplacement provisions in this part.''

As proposed under § 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 is retaining. However, the successor contractor would be required to presume that all employees working under a predecessor's Federal service contract would be terminated as a result of the award of the successor contract, unless the successor contractor could 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. No comments were received regarding § 9.12(c)(1). Other than modifying the phrase ''hired to work'' to ''working'' to clarify which employees are referenced, the final rule adopts § 9.12(c)(1) as proposed.

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, as defined by § 9.2. Consistent with proposed § 9.2, this exception would apply to individuals 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 are service employees if they appear on the list of service employees the predecessor contractor is required to provide by proposed § 9.12(e) (or have demonstrated they should have been included on the list). However, the successor contractor would be permitted to conclude that the list included non-service employees (and thus decline to offer those non-service employees employment) 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 considered sufficient for purposes of the proposed exception. No comments were received regarding § 9.12(c)(2), and the final rule adopts it as proposed, other than modifying the phrase ''hired to work'' to ''working'' to clarify which employees are referred to.

Consistent with paragraph (b) of the contract clause in section 3(a) of the Executive order, § 9.12(c)(3) of the proposed rule reiterated that a successor contractor or subcontractor would not be required to offer employment to any employee of the predecessor contractor if the contractor or any of its subcontractors reasonably believed, 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 contractor or any subcontractors. *See* 86 FR at 66398. The proposed rule would require the successor contractor to presume that there was no just cause to discharge any employees, unless the contractor 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.

For example, under the proposed rule, a successor contractor could 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. Similarly, as the Department explained in the NPRM 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, under the proposed language, written evidence that the predecessor contractor took disciplinary action against an employee for poor performance but stopped short of recommending termination would not generally constitute reliable evidence of just cause to discharge the employee. The determination that this exception applies would need to 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 sought 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 reflected in the Executive order.

The Department received several comments on proposed § 9.12(c)(3). Laborers' International Union of North America, Local Union 572 (LIUNA) suggested that the Department remove proposed § 9.12(c)(3) to exclude any performance-based exception from the final rule, asserting that any such exception is unnecessary and would lead to unfair hiring decisions and abuse, in particular for unionized workforces. The National Air Traffic Controllers Association (NATCA) suggested the Department modify the proposed rule to include a provision that would apply a predecessor contractor's grievance arbitration and disciplinary action procedures contained in its collective bargaining agreement to the successor contractor when applying the section § 9.12(c)(3) exception.

Several commenters also criticized proposed § 9.12(c)(3), as exemplified by the comment submitted by ABC, taking issue not only with the proposed rule but with the provisions of the Executive order, and arguing that it will be

difficult for incoming contractors to gain reliable information about the past performance of a predecessor's employees, thereby requiring those contractors to hire unsuitable workers. Nakupuna also commented that it would be a challenge for successor contractors to obtain the level of evidence described in the proposed rule, which could result in the successor contractor being required to offer employment to employees with unsatisfactory performance, and asserted that providing information about the performance of current or previous employees could expose an employer to a wide range of legal liabilities. Nakupuna further suggested the Department clarify the definition of reliable evidence, provide specific examples, and establish methods for the successor contractor to obtain such evidence from the predecessor contractor or the contracting agency. PSC, suggesting ''anecdotal'' evidence should be considered ''reliable,'' commented that predecessors may not always disclose sensitive performance information about their employees, as requiring predecessor contractors to share reliable evidence of just cause to discharge an employee could, in some circumstances, conflict with laws protecting worker privacy.

The Coalition generally supported the proposed exceptions to the obligation to offer a right of first refusal. The Coalition, however, expressed concern that a successor's reliance upon a predecessor contractor's unfinished termination process could be considered ''reliable evidence'' or ''just cause'' without requiring the successor to also obtain (in addition to the bare fact that a termination process has commenced) reliable evidence that the predecessor's proposed termination was supported by just cause. AFL–CIO also generally supported the just cause requirement, but similarly commented that the predecessor's mere initiation of a termination process should not be considered sufficient evidence of just cause because additional information can be provided during a termination process that can reduce the discharge to a lesser penalty or eliminate the penalty altogether.

Some commenters, like Nakupuna, ABC, and PSC, suggested a framework that, in effect, would permit successor contractors to decline to offer employment under a highly discretionary standard based on contractors' assessments of past performance. Other commenters, like LIUNA, advocated for elimination of any performance-based exception to the nondisplacement principles. The Department declines to make changes as suggested by commenters on either side of this question. Instead, the final rule seeks to advance the goals of the Executive order, which explicitly states that such just-cause-based decisions must be based upon reliable evidence, by focusing on the underlying evidence. *See* 86 FR at 66398. After considering the comments, the Department is modifying the language in proposed § 9.12(c)(3)(ii)(A). The proposed provision stated: ''[c]onversely, 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.'' The Department is modifying the provision to state that ''[w]ritten evidence related to disciplinary action taken without a recommendation of termination may constitute reliable evidence of just cause to discharge the employee, depending on the specific facts and circumstances.'' This change allows the successor contractor to have greater discretion when considering a predecessor's written disciplinary records in its just cause determination, but still requires the contractor to demonstrate that just cause for termination exists based on reliable evidence. This change in the language is also consistent with the proposed rule's acknowledgement that some forms of misconduct, such as severe sexual harassment, may be just cause for termination even if they did not result in termination of employment by the predecessor contractor.

The Department also declines to require successor contractors to adhere to the due process procedures of their predecessors' collective bargaining agreements in assessing past performance. The Executive order does not direct the imposition of such a requirement, and employees of the predecessor who have been wrongly denied an offer of employment can seek remedies provided consistent with the nondisplacement contract clause, as discussed further in § 9.21, regardless of whether they may have a right or ability to file a grievance under a collective bargaining agreement. The Department notes, however, that a contractor may not rely on Executive Order 14055 or its implementing regulations to circumvent any contractual obligations that it owes its employees, including those under a collective bargaining agreement. Nor does the order or the regulations supersede any obligations that a predecessor or successor contractor may have under the National Labor Relations Act.

The Department also declines to add further discussion in the regulatory text regarding the meaning of ''reliable evidence,'' as successor employers are generally already aware that any evidence upon which evaluations of past performance are based must, in the event of any review pursuant to §§ 9.22 and 9.34 of the rule, be sufficient to overcome the presumption (already stated explicitly in the proposed rule) that there is no just cause to discharge employees working on the predecessor contract during the last month of performance. As proposed, the language of the rule already permitted that such reliable evidence might come, for example, from the business records of the contracting agency, or from new statements supplied by other employees or other knowledgeable individuals; such evidence is not, as commenters like PSC and Nakupuna implied, only limited to a predecessor's potentially confidential personnel files, thus negating those commenters' calls for a provision protecting predecessor contractors who shared such confidential information. Finally, for greater clarity, the Department is moving the phrase ''[t]his 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,'' from § 9.12(c)(3)(ii)(A) to § 9.12(c)(3)(ii), as that instruction applies broadly, and not only to the specific circumstances described in § 9.12(c)(3)(ii)(A).

Pursuant to proposed § 9.12(c)(4), a contractor or subcontractor would not be required to offer employment to any employee who worked 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 the Executive order. 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. Under the proposed rule, to be reasonable, such a belief should be 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 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, statements from several employees that a janitorial contractor reassigned its workers who previously worked exclusively in a Federal building to both Federal and other private clients as part of a single job may indicate that the predecessor deployed workers to avoid the purposes of the nondisplacement provisions. Conversely, where the employees of the predecessor contractor were traditionally deployed to Federal and nonfederal service work as part of their job, and continued to do so on the predecessor contract, the successor would not be required to offer employment to the workers.

The Coalition requested the Department modify the language in proposed § 9.12(c)(4)(i), regarding nonfederal work, by replacing ''working'' with ''hired to work,'' pointing out, among other arguments, that such a change would more consistently track the language of the Executive Order 14055. After consideration of the comment, the final rule adopts § 9.12(c)(4) as proposed, other than changing the phrase ''working'' to ''hired to work,'' in accordance with the language used in section 4(b) of the order, as well as substituting the phrase ''in a manner'' for ''in such a way,'' in § 9.12(c)(4)(iii) for clarity.

iv. Section 9.12(d) Reduced Staffing

Proposed § 9.12(d) addressed 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) recognized 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, permitted 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 would not be required to ensure offers of employment on the contract to all employees on the predecessor contract, but would be required to ensure offers of employment to the number of eligible employees the successor contractor believes would be necessary to meet its anticipated staffing pattern. 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 provided 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 subcontractors or the scope of work that particular subcontractors perform would not alter the requirements of Executive Order 14055 and this part. Consistent with proposed § 9.13, a prime contractor would be 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 the Executive order and this part. Where a prime successor contractor chooses to use subcontractors, the prime contractor would be responsible for ensuring that any of its subcontractors and lower-tier subcontractors offer employment to service employees employed under the predecessor contract (including the predecessor subcontracts) in accordance with the requirements of the order and this part. Where a prime successor contractor chooses to subcontract less of the contract work than the prime predecessor contractor did, and instead chooses to employ more workers directly, the prime successor contractor would be required to offer direct employment to the number of eligible service 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 the order and this part. The Department did not receive comments on § 9.12(d)(1) and the final rule adopts § 9.12(d)(1) as proposed.

Proposed § 9.12(d)(2) acknowledged 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 numbers employed in others. In such cases, proposed § 9.12(d)(2) would require the 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 provided examples to demonstrate this principle.

Nakupuna stated that this provision would impose restrictions on a successor contractor's ability to reduce staff. Section 9.12(d)(1) allows a successor contractor to determine the number of employees necessary for efficient performance of the contract or subcontract (and, for bona fide staffing or work assignment reasons, to elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work), while § 9.12(d)(2) provides safeguards to ensure that reductions in staff or changes to staffing patterns are made in a way that minimizes the displacement of predecessor contract employees. The Department believes these safeguards are necessary to fulfill the nondisplacement goals of the Executive order, and that they still provide flexibility for a successor contractor to make staffing decisions in pursuit of efficient performance of the contract. Thus, the final rule adopts § 9.12(d)(2) as proposed.

Proposed § 9.12(d)(3) clarified that, subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), the successor contractor would be permitted to determine to whom 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 a court that a contractor has unlawfully discriminated or retaliated against a worker would be considered in determining whether the contractor's action or omission also violated the nondisplacement requirements.

Regarding § 9.12(d)(3), the Coalition commented that when all the predecessor employees cannot be hired, the successor contractor's offer of a right of first refusal should be based on seniority and length of service under the current and predecessor contractor for the same or similar service at the same location. The Department declines to adopt this change because the Executive order provides that employment be offered to qualified predecessor employees, without prescribing the criteria to be used when selecting among qualified workers to fill a reduced number of positions. *See* 86 FR at 66397. Establishing a bright-line requirement that a single criterion (such as seniority) must be used when a contractor is selecting among qualified employees could preclude employers from using a number of other legitimate factors (such as skills, prior experience, and cross-training) that successor contractors may wish to consider in selecting among qualified employees in this context. For this reason, the final rule adopts proposed § 9.12(d)(3) without change.

v. Section 9.12(e) Contractor Obligations Near End of Contract Performance

Proposed § 9.12(e) specified an incumbent contractor's obligations near the end of the contract; these requirements would work in tandem with the requirements at § 9.11(d). As proposed, § 9.12(e)(1) would require a contractor to, no fewer 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. Proposed § 9.12(e)(1) would require this list to also contain the anniversary dates of employment for each service employee on the contract with either the current or predecessor contractors or their subcontractors. A service employee would be considered employed under the contract even 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. To meet this provision, proposed § 9.12(e)(1) would allow a contractor to use 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 the 30-day certified list, proposed § 9.12(e)(2) would require a contractor to furnish the contracting officer with an amended certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance not fewer than10 business days before completion of the contract. Proposed § 9.12(e)(2) would require this list to include the anniversary dates of employment with either the current or predecessor contractors or their subcontractors. The contractor could use the list submitted to satisfy the requirements of the SCA contract clause specified at 29 CFR 4.6(l)(2) to meet this requirement.

The Department received an anonymous comment suggesting that the burden on the incoming contractor could be lessened if they did not have to search for employees employed under the predecessor contract but were instead provided contact information for the employees such as phone numbers, email addresses, or mailing addresses. The Department agrees with that recommendation, especially as the burden of this change on predecessor contractors will be minimal in light of the existing requirement that contractors maintain records of addresses pursuant to 29 CFR 4.6(g)(1)(i). Accordingly, the Department is modifying proposed § 9.12(e)(1) and (e)(2) to require predecessor contractors to list (in addition to names and anniversary dates) mailing addresses, and, if known, email addresses and phone numbers of the employees. The Department is also modifying § 9.12(e)(2) to remove the phrase ''and, where applicable, dates of separation'' from the information that must be included in the certified list of employees provided 10 days before contract completion, as this phrasing was unclear, and because where an employee is no longer employed by the predecessor 10 days before contract completion, that employee's name would simply not appear on that list. The Department is also inserting ''business'' before ''days'' for clarity.

The Department also received an anonymous comment suggesting that bidding on a contract without knowing the seniority level of workers is difficult. The Department notes that under the SCA, successor contractors are specifically provided the list of employees' dates of employment at the commencement of the successor contract pursuant to 29 CFR 4.6(l)(2). The commenter appeared to be suggesting a mandatory timeframe to communicate this information that would be earlier than this established regulation. The final rule does not adopt the suggestion to require earlier provision of a seniority list, because, for purposes of the Executive order, the provision of the list is meant to facilitate the communication of offers to employees and is not meant to otherwise influence the bidding process or the established rules and timeframes of the SCA. After considering the comments, the final rule adopts § 9.12(e)(1) and (e)(2) as proposed other than the modifications discussed.

Proposed § 9.12(e)(3) would require the predecessor contractor to, before contract completion, provide written notice to service employees employed under the predecessor contract of their possible right to an offer of employment on the successor contract. Such notice would be required to be posted in a conspicuous place at the worksite and/or delivered to employees individually. The text of the proposed notice was set forth in Appendix B to part 9. The Department intends to translate the notice into several common languages and make the English and translated versions available online in a poster format to allow easy access. Language clarifying that another form with the same information could be used was added to the regulatory text. Proposed § 9.12(e)(3) further explained that where the predecessor contractor's workforce is comprised of a significant portion of workers who are not fluent in English, the notice would be required to be provided in both English and a language in which the employees are fluent. Multiple language notices would be required to be provided where significant portions of the workforce speak different 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 would need to 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 solicited comments on whether it should establish a percentage threshold for determining what constitutes a ''significant portion of the workforce.'' In response to this question, the Coalition suggested that the Department impose a requirement consistent with their recommendation regarding § 9.12(b)(3) to provide notice in a language that each worker understands. As this worker-specific requirement would impose costs on the contractor regardless of whether a significant portion of the workforce required such translations, and as the

Department is modifying § 9.12(b)(3) to require that all offers be made in writing (making it possible for members of the workforce to themselves obtain a translation of the offer document), the Department declines this suggested change. Therefore, the final rule adopts § 9.12(e)(3) as proposed, other than, for clarity, changing the heading of § 9.12(e)(3) from ''Notices'' to the more specific ''Notices to employees of possible right to offers of employment on successor contract,'' and adding cross references to other employee notice provisions at § 9.5(f) (relating to agency exceptions) and § 9.11(c) (relating to location continuity).

vi. Section 9.12(f) Recordkeeping

Proposed § 9.12(f) addressed recordkeeping requirements. Proposed § 9.12(f)(1) clarified that this part would prescribe no particular order or form of records for contractors, and that the recordkeeping requirements would 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. No comments were received on § 9.12(f)(1), and the final rule adopts § 9.12(f)(1) as proposed.

As proposed, § 9.12(f)(2) specified the records contractors must maintain, including copies of any written offers of employment. Proposed § 9.12(f)(2) also would require 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 through a method of documentation authorized by WHD. Finally, proposed § 9.12(f)(2) would require contractors to maintain evidence of any notices that they provide 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 required under § 9.12(e)(3) of the regulations; notices of agency exceptions that a contracting agency requires a contractor to provide to affected workers and their collective bargaining representatives under § 9.5(f) of the regulations and section 6(b) of the Executive order; and notices to collective bargaining representatives of the opportunity to provide information relevant to the contracting agency's location continuity determination in the solicitation for a successor contract, pursuant to § 9.11(c)(4) of the regulations. WHD would use the records that are retained pursuant to § 9.12(f)(2) in determining a contractor's compliance with the order and this part. All contractors would be required to retain the records listed in proposed § 9.12(f)(2) for at least 3 years from the date the records were created and to provide copies of such records upon request of any authorized representative of the contracting agency or the Department.

As discussed above in relation to § 9.12(b)(3), in response to comments recommending all offers be made in writing, the Department is adding such a requirement to § 9.12(b)(3). Therefore, the Department is modifying § 9.12(f)(2)(ii) to remove reference to records related solely to oral offers, including removing the requirement for a contemporaneous written record of any oral offers of employment. The Department is also clarifying that copies of written offers must include the date of the offer. The Coalition was generally supportive of the proposed recordkeeping requirements, commenting that the requirements were similar to other requirements with which contractors are already required to comply. However, the Coalition also commented that the Department should require successor contractors to proactively report the number of employees they retained from the predecessor contract. The Department declines to add another procedural requirement to successor contractors in light of the other mechanisms provided by the rule for employees and the contracting agency to detect noncompliance. Finally, to conform to the final version of § 9.11(c), § 9.12(f)(2) was revised to require keeping records of notices to collective bargaining representatives regarding the provision of information related to the agency's location continuity determination. Additionally, § 9.12(f)(2)(iii) was edited to twice replace the phrase ''the employee list'' with ''any employee list'' to clarify that contractors must maintain copies of any applicable list required by § 9.12(e). Other than the modifications discussed above, the final rule adopts § 9.12(f)(2) as proposed.

vii. Section 9.12(g) Investigations

Proposed § 9.12(g) outlined 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 also included investigations related to other contractors (*e.g.,* predecessor and successor contractors) and subcontractors. The Department did not receive any comments regarding this proposed provision and the final rule adopts § 9.12(g) without change.

8. Section 9.13 Subcontracts

Proposed § 9.13(a) discussed the responsibilities and liabilities of prime contractors and subcontractors with respect to subcontractor compliance with the nondisplacement clause. The proposed section stated that prime contractors would be required 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 any lower-tier subcontracts. Requiring that the contract clause be inserted in all subcontracts, including lower-tier subcontracts, would serve to notify a subcontractor of their obligation to provide employees the right of first refusal and of the enforcement methods WHD may use when a subcontractor is found to be in violation of the Executive order, including the withholding of contract funds.

Proposed § 9.13(a) also explained that the prime contractor would be responsible for the compliance of any subcontractor or lower-tier subcontractor with the contract clause. 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 contractor's 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 violations of any subcontractors. The requirements of this proposed section would prevent contractors from circumventing the requirements of part 9 by subcontracting the work to other contractors. Thus, the proposed section would help to ensure that all covered contractors and subcontractors of any tier are aware of and adhere 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) explained 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.

The Department received one comment from the Coalition regarding proposed § 9.13. The Coalition strongly supported the proposed section, citing concerns about subcontractor oversight. The Coalition stated that holding the prime contractor responsible for the compliance of a subcontractor will increase compliance and promote clarity and consistency because contracting agencies have minimal direct interaction with subcontractors.

The Department agrees with the Coalition's comment that proposed § 9.13 would increase compliance and promote greater clarity and consistency. The final rule adopts § 9.13 as proposed, with minor modifications to reference the FAR contract clause that will be required to be flowed down (instead of the clause in Appendix A) in contracts covered by the FAR.

Subpart C—Enforcement

9. Section 9.21 Complaints

As part of the NPRM, the Department put forth a process for filing complaints in proposed § 9.21. Section 9.21(a) outlined the procedure to file a complaint with any office of WHD. It provided that a complaint may be filed orally or in writing and that WHD would accept a complaint in any language. Section 9.21(b) reiterated the well-established policy of the Department with respect to confidential sources. *See* 29 CFR 4.191(a); 29 CFR 5.6(a)(5). The Department received a few comments related to proposed § 9.21.

The Coalition indicated support for much of the proposed enforcement provisions in the NPRM. NATCA commented that the NPRM did not account for employees of a predecessor contractor who are represented by a union and covered by a collective bargaining agreement that contains grievance and arbitration provisions. Specifically, NATCA requested that the Department amend § 9.21 to include a new provision that would allow an employee of a predecessor contractor who was covered by a collective bargaining agreement and who was not offered employment by the successor contractor pursuant to proposed § 9.12(c)(3) to raise the matter pursuant to the complaint process under § 9.21(a) or under the predecessor contractor's collective bargaining agreement's negotiated alternative dispute resolution procedure. This proposal is addressed above in the discussion of the ''just cause'' exception to the nondisplacement requirements in § 9.12(c)(3). The Department declines to impose this requirement in the rule, but notes that a contractor may not rely on Executive Order 14055 or its implementing regulations to circumvent any contractual obligations that it owes its employees, including those under a collective bargaining agreement. Nor do the order or the regulations supersede any obligations that a predecessor or successor contractor may have under the National Labor Relations Act.

After review of the comments, the final rule adopts § 9.21 as proposed.

10. Section 9.22 Wage and Hour Division Investigation

Proposed § 9.22(a) outlined WHD's investigative authority. The Department proposed to 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 an 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 an investigation. The proposal was consistent with WHD's investigative authority under other statutes and regulations administered by WHD.

Proposed § 9.22(b) addressed subsequent investigations and would allow the Administrator to conduct a new investigation or issue a new determination if the Administrator concludes the circumstances warrant additional action. The proposed rule included examples of situations where additional action may be warranted, such as 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.

As noted in the preamble discussing § 9.21, the Coalition generally supported the proposed enforcement provisions in the NPRM. The Coalition, however, also recommended that Departmental investigations commence within 15 days of receipt of a complaint and that if the Administrator finds that the complaint was not frivolously brought, that the Administrative Review Board have the ability to order the immediate reinstatement of the employee upon application of the Administrator pending final order on the complaint. The Coalition further requested clarifying language in § 9.22 that workers and their representatives have the same right to inspect and copy relevant contractor records, documents, or evidence as the Department has under proposed § 9.22.

The Department considered these suggestions and the views of those who opined on enforcement provisions. The Department understands commenter concerns but declines to implement these changes. Specifically, the Department will not implement a 15-day requirement for Departmental action following the receipt of a complaint. Nothing in the Executive order requires that investigations commence within 15 days of receipt of a complaint. Such a stringent requirement could negatively affect other enforcement obligations of the Department. The Department believes that the complaint procedure as proposed will ensure effective enforcement of and compliance with the rule's requirements.

The Department also declines to add the suggested provision giving workers and their representatives the right to inspect and copy relevant contractor records, documents, or evidence in the same manner as the Department. The Department recognizes that worker cooperation with Wage and Hour investigations is critical to effective enforcement. The final rule provides procedures in § 9.21 for workers to file complaints and in § 9.32 for complainants to request hearings by an Administrative Law Judge in specified circumstances, which may include

discovery of relevant evidence. The rule also includes an antiretaliation provision at § 9.23(e) to protect workers who file a complaint, cooperate in an investigation, or otherwise pursue any rights under the order. The Department further declines to add the suggested provision giving the Administrative Review Board the ability to reinstate an employee on an expedited basis if the Administrator finds that a complaint was not frivolously brought. ''Reinstatement'' for a particular employee may not always be an appropriate remedy, depending on the circumstances. However, § 9.23(a) does afford the Secretary the authority to require a contractor to offer employment in positions for which the employee is qualified, if warranted, and a contractor may be debarred for noncompliance with any order of the Secretary.

The Department believes that the Administrator's investigation process, as proposed, will achieve effective enforcement of Executive Order 14055. Thus, the Department declines to amend the language in proposed § 9.22(a) to mandate additional procedures and authorities during the investigation process.

The Department did not receive any other comments addressing proposed § 9.22 and the final rule adopts the provision as proposed.

11. Section 9.23 Remedies and Sanctions for Violations of This Part

Proposed § 9.23 discussed remedies and sanctions for violations of *Executive Order 14055* and this part. Proposed § 9.23(a) reiterated 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) provided 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) also provided that the contractor would be required to pay interest on any underpayment of wages. As explained in the proposed rule, 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 on back-pay is an appropriate remedial measure to make a worker fully whole. The proposed language provided 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. As the proposed rule explained, various OSHA whistleblower regulations use the tax underpayment rate and daily compounding because that accounting best achieves the make-whole purpose of an employee receiving back-pay. *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). A similar approach is warranted in implementing *Executive Order 14055.*

Proposed § 9.23(c) addressed the withholding of contract funds for noncompliance. Under proposed § 9.23(c)(1), the Administrator would be able to 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) permitted the cross-withholding of monies due. The proposed rule explained that 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 provided 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, the proposed rule explained, 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 provided 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) clarified 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) provided 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 provided 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. The Department explained in the proposed rule that, 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 will enhance contractor compliance with *Executive Order 14055* as well.

Proposed § 9.23(e) stated 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 will 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 rule, as proposed, would protect workers who file oral as well as written complaints. *See Kasten,* 563 U.S. at 17. The Department's rule, as proposed, 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, or with the Department or another Federal agency—and from retaliation for otherwise taking reasonable action with the intent to seek compliance with or enforcement of the order.

As explained in the proposed rule, 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.

In its comment, the Coalition requested that the Department add liquidated damages in an amount equal to two times the amount of back pay owed as a remedy available to employees under this section. The Coalition explained that this suggestion is modeled, in part, on the remedies provision in the FLSA and that the possibility of treble damages will deter employer noncompliance and help cover the added expenses workers may incur. The Department believes that the remedies under this section, which include the payment of interest on back pay, reinstatement, withholding, debarment, and the suspension of the payment of contract funds, are sufficient to both make a worker whole and deter employers from noncompliance. For this reason, the Department declines to implement the Coalition's suggestion to add liquidated damages as a remedy available to employees under this section. The Department did not receive any additional comments, and the final rule adopts § 9.23 as proposed.

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

12. Section 9.31 Determination of the Administrator

Proposed § 9.31(a) provided 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 that 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 and express delivery services, or personal service to the last known address. As 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 ensuring 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) explained that where the Administrator concludes 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 would 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. This proposed section also stated that such a request may be sent by letter or by any other means normally ensuring 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 explained that the Administrator's determination not to seek debarment is not appealable.

The Department explained that proposed § 9.31(b)(2) would apply to situations where the Administrator has concluded that there are no relevant facts in dispute. In such cases, 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 would become the final order of the Secretary and would 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 ensuring delivery sent within 20 calendar days of the date of the Administrator's determination. Upon such a request, the Administrator would either refer the request for a hearing to the Chief ALJ 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).

The Department received one comment on this proposal, from the Coalition, which generally supported the proposed administrative process provisions in the proposed rule. However, the Coalition recommended that the Department amend § 9.31(b) to provide that the Administrator's decision not to seek debarment be appealable. The Department considered this recommendation but declines to make this change. The Department believes that the Administrator's decision not to seek debarment should not be appealable, as the Administrator must consider several factors that are particularly within their purview when determining if debarment is warranted, such as whether pursuing debarment is the best use of Departmental resources under the particular circumstances. Moreover, the Administrator's decision not to pursue debarment should be left to the Administrator's discretion, particularly given that the Administrator would necessarily be required to participate in such an appeal, that debarment cases are resource-intensive, and that debarment does not provide individual relief to a particular employee. These factors render debarment a distinct form of relief and warrant special consideration. The Department believes that this provision, as proposed, will achieve effective enforcement of Executive

Order 14055. Thus, the Department does not adopt the recommendation to make the Administrator's decision not to debar appealable.

The Department did not receive any other comments addressing proposed § 9.31, and the final rule adopts the provisions as proposed.

13. Section 9.32 Requesting Appeals

Proposed § 9.32 provided procedures for requesting appeals. Proposed § 9.32(a) provided 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) stated that any aggrieved party may request a hearing by an ALJ within 20 days of the determination of the Administrator. To request a hearing, the aggrieved party must send the request to the Chief ALJ of the Office of Administrative Law Judges by letter or by any other means normally ensuring delivery and the request must include a copy of the Administrator's determination. The proposal also would require that the party send a copy of the request for a hearing to the complainant(s) or successor contractor, their representatives, if any, as appropriate, and to the Administrator and the Associate Solicitor. The final rule includes the complete address, adding Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, to the regulatory text.

Proposed § 9.32(b)(1)(ii) provided 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 proposal explained 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) provided 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 proposal explained 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) explained 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)–(B) stated that a petition for review must refer to the specific findings of fact, conclusion 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. The final rule includes the complete address, adding Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, to the regulatory text.

Proposed § 9.32(b)(2)(ii)(C) provided 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 ineligibility sanctions, however, the remainder of the decision would be immediately effective. The proposal stated that no judicial review would be available to parties unless a petition for review to the ARB is first filed.

The Coalition recommended the Department amend § 9.32(b)(ii) by removing the word ''monetary,'' thereby allowing the complainant or other interested party to appeal an Administrator determination if the complainant or other interested party believes the Administrator has ordered inadequate nonmonetary relief, such as reinstatement. The Department considered this suggestion and declines to make this change. The requirements of proposed § 9.32(b)(ii) are identical to the approach the Department took in implementing Executive Order 13495, and the Department believes that such an approach aided in achieving effective enforcement of Executive Order 13495. Further, nothing in Executive Order 14055 indicates that a different approach was expected or is warranted in implementing Executive Order 14055. In addition, just as the Administrator's decision of whether to pursue debarment of a contractor involves discretion, the Administrator's decision of whether to seek reinstatement of a worker involves discretion. The Administrator may consider a variety of factors when considering whether to pursue reinstatement, including whether reinstatement may result in the termination of employment of another employee who is currently performing on the contract. Thus, it would not be appropriate to allow a complainant or other interested party to seek review where the Administrator has determined that reinstatement is not warranted. As another example, the Administrator might not order reinstatement and instead pursue front pay for the employee. In such an instance, it would add a level of complexity and inefficiency if the employee could seek reinstatement at the same time. For these reasons, the Department does not believe that it would be practicable for a complainant or other interested party to be able to request a hearing if they believe the Administrator has ordered inadequate nonmonetary relief.

PSC also commented on proposed § 9.32 and requested that the Administrator—and not the contractor—be the respondent in appeals of the Administrator's determinations. PSC believes the proposed provision unfairly punishes contractors by creating the functional equivalent of a private right of action against the contractor. In particular, PSC believes that contractors should not incur the cost and burden to defend a challenge to the Administrator's finding that the contractor did not commit a violation. The Department does not agree that permitting aggrieved and interested parties to seek review is unfair or unduly burdensome, and the final rule reaffirms that the employer is the appropriate respondent in appeals brought under this section, as the employer is best suited to represent its own interests in such appeals and may well wish to participate in such appeals to defend the legality of its actions. The Department also notes that Executive Order 14055 does not contemplate a private right of action, nor does the final rule provide a private right of action. The Department considered the comments received, and the final rule adopts the proposed language without change.

14. Section 9.33 Mediation

To resolve disputes by efficient and informal alternative dispute resolution methods to the extent practicable, proposed § 9.33 generally encouraged

parties to use settlement judges to mediate settlement negotiations pursuant to the procedures and requirements of 29 CFR 18.13. Proposed § 9.33 also provided that the assigned ALJ must approve any settlement agreement reached by the parties consistent with the procedures and requirements of 29 CFR 18.71. The Department did not receive any comments related to § 9.33. The final rule accordingly adopts the provision as proposed.

15. Section 9.34 Administrative Law Judge Hearings

Proposed § 9.34(a) provided for the OALJ to hear and decide, in its discretion, appeals concerning questions of law and fact regarding 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) detailed 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) provided that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, would not apply to proceedings under part 9 because 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 would have 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) stated 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) provided 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 provided 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.

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

With certain exceptions, proposed § 9.34(g) stated that it 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 part 9. The exceptions in proposed § 9.34(g) provided 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) provided that the Rules of Evidence at 29 CFR part 18, subpart B, would be inapplicable to administrative proceedings under this part. The proposed paragraph would clarify that rules or principles designed to ensure 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.

Proposed § 9.34(i) stated that, upon the issuance of a decision that a violation had occurred, the ALJ would order the successor contractor to take appropriate action to remedy the violation. The remedies could 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. The Coalition suggested amending proposed § 9.34(j) to make reasonable expenses incurred by an employee's representative in connection with ALJ hearings under this paragraph recoverable. However, § 9.34(j) is not intended to be an open-ended provision for the recovery of costs incurred by anyone other than the aggrieved employee. The Department clarifies that labor costs incurred by an aggrieved employee's representative would not be recoverable under this provision. However, the Department views costs for postage, photo copying, or messenger delivery, for example, that are initially incurred by the aggrieved employee's representative could be ''costs incurred by the aggrieved employee'' if they are ultimately charged to the employee. Such costs, therefore, could be recoverable under this provision if they are reasonable and otherwise meet the criteria for the recovery of costs under this paragraph. Therefore, the final rule does not expand the amount awarded to an aggrieved employee to include reasonable expenses incurred by an employee's representative in connection with ALJ hearings and adopts the provision as proposed.

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

With exception of one comment related to § 9.34(j), the Department did not receive any comments on proposed § 9.34 and the final rule adopts § 9.34 as proposed.

16. Section 9.35 Administrative Review Board Proceedings

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

Proposed § 9.35(a)(1) stated 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) identified 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 before it 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) provided 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 were to involve an appeal from an ALJ's decision.

Proposed § 9.35(c) would require the ARB's order to mandate action to remedy the violation if the ARB concludes a violation occurred. Under the proposed rule, 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 seeks debarment, the ARB would be required to determine whether debarment would be appropriate. Proposed § 9.35(c) also provided that the ARB's order would be 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) would allow 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 lost wages or other relief due under § 9.23(b) of this part.

Proposed § 9.35(e) provided that the ARB's decision would 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.*

The Department did not receive any comments related to § 9.35. The final rule accordingly adopts the provision as proposed.

17. 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 will not be affected. *See* 86 FR at 66400. Consistent with this directive, the Department proposed to include a severability clause in part 9. Proposed § 9.36 explained that each provision would be capable of operating independently from one another. If any provision of part 9 were 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 intended that the remaining provisions would remain in effect.

The Department did not receive any comments related to § 9.36. The final rule accordingly adopts the provision as proposed.

18. Nonsubstantive Changes

The Plain Writing Act of 2010 (Pub. L. 111–274, 124 Stat. 2861) requires Federal agencies to write documents in a clear, concise, well-organized manner. The Department has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885). Consistent with this practice, technical edits have been made throughout the regulations such as replacing the term ''shall'' with ''will'' or ''must,'' and replacing the term ''assure'' with ''ensure.'' Such changes are not intended to reflect a change in the substance of these sections.

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, the information collections' practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. Under the PRA, an agency may not collect or sponsor an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi). OMB has assigned control number 1235–0021 to the information collection which gathers information from complainants alleging violations of the labor standards that WHD administers and enforces, and the Department requested a new control number be assigned to the new information collection required as part of this rule. In accordance with the PRA, the Department solicited public comments on the proposed changes to the information collection under control number 1235–0021 and the creation of the new information collection in the NPRM, as discussed below. *See* 87 FR 42552 (July 15, 2022). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the existing information collection and the creation of a new information collection in accordance with 44 U.S.C. 3507(d). On August 16, 2022, OMB issued a notice that assigned the new information collection control number 1235–0033 and on August 18, 2022, issued a notice that continued the previous approval of the information collection under 1235–0021 under the existing terms of clearance. Both notices ask the Department to resubmit the requests upon promulgation of the final rule and after consideration of the public comments received.

Circumstances Necessitating this Collection: This rulemaking implements Executive Order 14055, Nondisplacement of Qualified Workers Under Service Contracts, signed by President Joseph R. Biden, Jr. on November 18, 2021. The Department administers and enforces these regulations that implement Executive Order 14055.

Executive Order 14055 generally requires Federal service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, to include a clause requiring the successor contractor and its subcontractors to offer service employees employed under the predecessor contract and its subcontracts 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 those employees are qualified. Section 5 of Executive Order 14055 contains exclusions, directing that the order will not apply to contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134 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 Executive 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 authority to investigate potential violations of, and obtain compliance with, the order.

This final rule, which implements Executive Order 14055, contains several provisions that could be considered to entail collections of information: (1) the requirement in § 9.12(b)(3) requiring successor contractors to make employment offers in writing; (2) the notice provision in § 9.11(c)(4) that requires contractors to provide notice to employees' representatives on a contract of the method and opportunity to provide information to the contracting agency relevant to the location continuity determination; (3) the notice provision described in in § 9.5(f) that requires contractors to provide notice to workers of contracting agency decisions to except contracts from the nondisplacement requirements; (4) the requirement in § 9.12(e) that predecessor contractors submit a list of the names, mailing addresses, and, if known, phone numbers and email addresses of all service employees working under the contract and its subcontracts to the contracting officer before contract completion and the requirement to provide service employees with written notice of their possible right to an offer of employment on a successor contract; (5) disclosure and recordkeeping requirements for covered contractors described in § 9.12(f); (6) the requirement in § 9.13(a) for the contractor to insert the nondisplacement contract clause into any lower-tier subcontracts; (7) the complaint process described in § 9.21; and (8) the administrative proceedings described in subpart D. These requirements are essential to the Department's ability to implement and enforce the requirements of Executive Order 14055 and this final rule.

Section 9.12 states compliance requirements for contractors covered by Executive Order 14055. As discussed above, under proposed § 9.12(b)(3) the successor contractor would have had the option of making a specific oral or written employment offer to each qualified employee on the predecessor contract. The final rule modifies the language of proposed § 9.12(b)(3), as well as the corresponding recordkeeping requirements of § 9.12(f)(2)(i), to require contractors to make offers of employment in writing. As all offers must be in writing, the final rule does not include the requirement that these offers be translated, as employees may obtain their own translations of the written offer documents in their possession.

Section 9.12(e) details contractor obligations near the end of contract performance. Sections 9.12(e)(1) and (e)(2) require a contractor to furnish the contracting officer with a certified list of the names, mailing addresses, and, if known, phone numbers and email addresses of all service employees working under the contract and its subcontracts during the last month of contract performance. Additionally, § 9.12(e)(3) requires a contractor to provide service employees with written notice of their possible right to an offer of employment on a successor contract. Finally, as noted in § 9.12(e)(3), contractors are also required to provide additional notices to workers by the provisions in § 9.5(f) (relating to agency exceptions) and § 9.11(c)(4) (relating to location continuity).

To verify compliance with the requirements in part 9, § 9.12(f) requires 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; (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), 1320.4(a)(2), 1320.4(c). Additionally, § 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 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(f) of the regulations; and notices to collective bargaining representatives of the opportunity to provide information relevant to the contracting agency's location continuity determination in the solicitation for a successor contract, pursuant to § 9.11(c)(4) of the regulations.

Section 9.13(a) requires the contractor or subcontractor to insert in any lower-tier subcontracts the nondisplacement contract clause in Appendix A or the FAR, as appropriate. As explained in the preamble to that section, this requirement notifies subcontractors of their obligation to provide employees the right of first refusal and of the enforcement methods WHD may use when subcontracts are found to be in violation of the Executive order. The Department has estimated additional burden hours for this requirement, but believes that this additional burden will be minimal, because the clause will be easily accessible to contractors and subcontractors who may simply copy and insert the clause into the lower-tier subcontract.

Section 9.21 details the procedure for filing complaints of violations of the Executive order or part 9. 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. WHD submitted an Information Collection Request (ICR) to revise the approval under 1235–0021 to incorporate the regulatory citations in this rule and to adjust burden estimates to reflect an increase in the number of complaints filed.

Subpart D establishes administrative proceedings to resolve investigation findings. Particularly with respect to hearings, the rule imposes information collection requirements. The Department notes that information exchanged between the target of a civil or administrative action and the agency to resolve the action is 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 final 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 regulations. A respondent may meet the requirements of this final rule using paper or electronic means. WHD, 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 assist.

Public comments: The Department invited public comment on its analysis that the rule would create a slight increase in the paperwork burden associated with ICR 1235–0021 and on the burden related to the new ICR 1235–0033. The Department did not receive comments on the ICRs themselves or any comments submitted regarding the

PRA analysis in particular. However, commenters addressed aspects of the information collections while commenting on the text of the proposed rule.

For example, ABC commented that the 10-day time frame in which predecessor contractors must furnish to the contracting officer an updated list of employees working on the predecessor contract under § 9.12(e)(2) is both impractical and unworkable, arguing that 10 days is an inadequate time frame for the successor contractor to inform, interview, and evaluate the displaced workers prior to the commencement of the successor contract. Relatedly, an anonymous commenter suggested that the burden on the successor contractor to offer employment to qualified employees on the predecessor contract may be lessened if the successor contractor is provided with contact information for the employees such as phone numbers, email addresses, or mailing addresses. To address ABC's concern that the 10-day time frame may make it impractical for the successor contractor to inform, interview, and evaluate employees prior to the commencement of the successor contract, the Department is adopting the anonymous commenter's suggestion that the successor contractor be provided with employee contact information. Accordingly, as explained in the preamble to § 9.12, the Department is modifying proposed § 9.12(e)(1) and (e)(2) to require predecessor contractors to list (in addition to names and anniversary dates) mailing addresses, and, where known, email addresses and phone numbers of the employees. The Department believes that the burden of this change on contractors will be minimal in light of the existing requirement that contractors maintain records of addresses pursuant to 29 CFR 4.6(g)(1)(i).

The Coalition commented on the requirements for successor contractors in § 9.12(b)(3) when making the required job offers to employees on the predecessor contract. The Coalition suggested the Department require job offers be provided in writing, and not verbally, to lessen disputes between contractors and employees as to the existence and adequacy of offers. The Coalition further noted that requiring offers in writing would lessen the degree of employees' reliance on the accuracy of contractors' translators. AFL–CIO echoed the Coalition's sentiments regarding offers being made in writing. The Department agrees that requiring offers to be made in writing would lessen such factual disputes between contractors and employees, including disputes about the fidelity of linguistic translations. For that reason, the Department is amending proposed § 9.12(b)(3), as well as the corresponding recordkeeping requirements of § 9.12(f)(2), to require that offers be in writing, thus removing the option for successor contractors to make offers orally. Because this change removes the requirement for a contemporaneous written record of any oral offers of employment and simply retains the requirement that contractors maintain copies of any written offers of employment, this change does not require contractors to maintain additional information. Thus, the Department has not estimated additional recordkeeping burden hours or costs associated with this change. However, because this change requires contractors to provide written offers of employment to predecessor contract employees, the Department estimates additional burden hours and costs associated with this requirement.

Total burden for the subject information collections, including the burdens that will be unaffected by this final rule and any changes, is 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: 27,010 (10 from this rulemaking).

Estimated number of responses: 27,010 (10 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 9,003 (3 burden hours due to this rulemaking).

Capital/start-up costs: $0 ($0 from this rulemaking).

Title: Nondisplacement of Qualified Workers Under Service Contracts.

OMB control number: 1235–0033.

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

Estimated number of respondents: 137,463 (all from this rulemaking).

Estimated number of responses: 3,042,829 (all from this rulemaking).

Frequency of response: on occasion.

Estimated annual burden hours: 205,332 (all from this rulemaking).

Estimated annual burden costs: $13,307,567.00

Capital/start-up costs: $0 ($0 from this rulemaking).

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

Under Executive Order 12866, as amended by Executive Order 14094, 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.[12] OIRA has determined that this rule is a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866.

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 could result from this 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 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 only to contracts that are covered by the SCA.

[12] *See* 88 FR 21879 (Apr. 11, 2023); 58 FR 51735, 51741 (Oct. 4, 1993).

This 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 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 442,761 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.[13] [14] 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.[15]

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 at times 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 [16] and (2) those covered by the DBA.[17] 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 certain U.S. territories. The firms for the remaining contracts are included as potentially impacted by this rulemaking.

In 2019, there were 86,000 unique prime contractors in *USASpending.gov* 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 rule. The Department examined 5 years of *USASpending.gov* data (2015 through 2019) and identified 33,708 unique subcontractors that did not hold contracts as prime contractors in 2019.[18] 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.[19] [20]

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 GSA's System for Award Management (SAM) since all entities bidding on Federal procurement contracts as a prime contractor or applying for 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 contractor 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 rulemaking; these firms are not included in the Department's estimate. The 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 October 2022 SAM data and identified 409,053 registered firms.[21] The Department excluded firms with expired registrations, firms only applying for grants,[22] government

[13] 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 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*.

[14] The Department also acknowledges that prime contracts that are less than $250,000 and their subcontracts would not be covered by this regulation, but the Department 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.

[15] The Department estimated the number of prime contractors using the 2021 *USASpending.gov* 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.

[16] 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).

[17] 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.

[18] 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.gov* database (*i.e.,* the Labor Standards variable, the Construction Wage Rate Requirements variable, or the product or service code variable).

[19] 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/*.

[20] 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).

[21] Data released in monthly files. *See* GSA, *SAM.gov*, available at: *https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf.*

[22] 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.

entities (such as city or county governments),[23] 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.gov* to this estimate. Adding these 33,708 firms identified in *USASpending.gov* to the number of firms in SAM results in 442,761 potentially affected firms.

TABLE 1—RANGE OF NUMBER OF POTENTIALLY AFFECTED FIRMS

Industry	NAICS	Lower-bound estimate			Upper-bound estimate		
		Total	Primes from *USASpending.gov*	Subcontractors from *USASpending.gov*	Total	Firms from SAM	Subcontractors from *USASpending.gov*
Agriculture, forestry, fishing and hunting	11	2,482	2,482	0	5,769	5,769	0
Mining	21	145	102	43	959	916	43
Utilities	22	1,596	1,541	55	2,485	2,430	55
Construction	23	13,708	5,457	8,251	56,126	47,875	8,251
Manufacturing	31–33	13,958	5,637	8,321	51,299	42,978	8,321
Wholesale trade	42	1,205	564	641	18,092	17,451	641
Retail trade	44–45	344	317	27	7,979	7,952	27
Transportation and warehousing	48–49	3,387	2,998	389	17,921	17,532	389
Information	51	4,061	3,735	326	13,350	13,024	326
Finance and insurance	52	475	429	46	3,365	3,319	46
Real estate and rental and leasing	53	2,822	2,821	1	19,439	19,438	1
Professional, scientific, and technical services	54	37,739	26,103	11,636	115,007	103,371	11,636
Management of companies and enterprises	55	3	3	0	604	604	0
Administrative and waste services	56	15,120	11,509	3,611	36,187	32,576	3,611
Educational services	61	3,609	3,359	250	17,600	17,350	250
Health care and social assistance	62	7,004	6,987	17	36,758	36,741	17
Arts, entertainment, and recreation	71	916	915	1	5,172	5,171	1
Accommodation and food services	72	3,037	3,031	6	10,474	10,468	6
Other services	81	8,084	7,997	87	24,175	24,088	87
Total private	.....	119,695	85,987	33,708	442,761	409,053	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.[24] 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).[25] 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. 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). One commenter also posited that this estimate could be an overestimate because many of these workers are already covered under collective bargaining agreements that may ensure them continued employment.

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.

i. 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).

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

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 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.[26] The firms for the remaining contracts are also included as potentially impacted by this

The Department included only firms with a value of ''Z2,'' which denotes ''All Awards.''

[23] 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 relatively minimal and including all government entities would result in an inappropriate overestimation.

[24] *See* 86 FR 67126, 67194 (Nov. 24, 2021).

[25] *See* 81 FR 67598 (Sept. 30, 2016) and 79 FR 60634 (Oct. 7, 2014).

[26] Identified when the ''Construction Wage Rate Requirements'' element is ''Y,'' meaning that the contracting agency flagged that the contract is covered by DBA.

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 certain 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.[27] 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 code 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) data, formerly Occupational Employment Statistics.[28] 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 estimates 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.

ii. 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.[29] [30] 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).[31]

TABLE 2—NUMBER OF POTENTIALLY AFFECTED WORKERS

NAICS	Total private output (billions) [a]	Covered contracting output (millions) [b]	Share output from covered contracting (%)	Private sector workers (1,000s) [c]	Workers on SCA contracts (1,000s) [d]
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
Territories	156	1,501	[e]	963	9.9

[27] Bureau of Economic Analysis (BEA). Table 8. Gross Output by Industry Group. 2020, available at: *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.''

[28] Bureau of Labor Statistics Occupational Employment and Wage Statistics. May 2019. Available at: *https://www.bls.gov/oes/*.

[29] GDP is limited to personal consumption expenditures and gross private domestic investment.

[30] 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.

[31] 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) [a]	Covered contracting output (millions) [b]	Share output from covered contracting (%)	Private sector workers (1,000s) [c]	Workers on SCA contracts (1,000s) [d]
Total	33,691	297,794	0.88	134,761	1,376

[a] 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.
[b] *USASpending.gov*. Contracting expenditures for covered contracts in 2019.
[c] 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.
[d] 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.
[e] 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. In the proposed rule, the Department asked for comments regarding any data sources that would allow it to analyze the demographic composition of SCA contract workers, so that it could better assess any equity impacts of this rulemaking. In their comment, the Center for American Progress (CAP) noted that women and people of color are overrepresented in many of the service industries that the Federal government contracts out. CAP, along with multiple other commenters, cited their analysis which looked at industries with significant Federal contracting spending and found that women and people of color were overrepresented in industries such as building services, administrative services, security services, nursing care, and meat and food processing.[32] In their comment, the American Federation of State, County, and Municipal Employees (AFSCME) also noted that ''[c]overed workers under the SCA comprise a disproportionate share of women, people of color, LGBTQ individuals, people with disabilities, and veterans compared to the workforce as a whole.'' They stated that this rule will help reduce historical inequities in the effects of job displacement for these groups.

C. Costs

1. Rule Familiarization Costs

This 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 442,761 potentially affected firms to calculate rule familiarization costs. This is an overestimate, because not all of the firms that are registered in SAM currently hold contracts or will bid on an SCA contract. Those that do not hold contracts and 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 the content of the contract clause itself as incorporated into a solicitation, 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 are already familiar. Thus, this regulation is not introducing an entirely novel policy that would require substantially 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.[33] Therefore, the Department has estimated regulatory familiarization costs to be $11,124,370 ($50.25 per hour × 0.5 hour × 442,761 contractors). The Department has included all regulatory familiarization costs in Year 1.

2. Implementation Costs

This rule contains various requirements for contractors. The 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 nondisplacement contract clause. This provision comes directly from Executive Order 14055, and the Department estimated 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. A contractor must provide notices to affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception and of the opportunity to provide information relevant to an agency's location continuity determination. 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. Contractors may also be required to retroactively incorporate a contract clause into subcontracts when it was not initially incorporated. In the NPRM, the Department estimated that these requirements would take an average of 30 minutes for each contractor. The Department explained that this average

[32] Center for American Progress, ''Federal Contracting Doesn't Go Far Enough to Protect American Workers.'' November 19, 2020. Available at: *https://www.americanprogressaction.org/article/federal-contracting-doesnt-go-far-enough-protect-american-workers/*.

[33] 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.*

estimate is appropriate because some of these requirements would not apply to all potentially affected contractors. For example, the requirement that a contractor send an agency exception notice would only apply when an agency grants an exception. In this final rule, the Department has increased this estimate to an average of 45 minutes for each contractor. This increase is to account for the change to the location-continuity notice procedure in the final rule, which now requires contractors to provide collective bargaining representatives with notice of an opportunity to provide information regarding location continuity determinations where a location change is possible. Under this amended procedure, location-continuity notices still will not be required for all predecessor contracts; but they will be required wherever a location change is possible, whereas under the NPRM, the provision required notice only after contracting agencies determine not to require location continuity. The increase is also to account for the time it takes a successor contractor to issue an offer letter (to a predecessor employee) in circumstances where the successor contractor otherwise may not have needed to issue an offer letter to staff the successor contract.

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 $7,518,342 ($50.25 per hour × 1.25 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 in subcontracts each year since the clause only needs to be included in new contracts (which under Executive Order 14055 and this rule do not include options or other extensions) and their subcontracts.

Under this rule, contracting agencies will, among other things, be required to ensure contractors provide notice to employees on predecessor contracts of their possible right to an offer of employment. Contracting agencies will also be required 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 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 incorporate the contract clause post-award 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.[34] This includes the median base wage of $52.17 from Office of Personnel Management salary tables,[35] plus benefits paid at a rate of 69 percent of the base wage,[36] 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. Therefore, the estimated cost to contracting agencies is $27,953,342 ($97.04 per hour × 2.5 hours × 115,224 contracts).

3. Recordkeeping Costs

This rule will 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 on 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 rule will 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 rule also specifies the records successor contractors would be required to maintain, including copies of or documentation of any written offers of employment and copies of the written notices that have been posted or delivered. The rule will 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 × 1 hour × 119,695).

4. Summary of Costs

Costs in Year 1 consist of $11,124,370 in rule familiarization costs, $35,471,685 in implementation costs ($7,518,342 for contractors and $27,953,342 for contracting agencies), and $6,014,674 in recordkeeping costs. Therefore, total Year 1 costs are $52,610,728. Costs in the following years consist only of implementation and recordkeeping costs and amount to $41,486,358. Average annualized costs over 10 years are $43 million using a 7 percent discount rate, and $52 million using a 3 percent discount rate.

5. Other Potential Impacts

This 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 rule, successor contractors will 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 will likely spend at most an equal amount of time determining job suitability under this final rule as under current practices. To the extent that, in the absence of this rule, a successor

[34] Because the work of the contracting agency may be split among different positions, the Department has used the wage of a more senior position for the estimate.

[35] 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.*

[36] 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.*

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.

Many successor contractors may already be keeping the predecessor contractor's employees on the contract, so the Executive order and this rule would not impact any existing hiring practices for these firms.

There may be some 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 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 they are currently working on a covered contract which is then awarded to another contractor, they would receive offers of employment from the successor contractor.

This rule will 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 14026 (Increasing the Minimum Wage for Federal Contractors), or Executive Order 13658 (Establishing a Minimum Wage for Contractors). Executive Order 14055 and this 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 will not be a result of this rule. What this rule will do is help ensure that these workers have continued employment, saving them the costs of finding a new job. The requirement for successor contractors 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. In their comment, NELP agreed that displaced workers may suffer financial hardship and communities could see an increased need for social insurance programs.[37] As discussed above, the benefits of increased job security and prevention of unemployment could be offset in some cases in which the successor contractor has existing employees for whom it is unable to find positions because of the requirements of this rule. The Department did not receive any comments discussing this scenario.

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.[38] Maintaining the same staff on a Federal Government contract could reduce the occurrence of these costly data breaches. The Coalition agreed that the rule will promote physical and information security. They note, ''Whether through building security, janitorial services provided in a secure facility, or CMS call center representatives addressing callers' personal health information, federal service contract workers regularly provide physical security and work with or adjacent to classified, sensitive, or private personal information. Retaining those workers across service contracts limits the need for costly training and vetting[.]'' They also note that the requirements of this rule will lead to cost savings for new contractors and the Federal Government, because of the extensive security clearance process required to enter Federal buildings. They stated that, ''[a]ccording to the Defense Counterintelligence and Security Agency, prices for new background investigations and clearances for fiscal year 2023 will range from $140 each at the lowest level of vetting, to $400 for a secret clearance, and then up to $5,140 for a top-secret clearance.'' [39] If successor contractors hire predecessor contractor employees who already have the necessary security clearances, it could lead to cost savings.

The requirements of the Executive order and this rule also will 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.[40] Another paper conducted an analysis of case studies and found that turnover costs represent 39.6 percent of a position's annual wage.[41] Multiple commenters also agreed that this rule would help reduce turnover, and they provided additional sources showing the high cost of turnover in multiple industries. The Economic Policy Institute (EPI) cited research showing that ''worker turnover can cost employers approximately one-fifth of a job's salary to fill each vacancy, plus an average of nearly $1,300 in training expenditures for each new hire.'' [42] Other commenters

[37] In support of their analysis, NELP cited a study in an academic journal. *See* Jennie E. Brand, ''The Far-Reaching Impact of Job Loss and Unemployment.'' Annual Review of Sociology. Aug 2015. *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4553243/.*

[38] *See* Ben Miller, *IBM: Government Data Breaches Becoming Less Costly* (Aug. 18, 2020), *https://www.govtech.com/data/ibm-government-data-breaches-becoming-less-costly.html.*

[39] U.S. Dep't of Def., Def. Counterintel. & Sec. Agency, DCSA Products & Services Billing Rates for Fiscal Years 2023 and 2024 (June 30, 2022), available at *https://www.dcsa.mil/Portals/91/Documents/pv/GovHRSec/FINs/FY22/FIN_22-01_FY23-FY24-Billing-Rates_30June2022.pdf;* Lindsey Kyzer, *How Much Does It Cost to Obtain a Clearance—FY 2022/23 Costs Go Down,* ClearanceJobs (Sept. 7, 2021, available at *https://news.clearancejobs.com/2021/09/07/how-much-does-it-cost-to-obtain-a-clearance-fy-2022-23-costs-go-down/.*

[40] Kuhn, Peter and Lizi Yu. 2021. ''How Costly is Turnover? Evidence from Retail.'' Journal of Labor Economics 39(2), 461–496.

[41] 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/.*

[42] Heather Boushey and Sarah Jane Glynn, There Are Significant Business Costs to Replacing Employees, Center for American Progress, November 2012. *https://www.americanprogress.org/article/there-are-significant-business-costs-to-*

Continued

cited literature showing that turnover impacts organizational performance and customer service.[43] [44] This rule will lead to staffing continuity from the perspective of the customer (both the Federal government and its clients) and could therefore lead to improved service.

E. Comments Received Relating to the Economic Analysis

The Department received various other comments on the impacts discussed in this economic analysis. For example, both ABC and PSC generally contended that the Department did not provide evidentiary support that the rule would actually achieve greater efficiency in federal procurement. The Department notes that section IV.D. discusses various ways in which the rule is expected to promote increased efficiency, such as through reduced turnover and by maintaining information security. Additionally, PSC said that the Department did not offer any analysis or studies concluding that the potential benefits would outweigh the administrative costs that the rule would impose on contractors and contracting agencies. They also noted that the Department only included studies about the costs of turnover in the retail sector, so in light of this comment, the Department has included a discussion of additional literature provided by other commenters in the above section. Moreover, as noted above, 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. The cost of data security breaches is such a cost, with individual data security breaches having the potential for widespread private costs where confidential personal information may be involved or very difficult to quantify public costs where data breaches may involve national security. *See, e.g., Protecting Against Nat'l Sec. Threats to the Commc'ns Supply Chain Through FCC Programs,* 34 F.C.C. Rcd. 11423, 11466–67 (2019) (noting that such national security-related benefits of data security are particularly hard to quantify).

One commenter asserted that the true costs of implementing this rule are unknown. They state that the cost estimate does not include the time it will take successor contractors to track down the predecessor contractor's employees. The Department believes that because the rule requires the predecessor contractor to provide the successor contractor with a list of its employees and their contact information, it will not take successor contractors a significant amount of time to get in contact with employees. The commenter also stated that the cost estimate does not include the ''resources needed for contractors (and subcontractors) to onboard the predecessor's SCA employees at the last minute.'' The Department believes that any cost to onboard predecessor contract employees will be alleviated because these workers are already familiar with the work of the contract. The successor contractor will therefore save on training costs.

V. Final Regulatory Flexibility Act 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 rules 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 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. Need for, and Objectives of, the Rule

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 final rule to implement the directives of the Executive order.

B. Comments Received in Response to the Initial Regulatory Flexibility Analysis

The Department received a few comments regarding the rule's impact on small businesses. For example, ABC stated that the proposed rule would disincentivize small businesses from engaging in federal contracting. They requested that DOL provide additional flexibility to small business contractors and provide businesses with a Small Entity Compliance Guide. Following issuance of this rule, the Department will publish a Small Entity Compliance Guide, which will help small entities comply with the requirements of Executive Order 14055 and these implementing regulations. The Department will also publish subregulatory guidance and offer technical assistance to help businesses understand and comply with the rule. In its comment, PSC stated that ''[w]hile small business employees may be retained by successor contractors, small businesses themselves may suffer from employee attrition to follow-on successors.'' While predecessor contractors of all sizes could see some employee attrition if their current employees chose to remain on the contract, the Department notes that this rule can be expected to benefit small businesses who are successor contractors, because they will gain employees who are already familiar with the work of the contract.

The Chief Counsel for Advocacy of the Small Business Administration did not provide a comment on the proposed rulemaking.

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

In order to determine the number of small businesses that will be affected by the rulemaking, the Department followed the same methodology laid out in section IV.B.1. of the economic analysis.[45] For the data from USASpending.gov, the business determination was based on the

replacing-employees/. Lorri Freifeld, ''2020 Training Industry Report,'' Training Magazine, November 17, 2020. *https://pubs.royle.com/publication/?m=20617&i=678873&p=30&ver=html5.*

[43] TaeYoun Park and Jason Shaw, ''Turnover Rates and Organizational Performance: A Meta-Analysis,'' Journal of Applied Psychology, 98 (2) (2013): 268–309. *https://leeds-faculty.colorado.edu/dahe7472/Park%20and%20Shaw%20Turnover%20rates%20and%20organizational%20performance_%20A%20meta-analysis%202013.pdf.*

[44] Mahesh Subramony and Brook Holtom, ''The LongTerm Influence of Service Employee Attrition on Customer Outcomes and Profits,'' Journal of Service Research, 15 (4) (2012): 460–473. *https://www.researchgate.net/publication/258158753_The_Long-Term_Influence_of_Service_Employee_Attrition_on_Customer_Outcomes_and_Profits.*

[45] 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.

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 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.gov*	Small subcontractors from *USASpending.gov*	Total	Small firms from SAM	Small subcontractors from *USASpending.gov*
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 Rule, Including Reporting and Recordkeeping

The 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 nondisplacement contract clause. The rule also requires contracting agencies to incorporate the nondisplacement contract clause in applicable contracts; ensure contractors provide notices to employees on predecessor contracts of their possible right to an offer of employment, of agency decisions to except a successor contract from nondisplacement requirements, and of employees' opportunity to provide information relevant to the location continuity analysis; 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 will 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 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 rule requires a contractor, no less than 30 calendar days before completion of the contractor's performance of services on a contract, to furnish the contracting officer a list of the names and contact information 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 on 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 rule also requires a contractor to furnish the contracting officer a certified list of the names and contact information 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 Rule on Small Business Firms

This rule could result in costs for small business firms in the form of rule familiarization costs, implementation costs, and recordkeeping costs. See section IV.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.[46] Therefore, the Department has estimated regulatory familiarization costs to be $25.13 per small firm ($50.25 per hour $\times$ 0.5 hour).

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 45 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

[46] 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: *https://www.bls.gov/oes/current/oes131141.htm.*

contract clause to be $62.81 per small firm ($50.25 per hour × 1.25 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 rule could each have additional costs of $138.19 in Year 1 ($25.13 + $62.81 + $50.25).

As discussed in section IV.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 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. Regulatory Alternatives and the Impact on Small Entities

The Department is issuing a 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, in the proposed rule, the Department discussed a few specific provisions in which limited alternatives could have been possible.

First, the Department has some discretion in defining the specific analysis that must be completed by contracting agencies regarding location continuity. The Department considered whether to require contracting officers to analyze additional factors when determining whether to decline to require location continuity. In the final rule, the Department has limited this language to provide a list of factors for consideration only when a location change is a possibility, and the rule suggests the factors that generally should be considered but does not mandate their consideration. In the final rule, the Department also has eliminated the proposed requirement that a location continuity determination must be made in writing by the Senior Procurement Executive, and declined to adopt reconsideration procedures suggested by commenters that could have increased the contract administration responsibilities of agencies related to location continuity determinations. The Department also proposed, but did not adopt, a reconsideration procedure for agency exceptions that could have had a similar effect. The Department's decisions not to include such requirements and procedures reduces the impact of the rule on small entities.

There are also a few places in this rule where the Department has developed additional requirements beyond what is set forth 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 added the requirement that the successor contractor must generally 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 believes that these clarifications will help small businesses comply with the rulemaking.

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 final rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The final rule will 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 final rule will not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The final rule will 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 in 29 CFR Part 9

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

For the reasons set out in the preamble, the Department of Labor amends Title 29 of the Code of Federal Regulations by adding part 9

PART 9—NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

Sec.

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, 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 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 will 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, must be disposed of only as provided by the Secretary of Labor 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.

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.

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, temporary interim contracts, 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; 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.

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.

Same or similar work means work that is either identical to or has primary characteristics that are alike in substance to work performed on another service contract.

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

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 issued or entered on or after the applicability date of this part, provided that:

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

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

(b) 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 described in § 9.11(a), and contractors on such contracts must comply with all the requirements of § 9.12 unless the contract is excluded or excepted under this part.

(c) Contracts and solicitations that satisfy the requirements of paragraph (a) of this section, but do not succeed a contract for performance of the same or similar work, must contain the contract clause described in § 9.11(a), and all contractors on such contracts must comply with the requirements of § 9.12(a)(4), (e), (f), and (g), unless the contract is excluded or excepted under this part.

§ 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 Executive Order 14055 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. Where an agency determines that a prime contract is excepted under this section, the nondisplacement requirements will also not apply to any subcontracts under the excepted prime contract. For indefinite-delivery-indefinite-quantity (IDIQ) contracts, an exception must be granted prior to the solicitation date if the basis for the exception cited would apply to all orders. Otherwise, exceptions must be granted for each order by the time of the notice of the intent to place an order.

(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. Where an incumbent contractor's employees are covered by a collective bargaining agreement, the contracting agency must, to the extent consistent with mission security, include the employees' representative in any market-research-related exchanges with industry that are specific to the nondisplacement requirement. 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 it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price and adhering to the requirements of the order would not be reasonably tailored to the agency's needs. When determining whether a fair and reasonable price can be achieved, the agency must consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the nondisplacement requirements (*e.g.,* costs of labor or materials, supply chain costs). 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) 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 Federal Acquisition Regulation (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) *Notices.* 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), and, where relevant, notice to employees' representatives consistent with the provisions of § 9.11(c)(4) (relating to the location continuity analysis), and § 9.5(f) (relating to agency exceptions).

(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) When there is a possibility that the successor contract could be performed in a locality other than where the predecessor contract has been performed, and a location change is under consideration, an agency's location-continuity analysis should generally include, but not be limited to, the following considerations:

(i) Whether factors specific to the contract at issue suggest that the employment of a new workforce at a new location would increase the potential for disruption to the delivery of services during the period of transition between contracts (*e.g.,* the large size of workforce to be replaced or the relatively significant level of experience or training of the predecessor workforce);

(ii) Whether factors specific to the contract at issue suggest that the employment of a new workforce at a new location would unnecessarily increase physical or informational security risks on the contract (*e.g.,* whether workers on the contract have had and will have access to sensitive, privileged, or classified information);

(iii) Whether the workforce on the predecessor contract has demonstrated prior successful performance of contract objectives so as to warrant a preference to retain as much of the current workforce as possible; and

(iv) Whether program-specific statutory or regulatory requirements govern the method through which the location of contract performance must be determined or evaluated, or other contract-specific factors favor the performance of the contract in a particular location.

(4) Agencies must complete the location-continuity analysis required under paragraph (c)(1) of this section prior to the date of issuance of the solicitation. Where an incumbent contractor's employees are covered by a collective bargaining agreement and a contract location change is possible and under consideration, the agency must, to the extent consistent with mission security, provide the employees with an opportunity prior to the issuance of the solicitation to submit information relevant to this analysis. Under such circumstances, the agency must, at the earliest reasonable time in the acquisition planning process, direct the incumbent contractor to notify the collective bargaining representative(s) for the affected employees of the appropriate method to communicate such information.

(i) *Method of notice.* Agencies must direct the incumbent contractor to provide notice in the manner set forth in this paragraph. The contractor must provide written notice directly to the employees' representative in the same manner customarily used by the contractor to communicate with the representative.

(ii) *Model notice.* Agencies may use the following sample language as a basis in preparing their own notices regarding location continuity: Notice to Employees Regarding Location Continuity of Federal Contract Services. The contract for [insert type of service] services currently performed by [insert name of incumbent contractor] is scheduled to expire on [insert date]. [Insert name of contracting agency] is currently preparing a [insert type of solicitation] for a new contract for the provision of these services. As part of the acquisition planning process, [insert name of contracting agency] is considering whether to require or include a preference that these services continue to be performed in the same locality. If you have information regarding the provision of these services that would be relevant to this location continuity analysis, please contact [insert name of contracting agency contact] at [insert email address]. Before completion of the [insert name of incumbent contractor] contract, a subsequent notice will be provided to employees regarding the rights of certain service employees on the current contract to an offer of employment on any successor contract that is awarded. For additional information, contact the Wage and Hour Division of the United States Department of Labor at 1–866–4US–WAGE (1–866–487–9243), *https://www.dol.gov/agencies/whd.* If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

(5) 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 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 require retroactive application of the contract clause to the commencement of performance under the contract or other date the Administrator determines to be appropriate. In determining whether retroactive application is appropriate, the Administrator will consider, among other factors, whether retroactive application would result in an overly onerous administrative or economic burden on the contracting agency that may constitute a severe disruption in the agency's procurement practices.

§ 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 in this part, 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 service employee. 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 (*e.g.,* 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 to conclude an employee is unqualified solely because, despite an employee's reasonable efforts to do so, 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, offer employment to each employee. See also paragraph (f) of this section, Recordkeeping. Where written offers are not delivered 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 offers with changes to pay, benefits, or terms and conditions

such as the option of remote work, provided that these changes were not made to discourage acceptance of the offer. 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 generally 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) *Post-award incorporation of omitted 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 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 of an employment opening 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 in 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 working 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 working 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. 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.

(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 clearly warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired. Written evidence related to disciplinary action taken without a recommendation of termination may constitute reliable evidence of just cause to discharge the employee, depending on the specific facts and circumstances.

(B) [Reserved].

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

(ii) The successor contractor must presume that no employees 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 a manner 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 to 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, mailing addresses, and if known, phone numbers and email addresses 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 on 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 but must also include the mailing address, and if known, phone numbers and email addresses of the workers.

(2) *Certified list of employees provided 10 business 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 business days before completion of the contractor's performance of services on a contract, furnish the contracting officer with a certified list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees employed within the last month of contract performance. The list must also contain anniversary dates of employment of each service employee on 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 but must also include the mailing addresses, and if known, phone numbers and email addresses of the workers.

(3) *Notices to employees of possible right to offers of employment on successor contract.* 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. Another form with the same information can be used. 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. These notice requirements are in addition to the notice provisions listed at § 9.5(f) (relating to agency exceptions) and § 9.11(c) (relating to location continuity).

(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, including the date of the offer.

(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 any employee list received from the contracting agency and any 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 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(f) and section 6(b) of the order; and notices to workers and their representatives of the opportunity to provide information relevant to the contracting agency's location-continuity determination in the solicitation for a successor contract pursuant to § 9.11(c)(4).

(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 nondisplacement contract clause contained in Appendix A or the FAR, as appropriate. The contractor or subcontractor must also insert a clause in any subcontracts to require the subcontractor to include the Appendix A or FAR contract clause 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 the event of any violations of the contract clause, 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 (WHD) 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 WHD. No particular form of complaint is required. A complaint may be filed orally or in writing. The WHD 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 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 must 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 may, at their discretion, and must 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) *Notification to a contractor of the withholding of funds.* If the Administrator directs a contracting agency to 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); contractors, including the prime contractor if a subcontractor is implicated; contractor representative(s); and the contracting officer by registered or certified mail to the last known address or by any other means normally ensuring 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 ensuring 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 ensuring 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).

(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 days of the determination of the Administrator. The request for a hearing may be sent by mail or by any other means normally ensuring delivery and must 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 Administrator of the Wage and Hour Division; and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(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 must refer to the specific findings of fact, conclusions of law, or order at issue.

(B) *Service.* Copies of the petition and all briefs must be served on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(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 ineligibility sanctions, however, the remainder of the decision will 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 will 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 must 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, must 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, will 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, will not apply. Rules or principles designed to ensure production of the most probative evidence available will 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 must 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).

§ 9.35 Administrative Review Board proceedings.

(a) *Authority*—(1) *General.* The 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 is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding will be one of utter invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

Appendix A to Part 9—Contract Clause

The following clause must be included by the contracting agency in every contract 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) of this clause, 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) of this clause, 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, mailing addresses, and if known, phone numbers and email addresses 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) of this clause 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 must, 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, mailing addresses, and if known, phone numbers and email addresses 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. Where changes to the workforce are made after the submission of the certified list described in this paragraph (f)(1) of this clause, the contractor must, in accordance with paragraph (c) of this clause, 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, mailing addresses, and if known, phone numbers and email addresses of all service employees employed within the last month of contract performance. The updated 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. Only contractors experiencing a change in their workforce between the 30- and 10-day periods will have to submit a list in accordance with paragraph (c) of this clause.

(2) The contracting officer must 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 and mailing addresses 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, at their discretion, and must 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) 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. The contractor further agrees to provide notifications to employees under the contract, and their representatives, if any, in the timeframes and methods 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, and to notify them of the opportunity to provide information relevant to the contracting agency's location-continuity determination in the solicitation for a successor contract.

(g) The contractor and subcontractors must 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.

(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 must 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 must 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 must make records requested by such official(s) available for inspection, copying, or transcription upon request.

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

(j) Nothing in this clause will relieve a contractor or subcontractor of any obligation under the HUBZone program statute, 15 U.S.C. 657a, the Javits-Wagner-O'Day Act, 41 U.S.C. 8501–8506, the Randolph-Sheppard Act, 20 U.S.C. 107. The provisions of those laws must be satisfied in tandem with and,

if necessary, prior to, the requirements of Executive Order 14055, 29 CFR part 9, and this clause. Thus, any contractor or subcontractor operating under a contract awarded on the basis of a HUBZone preference, 41 U.S.C. 657a(c); operating pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 8501–8506; or operating pursuant to agreements for vending facilities entered into pursuant to the regulations establishing a priority for individuals who are blind issued under the Randolph-Sheppard Act, 20 U.S.C. 107, must ensure that it complies with the statutory and regulatory requirements of the relevant program. Such contractor or subcontractor must, whenever possible, also comply with requirements of this clause, Executive Order 14055, and 29 CFR part 9, to the extent that such compliance would not result in a violation of the requirements of the relevant program.

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, in writing, 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.

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.

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), *https://www.dol.gov/agencies/whd.* If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Jessica Looman,

Administrator, Wage and Hour Division.

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