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Chief, Regulatory Analysis Branch  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

RE: RIN 1235-AA02  
Comments of the Society for Human Resource Management regarding the U.S.  
Department of Labor’s (DOL) Notice of Proposed Rulemaking Implementing the January  

The Society for Human Resource Management (SHRM) welcomes the opportunity to submit comments in response to the Department of Labor’s (DOL) March 19, 2010 proposed rule implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts.

SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM’s membership comprises HR professionals who are responsible for developing and administering their employer’s human resource policies and practices, including policies and practices relating to hiring, compensation, promotion, training, and termination of employees.

SHRM recognizes and supports the federal government’s procurement interests in economy and efficiency and in avoiding disruption of the delivery of services during the period of transition between service contractors. As a practical matter, many federal contractors operating under the Service Contract Act will hire some individuals who were employed by the previous contractor. However,
mandating that a new contractor give a right of first refusal to the previous workforce will stifle innovation, possibly deny the federal government new, more efficient and less costly services, and potentially discourage small, innovative companies from bidding on federal contracts covered by the Service Contract Act. Moreover, the proposed rule creates several practical human resource challenges for the new contractor. SHRM is very much concerned that the proposed notice’s emphasis on employee retention devalues the important considerations of human capital and firm-specific competencies thereby compromising and/or eliminating economy and efficiency in federal government procurement. SHRM recommends that the Secretary of Labor advise the President to revisit the mandatory nature of the Executive Order. In accordance with this recommendation, SHRM advises that successor contractors to federal government service contracts should be encouraged, not required, to hire the predecessor service contractor’s employees so long as timely access is both possible and provided to facilitate the successor contractor’s standard hiring and screening procedures.

In addition to recommending that a permissive approach be adopted, the Society has several practical concerns with the proposed rule. First, the proposal leaves insufficient time between the contract award and the start date to perform the necessary processes to hire these employees. The proposed rule, in sections 9.12(a)(1), (2), and (e), requires the predecessor contractor to provide the Contracting Officer with a list of all employees working on the service contract during the final 30 calendar days of the contract not less than 10 days before contract completion. The successor contractor must provide a right of first refusal to the predecessor’s employees, and the proposed rule mandates a minimum of 10 days for a predecessor’s employee to accept or reject the offer of employment. Even where a successor contractor intends to continue employing its own employees (who have worked for the contractor for at least three months preceding the commencement of the service contract), it is highly unlikely that relevant information, much less all relevant information used to make hiring decisions, can be assembled by the predecessor and transferred to and reviewed by the successor to afford informed hiring in a timely fashion.

During this short transition time, the successor contractor would have to facilitate the gathering and transfer of relevant information regarding the predecessor’s employees, enable the employee application process, perform interviews and reference checks, and provide new employee orientation and firm specific training. This will prove extremely difficult to perform in 10 days. For these reasons, SHRM proposes that the rule allow, at a minimum, at least 30 calendar days in advance of a successor’s performance start date and mandate that relevant data, such as the date of hire, hours worked for the previous six months, seniority list, training, discipline record, evaluations, references, job classification, and pay rate and benefits, be provided to the new contractor. Finally, the minimum period for a successor’s receipt of mandatory data should be expanded in relation to the size of the prospective workforce.

SHRM is also concerned that the proposal could create an incentive for the previous contractor to move its more experienced and valuable employees off the contract, leaving less productive or far less experienced employees to complete the service contract. Under the proposed rule, the new contractor must offer jobs to these employees, even though they may not be experienced enough or qualified for the positions. To address this possibility, SHRM recommends that the proposed rule be amended so that, in any situation where a predecessor contractor retains 10 percent or more of its workforce employed during the 90 calendar days preceding the completion of the Federal contract, the successor contractor be relieved of any requirement to hire any of the predecessor’s employees.

SHRM is further concerned that a predecessor contractor may not maintain or provide thorough records, evaluations, and accurate information of its service contract employees to enable informed
selection by the successor contractor. Where relevant data does not exist and/or is not made available in a timely fashion, SHRM recommends amending the proposed rule so that the successor contractor is afforded the opportunity to notify the Contracting Officer and be relieved of any right of first refusal obligation to any of the predecessor’s service contract employees. Where a Contracting Officer rejects a successor’s notification as lacking merit, SHRM recommends a right of appeal to the Government Accountability Office (GAO).

SHRM also has serious concerns regarding the proposed rule’s application when the predecessor’s workforce failed to meet the terms and conditions of the previous service contract. It would not serve the best interests of the federal government to require the new contractor to offer employment to the previous workforce if they did not provide timely service quality, when the predecessor experienced high workforce turnover, and/or where the predecessor’s workforce was less qualified than available open-market job applicants. In such a case, repeated failure is almost guaranteed. Poor business processes, lack of supervisory oversight, employee turnover, and absence of training affect employees both directly and indirectly. Improvements in federal economy and efficiency cannot be realized by imposing an unqualified workforce, or one that did not provide the government value, on a successor. SHRM recommends that in any situation where a predecessor’s service is regarded as compromised and delivery targets were missed, a successor contractor should be relieved of the requirement to provide a right of first refusal.

Finally, SHRM is concerned that the proposed regulatory requirements effectively override employers’ freedom under the National Labor Relations Act (NLRA) [29 U.S.C. §§ 151 et. seq.] to avoid work force continuity and resulting successor liability. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) and NLRB v. Burns Int’l Sec. Servs., 406 U.S. 272 (1972). Case law under the NLRA acknowledges that a mere change in ownership is not by itself such a significant circumstance as to relieve the successor employer from an obligation to bargain with a representative of the predecessor’s employees should there be one. However, if the successor’s operating structure and practices differ to the extent that the predecessor’s bargaining unit is no longer relevant or where the successor assembles, without unlawful discrimination, a workforce which does not consist of a majority of the predecessor’s employees, there is no continuing or carryover obligation to recognize and bargain with the predecessor’s employees. The proposal strips service providers of their statutory rights under the NLRA to select their workforces while lawfully avoiding a predecessor’s recognition and bargaining obligations, if any.

The proposed rule also requests assistance regarding definitions of “managerial” and “supervisory” employee. To avoid a proliferation and possible contradiction of statutory and regulatory definitions making good-faith compliance more difficult, SHRM recommends that the DOL embrace the definition of “supervisor” under the NLRA, 29 U.S.C. § 152(11) and case law treatment of “manager” by the U.S. National Labor Relations Board (NLRB). NLRB v. Bell Aerospace Co. Division, 416 U.S. 267 (1974); General Dynamics Corp., Convair Aerospace Div., 213 NLRB 851 (1974).

In conclusion, SHRM finds the proposed rule and the Executive Order’s contract clause troublesome for the federal government, employees, and employers for the reasons outlined above. The proposed rule undoubtedly will cause delay and disruption to the delivery of contracted services, may dissuade service contractors from doing business with the federal government, imposes counter-productive direct and indirect costs to employers, risks loss of the prospective service contractor’s value-proposition to the federal contracting agency or department, strips service providers of rights under federal labor law, and may convince service employees to cease working for federal contract service providers to ensure themselves greater employment stability. The impact of the proposed
regulation on service contractors and subcontractors is far-reaching given the relatively low contract dollar threshold.

Thank you for the opportunity to comment on the proposed rule. SHRM welcomes the opportunity to contribute further on this very important issue. For additional information or clarification of our concerns, please contact me at 703-535-6027.

Sincerely,

Nancy Hammer
Society for Human Resource Management