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COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby submits these comments in response to the notice of proposed rulemaking published by the Wage and Hour Division of the Department of Labor (DOL) titled Nondisplacement of Qualified Workers Under Service Contracts, 87 Fed. Reg. 42,552 (July 15, 2022) (the NPRM or the proposed rule).

The AFL-CIO is a federation of 57 national and international unions representing more than 12 million working men and women. The AFL-CIO's affiliates include numerous unions that represent workers covered by the Service Contract Act (SCA) who are potentially subject to the proposed rule.

When the DOL previously published a similar proposed rule in 2010, Nondisplacement of Qualified Workers Under Service Contracts, 75 Fed. Reg. 13,382 (March 19, 2010) (Notice of Proposed Rulemaking), in order to implement President Obama's Executive Order 13495, the AFL-CIO submitted extensive comments. *See* AFL-CIO Comments submitted in RIN1215-AB69; RIN 1235-AA02 (May 18, 2010). The DOL adopted several of the AFL-CIO's suggested changed in the Final Rule. *See* Nondisplacement of Qualified Workers Under Service Contracts, 76 Fed. Reg. 53,720 (Aug. 29, 2011) (Final Rule) ("the Obama Rule").

The operation of the Obama Rule was a resounding success in ensuring that the Federal Government's procurement interests in economy and efficiency were served by requiring in most instances that a successor contractor hire the predecessor contractor's employees. For the same reasons the AFL-CIO previously supported the Obama Rule, the AFL-CIO now supports the proposed rule here, which reinstates and refines that prior rule.

In particular, the AFL-CIO strongly agrees with the basic policy that underlies this proposed rule:

> 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. Using a carryover work force 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 work force that is familiar with the Federal Government's personnel, facilities, and requirements. 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.

Nondisplacement of Qualified Workers Under Service Contracts, Executive Order 14055 § 1 (Nov. 18, 2021).

In particular, the AFL-CIO strongly supports the two refinements the proposed rule makes to the Obama Rule, both mandated by Executive Order 14055:

(1) requiring "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"; and

(2) specifying certain procedural requirements that a contracting agency must complete before "grant[ing] an exception from the [nondisplacement] requirements of the order for a particular contract."

87 FR 42,554.

In the sections that follow, the AFL-CIO provides comments regarding these two important refinements to the Obama rule and responds to additional questions raised by the DOL in the NPRM regarding other topics.

I. The Location Continuity Provision

Section 9.11(c)(1) of the proposed rule states that "[w]hen 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." If so, "the agency must . . . include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities." § 9.11(c)(2).

The AFL-CIO strongly supports this location continuity provision for the reasons stated in the NPRM:

> The benefits of using a carryover workforce and location continuity are intertwined because, for many contracts, moving performance to a different locality will mean that most (or all) of the incumbent contractor's workers will ultimately not be able or willing to relocate and therefore will not provide a carryover workforce.

87 FR 42,565. That is, absent a location continuity requirement, there is a significant risk that the broader benefits of the nondisplacement rule will not be realized. *See ibid.* (recognizing that, even if the nondisplacement requirement is included in a solicitation, "the contract clause may have a more limited effect if a contract is moved beyond commuting distance from the predecessor contract"). *See also* Comments of SEIU, CWA, *et al.* ("Coalition comments") at 18 (providing example of incumbent employees displaced under the Obama Rule, which did not contain a location continuity provision). The location continuity provision, therefore, significantly strengthens the overall nondisplacement rule.

The DOL poses several specific questions with regard to the location continuity provision, to which the AFL-CIO responds below.

The DOL requests input "on an appropriate time limit within which interested parties would have to request reconsideration." 87 FR 42,564-65. Proposed Section 9.11(c)(3) states that "[a]gencies must complete the location continuity analysis . . . prior to the date of issuance of the solicitation." Accordingly, when an agency decides *not* to include a location continuity requirement or preference, the agency is only required to provide notice to affected workers and their collective bargaining representatives "within 5 business days *after* the solicitation is issued." *Ibid.*

(emphasis added). The workers or their representatives are then entitled to request reconsideration of that aspect of the solicitation. *Ibid.*

The AFL-CIO submits that requiring notice to workers and their representatives only *after* the solicitation has issued is too late. Instead, agencies should be required to provide notice of an adverse location continuity decision well *before* the solicitation issues so that workers or their representatives can request reconsideration of the decision by the contracting agency before it is given effect in the solicitation. In addition, the rule should include a right to appeal to the Secretary of Labor so that the Secretary, as an independent arbiter, can consider afresh any issues raised in the request for reconsideration that was rejected by the contracting agency.[1]

The AFL-CIO agrees with the proposed timeframe suggested by the Coalition in their comments. *See* Coalition comments at 16-17. What matters most is that there be ample time for interested parties to request reconsideration and have that request adjudicated *prior* to the issuance of the solicitation.[2] It need hardly be stated that taking the time to address the important issue of location continuity prior to the issuance of the solicitation is a more efficient approach than having to potentially re-solicit a contract if a request for reconsideration is granted. By structuring the reconsideration and appeal process in the manner suggested, all interested parties can have certainty about their rights and responsibilities before the solicitation is issued.

The DOL asks whether Section 9.11(c) "should provide additional guidance on the relevant factors that an agency should consider when it is considering location continuity." 87 FR 42,565. For example, the DOL asks whether contracting agencies should "start with a presumption in favor of location continuity in order to secure the full benefits of the nondisplacement clause on workforce retention." *Ibid.*

The AFL-CIO strongly encourages the DOL to apply a presumption in favor of location continuity and require a contracting agency that wishes to rebut that presumption to do so by a showing of clear and convincing evidence that not requiring location continuity in the solicitation is necessary to achieve the Federal

[1] Where the Department of Labor is the contracting agency, the regulations should provide for an alternative agency head to decide the appeal.

[2] In the event that the DOL determines not to provide for a pre-solicitation process for adjudicating requests for reconsideration, the AFL-CIO urges the agency to allow interested parties to request reconsideration at any time before the contract is awarded. *See* 87 FR 42,564-65 (suggesting this possibility).

Government's procurement interests in economy and efficiency. In accordance with the general presumption that government agencies act rationally, it is appropriate to presume that the work was located where it has historically been undertaken by the predecessor for a substantial reason and, therefore, that the burden should be on the agency to explain why it should be moved. This approach is in keeping with the reality that, in many cases, "location continuity" is "particularly important because the use of a carryover workforce provides critical benefits," such as "where the incumbent workforce on the contract handles classified information or sensitive information, such as personal, financial or identifiable information." 87 FR 42,565. And, in almost all cases, contracting agencies 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." *Ibid.* It is thus entirely appropriate for the contracting agency to carry the burden of showing that the Federal Government's procurement interests are best served by *not* requiring that the work be performed in the same locality.

DOL also inquires whether an agency's failure to follow the procedural requirements for a location continuity determination should make such a determination "ineffective as a matter of law," in the same manner as the proposed regulation treats procedurally-deficient exception determinations. 87 FR 42,566.

The AFL-CIO strongly urges DOL to treat procedurally-deficient location continuity determinations in the same manner as exception determinations. As the core policy statement of Executive Order 14055 reproduced above makes clear, the "same benefits" provided by the carryover work force requirement "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." E.O. 14055 § 1. Conversely, as a practical matter, "moving performance [of a contract] 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." 87 FR 42,565. Given these realities, it makes sense to treat both of these core requirements similarly, including with regards to penalties for a contracting agency's noncompliance.

II. Procedural Safeguards in the Issuance of Exceptions

The AFL-CIO strongly supports the procedural safeguards contained in the proposed rule with regard to instances when a contracting agency decides to except a particular contract from the nondisplacement rule's requirements. These safeguards ensure that the important policy of ensuring that contractors "offer

qualified employees employed under the predecessor contract a right of first refusal of employment under the successor contract," 87 FR 42,552, will be consistently enforced and that any exceptions to this policy will be granted only upon a determination based on objective criteria and supported by concrete evidence that *not* requiring the nondisplacement of incumbent workers will in fact affirmatively serve the Federal Government's procurement interests in economy and efficiency.

Specifically, the AFL-CIO supports the following procedural safeguards concerning exceptions set forth in the proposed rule:

(1) requiring that any exception decision be made by the senior procurement executive within the agency, § 9.5(a);
(2) requiring a specific written explanation of the facts and reasoning supporting any exception decision, § 9.5(b), with specific requirements for certain categories of determinations, § 9.5(d);
(3) providing specific factors that the agency may and may not consider with regard to whether an exception is appropriate, § 9.5(c);
(4) requiring notice to affected workers and their collective bargaining representatives of exception decisions, as well as the publication of such decisions on a centralized public website and quarterly notice to the Office of Management and Budget, § 9.5(g);
(5) providing a right of any interested party to request reconsideration of an exception decision, § 9.5(f); and
(6) providing clear guidance that an agency's failure to timely comply with these requirements will render the exception decision "inoperative," § 9.5(b).

Similar to the location continuity provision, the DOL requests input "on whether there should be a time limit within which interested parties would have to request reconsideration" of agency exception decisions. 87 FR 42,562-63. Proposed § 9.5(g) requires an agency to provide notice of an exception decision to workers and their representatives, and § 9.5(f) provides interested parties a right to request reconsideration of such a decision, but neither provision provides a specific time frame for notice or for the filing of a request for reconsideration. Section 9.5(b) states that a contracting agency must make any exception decision, including its written explanation for that decision, "no later than the solicitation date."

The AFL-CIO submits that the DOL should adopt the same timeline for the issuance of exception decisions, for requests for reconsideration, and for appeals of such decisions to the Secretary of Labor as set forth in the preceding section concerning location continuity decisions. *See* pages 3-4, *supra*. Exception

decisions, like location continuity decisions, are central to whether the proposed rule will have its intended effect in any given contracting situation. Any dispute over whether a particular contract should be excepted from the nondisplacement requirements, therefore, should be resolved before the solicitation is issued.

III. Additional Comments

In addition to expressing our strong support for those aspects of the proposed rule discussed in the preceding sections, the AFL-CIO provides the following additional comments in response to two specific questions raised by the DOL in the NPRM as well as two additional comments regarding the proposed rule.

A. Coverage of sub-contracts to covered prime contracts

The proposed rule states that, while prime contracts that do not meet the simplified acquisition threshold are excluded from the nondisplacement rule's requirements, "[i]f a prime contract meets or exceeds the simplified acquisition threshold and meets the other coverage requirements [], then each subcontract for services under that prime contract will also be subject to the [nondisplacement] requirements of this part, even if the value of an individual subcontract is under the simplified acquisition threshold." § 9.4(a)(2). The nondisplacement rule "does not apply to non-service subcontracts between a subcontractor and a prime contractor of use on a covered Federal contract." 87 FR 42,559. "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 . . . because it is a supply contract rather than a subcontract for services." *Ibid.* DOL requests comment on the provision applying the nondisplacement requirement to subcontracts for services under covered prime contracts. *Ibid.*

The AFL-CIO supports this provision as an important tool for ensuring that contractors do not evade the nondisplacement requirements by contracting out covered service functions to subcontractors who fall below the simplified acquisition threshold. Conversely, the clear limitations included in the proposed rule – that the nondisplacement requirement only applies to subcontractors of prime contractors who themselves are covered and does not apply to non-service subcontractors at all – ensures that the proposed rule does not unintentionally impact subcontracts that fall outside the intended sweep of the nondisplacement policy. The AFL-CIO therefore supports this appropriately-tailored provision.

B. Just cause

Section 9.12(c)(3)(i) of the proposed rule states that "[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." The proposed rule makes clear that any just cause determination "must be made on an individual basis for each employee." § 9.12(c)(3)(ii)(A). In contrast, "[i]nformation regarding the general performance of the predecessor contractor is not sufficient[.]" *Ibid.* Moreover, the proposed rule adopts a presumption that "there [is] no just cause to discharge any employees working under the predecessor contract in the last month of performance," absent "reliable evidence" to the contrary. § 9.12(c)(3)(ii). The DOL seeks comment on this provision. 87 FR 42,569.

The AFL-CIO strongly supports the just cause requirement. As a matter of common sense, the fact that an employee worked for the predecessor contractor through the end of the contract constitutes strong evidence that the employee is qualified to continue undertaking the same or similar work for the successor. In contrast, any claim by the successor contractor – who, by definition, has not routinely observed the employee's work – that the employee is unqualified should be treated with a great deal of skepticism.

The AFL-CIO does suggest that the DOL clarify one aspect of the just cause provision in the Final Rule. In § 9.12(c)(3)(ii)(A), the DOL states that "a successor contractor may demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable written evidence that the predecessor contractor initiated a process to terminate the employee for conduct warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired." Needless to say, the mere *initiation* of a termination process by the predecessor contractor does not constitute evidence that that employer had just cause to discharge the employee. But for the timing of the change of contractors, the predecessor, confronted with contrary evidence by the employee or the employee's representative, might well have reduced the discharge to some lesser penalty or no penalty at all. And, because collective bargaining agreements frequently contemplate the arbitration of disputes arising under the agreement even after the agreement has expired, *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), it would not be unusual for an arbitrator to rule in the employee's favor after the successor has taken over the contract. In either case, there

clearly would *not* be just cause for the successor employer to deny a right of first refusal to the employee. The DOL should thus strike the first sentence of § 9.12(c)(3)(ii)(A) from the Final Rule.

C. Scope of Coverage

Unlike the Obama Rule, proposed § 9.4 does not exclude "contracts awarded for services produced or provided by persons who are blind or who have severe disabilities." 87 FR 42,559. That is fully in accord with Executive Order 14055, which, in contrast to the Obama-era Executive Order, does not exclude such contracts from the nondisplacement rule's coverage. *Ibid.*

The AFL-CIO supports the broad scope of coverage of the proposed rule. Specifically, the AFL-CIO supports the proposed rule's coverage of contracts awarded under the Javits-Wagner-O'Day Act, which requires that three-quarters of the work performed on "AbilityOne" contracts must be performed by workers with disabilities. *See* 41 U.S.C. § 8501(6), (7). The economy and efficiency benefits to the Federal Government's procurement interests of retaining trained, qualified workers on AbilityOne contracts should be similar as with regard to service contracts generally. And, treating AbilityOne contracts in the same manner as other contracts subject to the proposed rule is consistent with promoting integrated employment in which workers with disabilities work alongside nondisabled workers and enjoy the same rights and protections. *See generally* Coalition comments at 11-13.

D. Requiring job offers in writing

Section 9.12(b)(3) of the proposed rule states that "[t]he successor contractor must, in writing or orally, offer employment to each employee." That offer must also "state the time within which an employee must accept an employment offer," which in no case may "be less than 10 business days." § 9.12(b)(2). Successor contractors are required to "maintain copies of any written offers of employment or a contemporaneous written record of any oral offers of employment." § 9.12(f)(2).

Important nondisplacement rights attach once the job offer is made and are keyed to the timing of that offer. It is self-evident that there is a significantly increased likelihood of factual disputes about the content and timing of such offers when they are made orally rather than in writing.

The AFL-CIO thus suggests that the DOL amend the Final Rule to require that all job offers be made in writing. This small change would not create any serious burden on successor contractors; indeed, since contractors are already required to keep written records of oral job offers, it makes little sense not to simply require written job offers in the first place. Such a rule would strongly support the Federal Government's interests in economy and efficiency in the contracting process by avoiding unnecessary disputes over the content and timing of job offers.

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The AFL-CIO greatly appreciates the opportunity to provide these comments on the proposed rule.

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Respectfully submitted,

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