

**SUPPORTING STATEMENT**  
**NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS**  
**PROPOSED REGULATIONS, 29 C.F.R. PART 9**  
**OMB CONTROL No. 1215-0190**

**A. Justification**

**1. Circumstances Necessitating Information Collection**

On January 30, 2009, President Obama signed Executive Order (E.O.) 13495, “Nondisplacement of Qualified Workers Under Service Contracts.” 74 Fed. Reg. 6103. The E.O. generally requires Federal service contracts and their solicitations to include a clause requiring the successor contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer suitable employment (i.e., positions for which the employees are qualified) on the contract to those predecessor employees whose employment will be terminated as a result of the award of the successor contract. *Id.* The E.O. contains a number of exclusions, including exempting contracts under the simplified acquisition threshold (currently \$100,000) and certain contracts awarded for services produced or provided by persons who are blind or have severe disabilities. The Secretary of Labor is responsible for investigating and obtaining compliance with the E.O. The E.O. also directs the Secretary, in consultation with the Federal Acquisition Regulatory Council, to issue implementing regulations within 180 days of the date of the Order to the extent permitted by law.

E.O. 13495 revokes former President Bush’s E.O. 13204 of February 17, 2001, which rescinded former President Clinton’s E.O. 12933 of October 20, 1994, entitled “Nondisplacement of Qualified Workers Under Certain Contracts.” *See* section 7 of E.O. 13495; *see also* 59 Fed. Reg. 53559 (Oct. 24, 1994) and 66 Fed. Reg. 11228 (Feb. 22, 2001). The E.O.s all relate to nondisplacement of service workers on Federal contracts; however, the earlier orders applied to solicitations and building service contracts for public buildings, whereas E.O. 13495 covers all types of services.

The Department of Labor (DOL) has issued a Notice of Proposed Rulemaking (NPRM) to implement the requirements of E.O. 13495. The information collections contained in the proposed rule, 29 C.F.R. Part 9, are based on the regulations implementing E.O. 12933. Control Number 1215-0190 applied to information collection requirements contained in the earlier rule, and the DOL seeks to reinstate that clearance number.

**A. Offers of Employment**

The employee nondisplacement contract clause specified by section 5 of the E.O. and proposed 29 C.F.R. § 9.11(a), with certain exceptions, requires the successor contractor and its subcontractors to make good faith employment offers to those employees who

performed work on the predecessor contract and whose employment will be terminated as a result of award of the contract or the expiration of the contract under which the employees were hired.

Proposed 29 C.F.R. § 9.12(b)(1) generally requires the contractor, before offering employment on the successor contract to any other person, to make a bona-fide express written or oral offer of employment on the contract to each employee who has performed work during the last thirty days of the predecessor's contract performance at the same location. Proposed §§ 9.12(f)(2)-(3) also require the successor service contractor to maintain for three years copies of certain records that are subject to Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act; including 1) any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any employee meeting(s) at which the offers were extended; a summary of each meeting; a copy of any written notice that may have been distributed, and the names of the employees from the predecessor contract to whom an offer was made; and 2) any record that forms the basis for any exclusion or exemption claimed from the nondisplacement requirements. See 44 U.S.C. §§ 3502(3), 3518(c)(1); 5 C.F.R. §§ 1320.3(c), -4(a)(2), -4(c). The DOL notes that the proposed rule does not require contractors to create any record regarding any basis for claiming an exclusion or exemption from the nondisplacement provisions of Federal service contracts; however, the contractor would need to retain any such record if created.

#### B. Certified List of Service Employees

Section 5 of the E.O. and § 9.12(e) of the proposed rule require covered contractors and subcontractors, not less than 10 days before completion of the contract, to furnish the Contracting Officer (CO) a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance. 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. *Id.* Proposed 29 C.F.R. § 9.11(c) requires the CO to provide the list to the successor contractor and, on request, to employees or their representatives. Proposed §§ 9.12(f)(2)(iii), (f)(3) then require the successor service contractor to maintain copies of the employee list provided to or received from the contracting agency for three years.

#### C. Complaints

Section 6 of the E.O. gives enforcement responsibility for the requirements of the Order, including investigating and obtaining compliance, to the Secretary of Labor. 74 Fed. Reg. 6105. Proposed 29 C.F.R § 9.21(a) provides a predecessor employee or a representative who believes that the successor contractor has violated the requirements of the Order the opportunity to file a complaint with the CO of the appropriate Federal

agency within 120 days of the alleged violation. Proposed § 9.21(b) allows the complainant to file the complaint directly with the Branch of Government Contracts Enforcement of the DOL's Wage and Hour Division (WHD), if he or she has been unable timely to file the complaint with the CO or the complainant has not received a copy of the report the agency has filed with the WHD within 30 days. The complaint must be filed with the WHD within 180 days of the alleged violation. *Id.*

## **2. Use**

Employees will use the job offers to decide whether to accept a position with the new contractor. The WHD will use the records identified in these information collections to determine compliance with the E.O. and the regulations. Any information provided in support of a complaint will be used to determine whether the WHD should initiate a compliance action. The list of employees on the contract will allow the government and the new contractor to know which employees may be entitled to a job offer under the E.O.

## **3. Technology**

Proposed § 9.12(f)(1) specifies that there is no particular order or form of records prescribed by the proposed regulations. A contractor may meet the requirements of this proposed rule using paper or electronic means, provided the required information is maintained and adequate facilities are available for inspection and copying and transcription of the records. *Id.*

## **4. Minimizing Duplication**

Proposed § 9.12(e) requires incumbent contractors to furnish the contracting agency with a certified list of the names of all service employees working under the predecessor contract and its subcontracts during the last month of contract performance. The existing contract clause specified at 29 C.F.R. §§ 4.6(l) and 4.173 and repeated in the Federal Acquisition Regulation at 52.222-41(n), applicable to contracts subject to the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 351 *et seq.*, already provides for the transfer of a vacation benefit seniority list of anniversary dates of employment of all predecessor service employees to the successor contractor through the contracting agency. The OMB approves the corresponding SCA information collection under Control Number 1215-0150. Contract clause paragraph (c) in section 5 of the E.O. specifically requires the same list to meet the nondisplacement requirements. The nondisplacement requirements apply to a subset of all SCA contractors, and proposed 29 C.F.R. § 9.12(e) allows contractors to use the same list to meet the requirements of both regulations; therefore, the SCA vacation benefit seniority list will satisfy the certified list of service employee requirement under the E.O.

## **5. Minimizing Small Entity Burden**

The job offer requirements in the proposed nondisplacement regulations follow a common business practice. E.O. 13495; proposed 29 C.F.R. § 9.1(a). In order to minimize burden, proposed § 9.12(f)(1) specifies that the nondisplacement regulations prescribe no particular order or form of records and that contractors may use records developed for any purpose to meet nondisplacement requirements, provided the records otherwise meet the regulatory requirements and are fully accessible. In addition, proposed § 9.12(e) specifically allows contractors to use the SCA vacation benefit seniority list required by 29 C.F.R. § 4.6(l)(2) to satisfy the certified list of service employees requirement under the E.O. The DOL has determined that the proposed information collections will not have a significant economic impact on a substantial number of small entities.

## **6. Consequence of Failing to Collect and Obstacles to Reducing Burden**

The E.O. requires the third-party disclosures and the seniority list. Moreover, determining compliance with the E.O. and the proposed regulations would be extremely difficult, if not impossible, were the DOL not to require the records specified in the proposed rule. Complainants would have no means of seeking redress of alleged violations, were the DOL not to sponsor a method of filing complaints.

## **7. Special Circumstances**

There are no special circumstances associated with the conduct of these information collections.

## **8. Public Comments**

The DOL will publish a NPRM for regulations to implement and enforce the E.O. The NPRM will include the information collections discussed in this supporting statement and invited public comments on them during a 60-day period. The NPRM will also provide that comments on the information collection aspects of the proposal can be submitted directly to the OMB. Comments received in response to the NPRM will be addressed at the final rule stage of this rulemaking.

## **9. Payment or Gifts to Respondents**

The DOL will offer no payments or gifts to respondents.

## **10. Assurances of Confidentiality**

The DOL will make no assurances of confidentiality to respondents.

## **11. Sensitive Questions**

The DOL will not request sensitive information in these information collections.

## **12. Estimated Annual Respondent Burden Hours**

According to the Federal Procurement Data System's (FPDS) 2006 Federal Procurement Report, slightly less than 75,000 (74,611) Federal government contract actions were subject to the SCA during that reporting period. The DOL assumes that about 15,000 contract actions per year (slightly more than 20 percent of all SCA covered contract actions in 2006) would be successor contracts subject to the nondisplacement provisions. Subcontracts are not reported in the FPDS, and the DOL has not found a reliable source on which to estimate the number of subcontracts per SCA prime contract. Based on consultations with Federal procurement officials, the DOL assumes that a typical SCA contract has one prime contractor and three subcontractors; therefore, the DOL estimates the information collection requirements of part 9 would apply to approximately 60,000 contracts. 15,000 covered contract actions x 4 contractors = 60,000 contracts.

Further review of FPDS data suggests that, while about 110,000 contractors performed work on Federal service contracts in fiscal year (FY) 2006, only 44,039 contractors performed work on service contracts in excess of \$25,000. See David Berteau, et al., Structure and Dynamics of the U.S. Federal Professional Services Industrial Base 1995–2007, Center for Strategic and International Studies, February 2009, at 26, [http://www.csis.org/media/csis/pubs/090212\\_fps\\_report\\_2009.pdf](http://www.csis.org/media/csis/pubs/090212_fps_report_2009.pdf). Because a lesser number of contractors would perform work on contracts subject to the nondisplacement requirements, the DOL estimates each year about 40,000 contractors and subcontractors will be subject to these information collections.

### **A. Express Offers of Employment**

Based on agency enforcement experience under the SCA, the DOL estimates that each service contract involves an average of approximately 15 employees. Typically, employers would make oral offers of employment at all-employee meetings where the employer need only make notations on a copy of the employee roster of the offer of employment. Otherwise, the employer would likely make offers of employment individually by mail or electronic means. Beyond making the offer of employment, the employer would also be responsible for maintaining copies of any written offers of employment, or contemporaneous written records of any oral offers of employment, and copies of any records that formed the basis for any exclusion or exemption claimed under the proposed rule. As job offers will typically be made in a bulk fashion, the DOL estimates it would take an employer an average of approximately one and one-half minutes per employee to make an offer, whether oral

or written, and another 1/2 minute to file the associated paperwork for each employee, including any paperwork forming the basis for any exclusion or exemption from the obligation to offer employment to a particular employee. Therefore, the DOL estimates an annual disclosure and recordkeeping burden of 30 minutes per contract for a total annual burden of 30,000 hours. 60,000 contracts x 15 third-party disclosures x 2 minutes = 30,000 hours.

**B. Complaints**

Based on previous estimates prepared for the nondisplacement rules promulgated pursuant to former President Clinton’s E.O. 12933 (59 Fed. Reg. 53559), as well as the current E.O., which now includes both prime and subcontracts, the DOL estimates it will receive 170 nondisplacement complaints per year, half of which may include supplemental information filed directly with the WHD for a total number of complainant responses of 255. 170 complaints + 85 supplemental documents = 255 complaint responses.

The DOL estimates that each complaint filing will take about 20 minutes; therefore, the DOL estimates the total burden for filing complaints to be about 85 hours. 255 responses x 20 minutes = 85 hours.

**TOTAL BURDEN ESTIMATES**

Total Annual Respondents . . . . .	40,170.
Total Annual Responses . . . . .	900,255.
Total Annual Burden Hours . . . . .	30,085.

Absent specific wage data regarding the respondents, the DOL has used the November 2009 annual average hourly earnings of \$27.11 for professional and business services industry employees and increased it by 40 percent to account for fringe benefits (a total of \$37.95 per hour) in order to estimate respondent costs. *See The Employment Situation: January 2010*, at 36, Table B-3, Bureau of Labor Statistics, ([http://www.bls.gov/news.release/archives/empisit\\_02052010.pdf](http://www.bls.gov/news.release/archives/empisit_02052010.pdf)). Estimated total annual costs for the value of respondents’ time are \$1,141,726 (rounded). \$37.95 x 30,085 hours = \$1,141,725.75.

**13. Estimated Annual Respondent Capital/Start-Up/Operation/Maintenance Costs**

The DOL associates no respondent costs with the subject information collections, other than the value of time.

**14. Estimated Annual Federal Costs**

The NPRM requires COs to accept complaints from predecessor employees or their authorized representatives and to forward the complaints, along with other supporting documentation, to the WHD within 30 days of the original filing. 29 C.F.R. § 9.11(d). The Federal costs associated with this requirement include the time it takes to gather the documents related to the complaint and to photocopy them for both the complainant and the contractor and the reproduction and mailing cost to forward the copies. Federal costs will also include the cost for the WHD to review the complaint to determine what further action might be appropriate.

The DOL estimates the WHD will receive 170 nondisplacement complaints per year. The DOL has used the 2009 Rest of United States salary table to estimate salary expenses for the contracting agency to compile the complaint documents and to photocopy them. [http://www.opm.gov/oca/10tables/html/RUS\\_h.asp](http://www.opm.gov/oca/10tables/html/RUS_h.asp).

GS-13 Step 4 to review complaint at the WHD and determine whether to schedule compliance action.

170 complaints x 10 minutes review time =	28 hours (rounded)
28 hours x \$43.13 =	\$1208 (rounded)

GS-11 Step 4 to compile and review the complaint and supplemental documents for forwarding:

170 complaints x 20 minutes =	57 hours (rounded)
57 hours x \$30.26 =	\$1725 (rounded)

GS-3 Step 4 to photocopy & assemble complaint documents:

170 complaints x 10 minutes =	28 hours (rounded)
28 hours x \$13.14 =	\$368 (rounded)

Printing costs

170 complaints x 4 pages x 3 copies x \$0.05 per page =	\$102
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Postage:

170 complaints x 3 mailings (DOL, contractor, and complainant) x \$0.47 (\$0.44 each + \$0.03 per envelope) =	\$240 (rounded)
<b>TOTAL ANNUAL FEDERAL COST =</b>	<b>\$3642 (rounded)</b>

**15. Reasons for Program Changes or Adjustments Affecting Public Burdens**

The DOL has proposed regulations to implement E.O. 13495. Those regulations will require the DOL to engage in collecting information in order to ensure workers receive the job offers required by the E.O and document compliance. Burden totals from the prior clearance under OMB control number 1215-0190 (ICR Reference No. 200105-1215-004) were based on E.O. 12933 that covered only solicitations and building service

contracts for public buildings. Burden totals reported in this submission are based on E.O. 13495, which covers all service contracts over \$100,000, with few exceptions. Inflation accounts for higher hourly rates for workers.

As stated earlier (see item A.1.), the DOL has issued an NPRM to implement the requirements of E.O. 13495. The information collections contained in the proposed rule, 29 C.F.R. Part 9, are based on the regulations from 1997 to implement E.O. 12933. *See* 62 Fed. Reg. 28185. Control Number 1215-0190 applied to information collection requirements contained in the earlier rule, and the DOL seeks to reinstate that clearance number.

This information collection control number was discontinued in 2001, when the DOL withdrew the underlying regulations. *See* 66 Fed. Reg. 16126. Due to the fact that these actions predated the institution of the OMB Form 83-D ("Discontinuance Request"), the documentation submitted by the DOL to accomplish the discontinuance was an OMB Form 83-C (nonsubstantive change to a currently approved collection) and, therefore, the collection of information was allowed to expire. *See* ICR Reference No: 200105-1215-004. The ROCIS system now interprets the reinstatement of the ICR and the burden totals associated with the revised version of those regulations as a potential violation of the PRA. However, as noted herein above, the collection was intentionally allowed to expire.

**16. Publishing Data From Information Collection**

The DOL will not publish the results of these information collections.

**17. Display of OMB Approval Expiration**

The DOL does not seek an exception to the requirement to display the expiration date for OMB approval of these information collections.

**18. Exceptions to Certification Statement**

The DOL is not requesting an exception to any of the certification requirements for these information collections. This request complies with 5 C.F.R. § 1320.9.

**B. Employing Statistical Methods:**

Not applicable.