DEPARTMENT OF LABOR

Office of Labor-Management Programs

29 CFR Chapter II and Part 270

RIN 1294–AA13

Permanent Replacement of Lawfully Striking Employees by Federal Contractors

AGENCY: Office of Labor-Management Programs, Office of the American Workplace, Labor.

ACTION: Final rule.

SUMMARY: This final rule implements Executive Order 12954, which was signed by President Clinton on March 8, 1995 and became effective on that date. Executive Order 12954 provides that in procuring goods and services, in order to ensure the economical and efficient administration and completion of contracts, federal contracting agencies shall not contract with employers that permanently replace lawfully striking employees. This final rule also makes a technical amendment to Chapter II of the Department's regulations, changing the heading of that chapter to reflect the earlier establishment of the Office of the American Workplace and its component offices, including the Office of Labor-Management Programs.

DATES: Effective June 26, 1995.

FOR FURTHER INFORMATION CONTACT: Charles L. Smith, Special Assistant to the Deputy Secretary, Office of the American Workplace, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–2203, Washington, DC 20210, (202) 219–6045. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

On March 8, 1995, President Clinton signed Executive Order 12954, ''Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts.'' The Order became effective on March 8, 1995, the date it was signed, and was published in the **Federal Register** on March 10, 1995, 60 FR 13023.

In the Order, the President sets forth the finding that economy and efficiency in procurement are generally advanced by contracting with employers that do not permanently replace lawfully striking employees. That is, the permanent replacement of strikers can adversely affect a contractor's ability to reliably provide high quality goods and services, thereby adversely affecting the Federal Government's economy, efficiency, and cost of operations. The Order then states that ''[i]t is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees.'' The Order further states that all discretion under the Order is to be exercised in accordance with this policy.

The Order then establishes a flexible mechanism, based on case-by-case determinations, designed to ensure economy and efficiency in government procurement involving contractors that have permanently replaced lawfully striking employees. Under the Order, the Secretary of Labor is authorized to conduct investigations, either on the basis of a complaint or on his or her own initiative, and to hold hearings as he or she deems advisable in order to determine whether an organizational unit of a federal contractor has permanently replaced lawfully striking employees.

When the Secretary finds that an organizational unit of a federal contractor has permanently replaced lawfully striking employees, he or she may exercise either or both of two options. First, he or she may find that it is appropriate to terminate existing contracts for convenience; the head of the contracting agency may object to that finding in writing and the termination for convenience shall not be issued.

Second, the Secretary may find that it is appropriate to debar the contractor from future contracts and renewal of existing contracts until the labor dispute is resolved. However, a contracting agency may enter into a contract with the employer if there is a compelling reason to do so.

The Secretary has delegated his authority under the Order to the Assistant Secretary for the American Workplace in Secretary's Order No. 2–95, which was signed on March 8, 1995 and published in the **Federal Register** on March 13, 1995, 60 FR 13602.

On March 29, 1995, the Department published a notice of proposed rulemaking, 60 FR 16354, setting forth proposed regulations implementing the Order. The notice also invited comments from the public, with the comment period ending April 28, 1995.

II. Summary and Discussion of the Comments

Fifty comments were submitted and considered. (Two additional comments were not considered. One was postmarked after the next business day after the expiration of the comment period, and the other was dated after the expiration of the comment period.)

Thirty-four officials from the following employers and employer associations submitted comments:

—Phoenix Cement,
—RC Cement Company, Inc. (4 officials),
—Hercules Cement Company (2 officials),
—Kaiser Cement Corporation,
—Heartland Cement Company (2 officials),
—National Association of Hosiery Manufacturers,
—Roanoke Cement Company,
—Signal Mountain Cement Company,
—National Electrical Contractors Association, Puget Sound Chapter,
—National Association of Plumbing-Heating-Cooling Contractors,
—Medusa Cement Company (2 officials),
—Holnam, Inc.,
—National Cement Company of Alabama, Inc.,
—Medusa Aggregates Company (2 officials),
—American Portland Cement Alliance,
—Citadel Cement Company,
—Associated Builders and Contractors, Inc.,
—The Associated General Contractors of America,
—National Mining Association,
—National Private Truck Council,
—Can Manufacturers Institute,
—American Health Care Association,
—Textile Rental Services Association of America,
—National Grocers Association,
—River Cement Company, Selma Plant,
—American Movers Conference,
—Painting and Decorating Contractors of America.

Four comments were received from the following associations:

—Labor Policy Association, Inc.,
—Alliance to Keep Americans Working,
—American Bar Association,
—Society for Human Resource Management.

Two comments were received from the following law firms:

—Wessels & Pautsch (on behalf of unnamed clients),
—Jones, Day, Reavis & Pogue (on behalf of the Chamber of Commerce of the United States of America, the National Association of Manufacturers, Bridgestone/Firestone, Inc., and Mosler Inc.).

Six comments were received from the following labor organizations:

—United Automobile, Aerospace & Agricultural Implement Workers of America,

—International Union of Operating Engineers,
—International Brotherhood of Teamsters,
—Air Line Pilots Association,
—American Association of University Professors,
—United Steelworkers of America.

Two comments were received from the following U.S. government agencies:

—Department of Health and Human Services,
—General Services Administration.

Finally, two comments were received from individuals.

The Department has carefully reviewed and considered all statements made in the comments in developing this final rule. The following is a summary of the comments and the Department's response.

A. Comments on the Definition of ''Lawfully Striking Employee''

Several comments objected to the element of the definition in the proposed regulations which provides that a strike is considered to be lawful until it has been finally adjudicated to be unlawful. These comments stated that final adjudication could take years, thereby keeping the contractor in limbo unfairly. One comment also stated that in the case of clearly unlawful strikes such as ''wildcat'' strikes or strikes in violation of a ''no strike'' contract clause, there should be discretion to deny strikers protection from replacement employees prior to final adjudication.

The proposed regulations do provide discretion, on a case-by-case basis, for the Assistant Secretary to determine that neither debarment nor termination of a contract is appropriate based on the entire record, and the nature of the strike as well as the status of related litigation may certainly be issues for development in the record. However, whether a strike is unlawful under federal, state or local law is generally a complex matter which is most suitably resolved in accordance with the standards and procedures set in those laws. OAW should not as a rule substitute its judgement for that of the relevant agencies and the courts. Accordingly, OAW believes that it is not necessary or appropriate to change the definition of ''lawfully striking employee'' or otherwise modify the regulations to specifically deal with ''clearly unlawful strikes'' since the Assistant Secretary already has sufficient discretion under the proposed regulations.

One comment objected to the reference to ''state or local law'' in the proposed definition because the lawfulness of a strike by employees covered by the National Labor Relations Act (NLRA) cannot be adjudicated under state or local law. Another comment stated that state law characterization of a dispute as a lockout for purposes of unemployment compensation should not affect the determination of whether a dispute is a strike or a lockout under federal law.

The inclusion of the phrase ''state or local law'' in the proposed definition is intended to deal with the situation where an entity of state or local government has a federal contract. State or local law would be pertinent in such cases in determining the lawfulness of a strike. However, state or local law would not affect the characterization or lawfulness of a strike by employees covered by the NLRA or the Railway Labor Act.

Finally, one comment expressed concern over the definition of ''employee,'' which excludes ''supervisors.'' This comment suggested that only those persons with full managerial or supervisory authority should be considered as supervisors excluded from the definition of employee, as recommended in the report of the Commission on the Future of Worker-Management Relations (also referred to as the Dunlop Commission), issued in December 1994. The comment noted that the Supreme Court has interpreted the similar definition of the term ''employee'' in the NLRA as excluding as supervisors persons who incidentally direct other employees' work.

Despite the similarity of the definition of ''employee'' in the proposed regulations to the definition in the NLRA (and perhaps other statutes), and the guidance that may be provided by court or administrative rulings issued pursuant to other statutes or executive orders, the Assistant Secretary is not necessarily bound by those rulings. The Assistant Secretary has the discretion and authority to make decisions on debarment and contract termination on the basis of the entire record in each case so as to effectuate the purposes of the Order.

B. Comments on the Definition of ''Permanently Replaced''

One comment objected to the definition of permanently replaced because it lacks any temporal element and therefore may include any strikers without an unconditional right to reinstatement. That is, an employer that contemplates permanently replacing strikers in the future could be determined to have actually permanently replaced strikers since their reinstatement may be conditional upon return to work at a future time. The comment argues that an employer should not have to declare that striking employees have an unconditional right to reinstatement at any time in order to prevent the Assistant Secretary from concluding that it has permanently replaced its striking employees. The comment concludes by stating that an employer should not be considered to have permanently replaced its lawfully striking employees unless it refuses to reinstate them or declares or evidences that its replacement workers may affect the reinstatement rights of the striking employees.

We do not believe that these concerns are well-founded. Whether or not lawfully striking employees have been permanently replaced at a particular point in time is a factual question to be resolved on the basis of the entire situation at that time, including (as the commenter appears to note with approval) the employer's declarations and other evidence from the employer's actions that its replacement workers may affect the reinstatement rights of the striking employees.

Another comment suggested that the definition of ''permanently replaced'' be revised to include situations where a contractor has entered into a contract with another entity to provide the goods or services required by the contract as well as the situation where a contractor permanently replaces its striking employees with replacement employees. However, OAW does not believe it is necessary or appropriate to revise the language of the definition. Under the proposed definition, the Assistant Secretary has the authority and discretion to determine on a case-by-case basis whether the Order is applicable where employees are permanently replaced by subcontracting as well as replaced by hiring new employees.

C. Comments on the Definitions of ''Organizational Unit'' and ''Affiliate''

The largest number of specific comments concerned the definitions of the terms ''organizational unit of a federal contractor'' and ''affiliate.'' Several comments simply asked questions concerning the scope of the application of the Order and the regulations. For example, these questions included whether the Order applies to a federal contractor whose sister company permanently replaces lawfully striking employees, whether it applies to a contractor as a whole or just the organizational element that is doing the work on a federal contract, and

whether it applies only to situations in which workers on a federal contract are replaced.

Many comments suggested that the proposed regulations be revised so as to limit the scope of the Order's application. For example, one comment suggested generally that affiliates or sister companies of a federal contractor should not be subject to the Order; another comment suggested that, for nursing home chains, the Order's application should be limited to the specific facility that permanently replaced lawfully striking employees.

On the other hand, several comments suggested that the proposed regulations be revised to expand the scope of the Order's application. For example, one comment suggested that the Order should apply to sister companies to which work in connection with a federal contract is transferred when the primary contractor has permanently replaced lawfully striking employees; another comment suggested that, for institutions of higher learning, the Order should apply to the entire university and not to just the Department which has the federal contract.

The number and variety of the particular situations described in the comments underscore the rationale for making determinations on the Order's application on a case-by-case basis rather than attempting to establish general rules to cover all situations. Further, in a rulemaking action it is not appropriate to make determinations about specific situations or particular industries described in the comments.

Nevertheless, the following general comments can be made on the questions and situations raised in the comments regarding the definitions of organizational unit of a federal contractor and affiliate.

In the case where (1) Corporation XYZ is a prime contractor holding a contract with a contracting agency, (2) Division A of Corporation XYZ is responsible for performing the contract, and (3) Division B of Corporation XYZ performs no work on the contract but could provide the goods or services required to be provided under the contract, then Corporation XYZ, Division A, and Division B (and any other affiliates of Corporation XYZ that could provide the goods or services required by the contract) form an ''organizational unit of a federal contractor'' under the regulations. If any part of the organizational unit permanently replaces lawfully striking employees (including, for example, employees of Division B who are not performing work on the federal contract), then the entire organizational unit would be subject to debarment if appropriate, and any contracts over $100,000 which any part of the organizational unit has with a contracting agency would be subject to a finding of whether termination for convenience is appropriate.

With regard to questions and comments concerning subcontractors, the Order is directed only to prime or first tier contractors. Thus, § 270.1(e) defines ''contractor'' as a ''prime contractor,'' which is defined at § 270.1(p) as any person holding a contract with a contracting agency. One comment noted that the regulations implementing Executive Order 11246, which deals with nondiscrimination in employment by government contractors, explicitly covers subcontractors as well as federal contractors. However, Executive Order 11246, unlike Executive Order 12954, specifically includes subcontractors within its coverage. There is no basis for revising the proposed regulations to include subcontractors.

In addition to these general questions and comments, there were two narrower issues raised in the comments. One comment suggested that the second part of the proposed definition of ''organizational unit of a federal contractor,'' relating to affiliates, be revised to include only affiliates that actually *provide or will provide* the goods or services required by the contract rather than affiliates that *could* provide those goods or services. However, OAW believes that the proposed definition is more consistent with the findings and purposes of the Order.

Finally, one comment suggested that the definition of ''affiliate'' in the Federal Acquisition Regulation (FAR) be used. However, the definition in the proposed regulations closely follows the FAR definition in all material respects.

D. Comments on Time Frames

Several comments suggested the addition of time frames to the procedures in the regulations. One of these comments suggested that the regulations at § 270.11, concerning investigations, be revised so that an agency which has a contract with a contractor that may have permanently replaced lawfully striking employees be formally notified at the beginning of the investigation. (Currently the only reference to notification of interested agencies is after the Assistant Secretary's decision that debarment and/or termination of the contract is appropriate.)

OAW believes that in most if not all cases, agencies will receive early notification since one of the first steps in an investigation will very likely be to obtain information from the contracting agency about the existence and amount of the contract with the contractor that may have permanently replaced lawfully striking employees. Therefore, OAW does not believe that it is necessary or appropriate to put a formal notification requirement in the regulations inasmuch as it is possible in some cases that the matter will be dismissed solely on the basis of preliminary information obtained about whether the contractor has permanently replaced lawfully striking employees, thus making it unnecessary to involve the agency.

One comment suggested that the contractor be notified that it is under investigation within three business days, or some other definite and limited time period, so that the contractor has time to adequately respond to the complaint. OAW does not believe that this is necessary or appropriate since the regulations at §§ 270.12(d) and 270.13 provide sufficient time for a contractor to present its position. In addition, the matter may be dismissed at an early stage based on information obtained relating to the contract and/or whether lawfully striking employees have been permanently replaced, thus obviating the need to notify the contractor.

One comment suggested that contractors be provided thirty days to respond to a notice of proposed debarment, as in the FAR at 48 CFR 9.406–3(c), rather than the fifteen days in proposed § 270.12(d). OAW believes that fifteen days is sufficient time for a contractor to provide information that raises a genuine dispute over material facts, given the limited issues involved in these proceedings. If the contractor has raised a genuine dispute over material facts, it will also be provided the opportunity to present its position at the hearing provided in § 270.13(a).

Another comment suggested the addition of time frames throughout the process for conducting investigations, making findings, holding hearings, etc. OAW does not believe that it is appropriate to set a time frame for all enforcement proceedings because the nature of each proceeding will vary based on the complexity and scope of the issues.

Finally, two comments noted that the regulations do not indicate when a debarment decision becomes effective. The final regulations have been revised at § 270.15(b) to state that debarment is effective immediately upon issuance of the debarment decision. However, unlike the FAR at 48 CFR 9.404 and 9.405, debarment is not effective at the

time of the Assistant Secretary's decision to propose debarment (§ 270.12(d)) since the Order authorizes debarment only after a final decision. (The Assistant Secretary will only transmit the final decision to debar to the General Services Administration for inclusion on the consolidated list of debarred contractors, currently titled the ''List of Parties Excluded from Procurement Programs,'' not information pertaining to the earlier decision to propose debarment.) In order to avoid confusion on this point, the wording of § 270.12(d) has been revised so as to eliminate the use of the term ''notice of proposed debarment.''

E. Resolution of Labor Dispute

One comment suggested certain revisions to § 270.16 concerning the Assistant Secretary's determination that a labor dispute has been resolved. The comment argued that there should be two touchstones for such a determination: (1) whether the parties have resolved their differences and (2) whether the striking employees have returned to work. The commenter proposed that § 270.16 provide that ''an agreement of the parties in which the strikers which have been permanently replaced have returned to work'' be the standard for determining that a labor dispute has been resolved. OAW believes that the current flexible standard in § 270.16, which provides that the Assistant Secretary will consider various factors in determining whether a labor dispute has been resolved, is preferable to a rigid definition.

F. Other Comments

1. Several comments suggested that the regulations be revised to set out standards and criteria for the exercise of discretion in making decisions. Two comments suggested that objective contract performance criteria should be established to govern decisions on whether debarment and/or termination of a contract for convenience is appropriate. Another comment suggested that § 270.15(a) be revised to specify when the scope of a debarment would go beyond the organizational unit which permanently replaced lawfully striking employees. However, in view of the fact that the Order establishes a flexible enforcement mechanism based on case-by-case determinations, OAW has decided that it would not be appropriate to circumvent that enforcement mechanism by unnecessarily limiting the Assistant Secretary's discretion in the regulations.

2. Three comments suggested that this rulemaking procedure be delayed pending the outcome of current litigation challenging the Executive Order, and that the comment period be reopened at the conclusion of the litigation. It is clearly not possible to delay rulemaking; the Order is effective as of the date it was signed and the Secretary has the obligation to promulgate a final rule implementing the Order.

3. One comment noted that under proposed regulations governing nonprocurement debarment and suspension and FAR (59 FR 65607, December 20, 1994), issued pursuant to § 2455 of the Federal Streamlining Act of 1994 and Executive Order 12689, reciprocal effect is to be given to debarment and suspension under FAR (for procurement programs) and under Executive Order 12549 and the implementing regulations (for nonprocurement activity such as grants). Thus, under these proposed regulations, a federal contractor which is debarred under Executive Order 12954 for permanently replacing lawfully striking employees would also be ineligible for nonprocurement activity such as grants. Because of this broad impact, the comment suggested that state and local governments be excluded from the definition of ''person'' so that they could not be considered to be federal contractors.

OAW believes that any impact on state and local government nonprocurement activity, though possible, will at most be rare. First, under most state law, strikes by employees of state entities are unlawful so that Executive Order 12954 will not be applicable. Second, the Assistant Secretary has the authority and discretion to find that debarment in a particular case is not appropriate. Finally, a finding by the Assistant Secretary that termination of the specific contract held by a state entity is appropriate would not have any impact on nonprocurement activity.

4. One comment asked whether it is correct in concluding that an entity is not a contractor subject to the Order solely because it receives Medicare and/or Medicaid reimbursements. This position is correct. The relationship between the federal government and a health care provider receiving payments under the Medicare program or receiving payments from states under the Medicaid program is a grantor-grantee relationship, not a contracting agency-contractor relationship. (Medicaid, unlike Medicare, does not involve a relationship between an executive agency of the U.S. government and a participating health care provider; rather, Medicaid is actually a grant program to the states.) Therefore, a contractor is not covered by the Order by virtue of the receipt of Medicare and/or Medicaid reimbursements.

However, under the proposed regulations referred to in the preceding comment regarding nonprocurement debarment and suspension and FAR, debarment under Executive Order 12954 for permanently replacing lawfully striking employees would also render a contractor ineligible for nonprocurement activity, including grants. Of course, as previously noted, the regulations give the Assistant Secretary the authority and discretion to make determinations on a case-by-case basis on whether debarment is appropriate, or whether termination of the specific contract is appropriate.

5. One comment suggested that the regulations should require that the agency head take certain steps before deciding not to adopt the Assistant Secretary's decisions that debarment and/or contract termination is appropriate, including issuing a notice and allowing the complainant to present his or her position. However, the Order does not provide the authority to require such a procedure.

6. Two comments stated that §§ 270.12 (b) and (c) of the regulations are confusing because under § 270.12(c) a contract can be terminated for convenience only if the contractor is found to have permanently replaced lawfully striking employees after March 8, 1995 (the effective date of the Executive Order) while § 270.12(b) specifies that a contractor can be debarred if the contractor is found to have permanently replaced lawfully striking employees and does not specify a time frame. However, these provisions of the proposed regulations reflect the effective dates for debarment and contract termination in the Order. That is, a contractor may be debarred if the contractor is found to have permanently replaced lawfully striking employees prior to March 8 but, pursuant to section 12(a) of the Order, a contract can only be terminated for convenience if the contractor is found to have permanently replaced lawfully striking employees after March 8.

7. One comment suggested revising proposed § 270.12(d) to include the effects of debarment in the notice to contractors advising of the Assistant Secretary's decision to propose debarment and/or termination. This change has been made.

8. One comment suggested revising proposed § 270.16(b) to state that the Assistant Secretary will specifically notify the General Services Administration of any decision to

terminate debarment because of the resolution of the labor dispute and publish the decision in the **Federal Register**. This suggestion has been adopted in this final rule.

9. Finally, many of the comments questioned the legality and the rationale of the Executive Order. These issues are clearly not within the purview of this rulemaking action.

In addition to promulgating regulations implementing Executive Order 12954, this final rule also changes the heading of Chapter II of Title 29 of the Code of Federal Regulations from ''Bureau of Labor-Management Relations and Cooperative Programs, Department of Labor'' to ''Office of Labor-Management Programs, Department of Labor.'' The Office of Labor-Management Programs, a unit within the Office of the American Workplace, was established by Secretary's Order 2–93 (58 FR 42578) and, among other things, performs functions previously assigned to the Bureau of Labor-Management Relations and Cooperative Programs.

III. Administrative Notices

A. Executive Order 12866

The Department of Labor has determined that this rule is a significant regulatory action as defined in section 3(f) of Executive Order 12866. The Department is issuing this rule in conformance with that Executive Order. The Department has determined that the potential benefits of this regulatory action outweigh the potential costs, and that the rule promotes the President's priorities. This rule does not meet the criteria of section 3(f)(1) of Executive Order 12866 and, therefore, the information in section 6(a)(3)(C) of that Executive Order is not required. This rule has been reviewed by the Office of Management and Budget.

B. Regulatory Flexibility Act

The Agency Head has certified that this rule is not expected to have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act. The Order and the regulations apply only to federal contracts in excess of $100,000.

C. Paperwork Reduction Act

This rule contains no information collection requirements for purposes of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

List of Subjects in 29 CFR Part 270

Administrative practice and procedure; Government contracts; Federal contractors and subcontractors.

Accordingly, Chapter II of Title 29 is amended as set forth below.

Signed at Washington, D.C., this 23rd day of May, 1995.

Charles L. Smith,

Special Assistant to the Deputy Secretary.

CHAPTER II—OFFICE OF LABOR-MANAGEMENT PROGRAMS, DEPARTMENT OF LABOR

1. The heading of Chapter II, now reading ''Bureau of Labor-Management Relations and Cooperative Programs, Department of Labor,'' is revised to read ''Office of Labor-Management Programs, Department of Labor.''

2. A new Part 270 is added to 29 CFR Chapter II to read as follows:

PART 270—OBLIGATIONS OF FEDERAL CONTRACTING AGENCIES: PERMANENT REPLACEMENT OF LAWFULLY STRIKING EMPLOYEES

Subpart A—Preliminary Matters

Subpart B—Enforcement

Subpart C—Ancillary Matters

Authority: Executive Order No. 12954, 60 FR 13023; Secretary's Order No. 2–93, 58 FR 42578; Secretary's Order No. 2–95, 60 FR 13602.

Subpart A—Preliminary Matters

§ 270.1 Definitions.

(a) *Affiliates* means business concerns, organizations, or individuals among which, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interest among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

(b) *Assistant Secretary* means the Assistant Secretary of Labor for the American Workplace.

(c) *Contract* means a mutually binding agreement between the Government as a buyer, represented by a contracting agency, and a seller, where the seller agrees to furnish supplies or services (including construction) and the Government agrees to pay for them. It includes job orders or task orders 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 modifications to a contract, which increase the supplies or services to be delivered under the contract. For purposes of this part a contract is limited to agreements in which the Government agrees to pay an amount in excess of the Simplified Acquisition Threshold of $100,000 specified in section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. 403(11). The term ''contract'' does not include agreements in which the parties stand in the relationship of employer and employee.

(d) *Contracting agency* means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(e) *Contractor* means a prime contractor.

(f) *Department* means the U.S. Department of Labor.

(g) *Deputy Assistant Secretary* means the Deputy Assistant Secretary for Labor-Management Programs, Office of the American Workplace, U.S. Department of Labor.

(h) *Employee* includes any employee of an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, but does not include any individual having the status of an independent contractor or any individual employed as a supervisor.

(i) *Government* means the government of the United States of America.

(j) *Labor dispute* includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(k) *Lawfully striking employee* means an employee who is engaged in a strike

that has not been finally adjudicated to be unlawful under any applicable federal, state, or local law.

(l) *Order* means Executive Order 12954, dated March 8, 1995 (60 FR 13023, March 10, 1995).

(m) *Organizational unit of a federal contractor* includes:

(1) A division or other organizational element of a person that is responsible as the prime contractor for performing a contract, and

(2) Any other affiliate of the person that could provide the goods or services required to be provided under the contract.

(n) *Permanently replaced,* when used in connection with a lawfully striking employee, means that during a lawful strike the employer has placed an individual in the lawfully striking employee's position, and the striking employee does not have an unconditional right to reinstatement.

(o) *Person* means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

(p) *Prime contractor* means any person holding a contract with a contracting agency.

(q) *Secretary* means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

§ 270.2 Statement of Policy.

(a) It is the policy of the Executive Branch of the Federal Government that in procuring goods and services, in order to ensure the economical and efficient administration and completion of contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees.

(b) All discretion under the Order and this part shall be exercised consistent with this policy.

(c) The Order and this part apply only to contracts in excess of the Simplified Acquisition Threshold of $100,000 established in section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. 403(11).

Subpart B—Enforcement

§ 270.10 Complaints.

(a) Complaints may be filed by an employee of an organizational unit of a federal contractor, or his or her representative, alleging that the organizational unit has permanently replaced lawfully striking employees. All complaints should be filed with the Deputy Assistant Secretary for Labor-Management Programs, Office of the American Workplace, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–2203, Washington, DC 20210.

(b) The complaint must be in writing and should include the name, address, and telephone number of the complainant, the name and address of the organizational unit of the federal contractor alleged to have permanently replaced lawfully striking employees, an identification of the lawfully striking employees who were allegedly permanently replaced, and any other pertinent information which will assist in the investigation and resolution of the complaint.

§ 270.11 Investigations.

The Deputy Assistant Secretary may cause an investigation to be conducted of an organizational unit of a federal contractor, regarding the permanent replacement of lawfully striking employees, on the basis of complaints filed with the Department, information submitted by other persons, or other available information. The Deputy Assistant Secretary shall notify the organizational unit of a federal contractor of the initiation of an investigation and the potential consequences under the Order. The Deputy Assistant Secretary may also cause a fact finding hearing to be conducted, either instead of or in addition to an investigation. The Deputy Assistant Secretary shall transmit the record, including a proposed finding of fact and a recommendation as to debarment and/or termination of a contract or contracts, to the Assistant Secretary.

§ 270.12 Findings by the Assistant Secretary.

(a) Upon receipt of the record, the Assistant Secretary shall make a finding as to whether the organizational unit of the federal contractor has permanently replaced lawfully striking employees.

(b) If the Assistant Secretary finds that the organizational unit of the federal contractor has permanently replaced lawfully striking employees, he or she shall determine whether it is appropriate to propose debarment.

(c) If the Assistant Secretary finds that the organizational unit of the federal contractor has permanently replaced lawfully striking employees after March 8, 1995, the effective date of the Order, he or she shall also determine whether it is appropriate to propose termination for convenience of the contract or contracts of the organizational unit.

(d) If the Assistant Secretary proposes debarment and/or termination, he or she shall notify the organizational unit of the proposed debarment and/or termination by certified mail, return receipt requested, advising the organizational unit of the effects of debarment and its right, within 15 days after receipt of the notice, to submit, in person, in writing, or through a representative, information and argument in opposition to debarment and/or termination.

§ 270.13 Hearings.

(a) If the Assistant Secretary finds that the submission by the organizational unit of a federal contractor in opposition to the proposed debarment and/or termination raises a genuine dispute over facts material to the proposed debarment and/or termination, the Assistant Secretary shall afford the organizational unit the opportunity to appear at an informal hearing. The Assistant Secretary or his or her designee shall preside over the proceeding.

(b) The Assistant Secretary shall make a decision on the proposed debarment and/or termination of a contract or contract based on the record.

§ 270.14 Termination of contract for convenience.

(a) Upon finding that termination of a contract or contracts for convenience is appropriate, the Assistant Secretary shall notify the organizational unit of a federal contractor by certified mail, return receipt requested, and shall transmit that finding to the head of any department or agency that contracts with the organizational unit.

(b) The head of the department or agency shall notify the Assistant Secretary in writing of those contracts that have been terminated for convenience pursuant to the Assistant Secretary's finding.

(c) If the head of the department or agency objects to the termination for convenience of a contract, he or she shall notify the Assistant Secretary in writing, promptly after receipt of the Assistant Secretary's finding, of the reasons for not terminating the contract and the termination for convenience shall not be issued.

§ 270.15 Debarment.

(a) The scope of any debarment normally will be limited to the organizational unit of a federal contractor that the Assistant Secretary has found to have permanently replaced lawfully striking employees.

(b) Upon finding that debarment is appropriate, the Assistant Secretary shall promptly notify the organizational unit of the federal contractor by certified mail, return receipt requested. The

notice shall advise the organizational unit of the federal contractor:

(1) That debarment is effective immediately;

(2) That the debarment will not extend beyond the date when the labor dispute precipitating the permanent replacement of lawfully striking employees has been resolved, as determined by the Assistant Secretary in accordance with § 270.16;

(3) That under the debarment, contracting agencies throughout the executive branch of the Government shall not contract or consent to subcontracts with the organizational unit of the federal contractor nor renew or otherwise extend the duration of current contracts, unless the head of a contracting agency or his or her designee determines that there is a compelling reason for such action.

(c) The Assistant Secretary shall notify the Administrator of the General Services Administration of the debarment and the Administrator shall include the contractor on the list of debarred contractors. The Assistant Secretary shall publish or cause to be published in the **Federal Register**, the names of contractors that have, in the judgment of the Assistant Secretary, permanently replaced lawfully striking employees and have been the subject of debarment. Departments and agencies shall not renew or otherwise extend the duration of current contracts or solicit offers from, award contracts to, or consent to subcontracts with these contractors unless the head of the agency or his or her designee determines, in writing, that there is compelling reason for such action.

§ 270.16 Determination of resolution of labor dispute.

(a) The Assistant Secretary may cause an investigation to be conducted, on his or her own initiative or upon request by any person, to determine whether a labor dispute that resulted in debarment has been resolved. Among the factors or conditions that the Assistant Secretary may consider are:

(1) Whether the parties to the labor dispute have either reached a formal settlement or agreed on a procedure for resolving their differences.

(2) Whether the parties have agreed informally to end the labor dispute without the signing of a written agreement.

(3) Whether striking employees have returned to work.

(4) Any other relevant factors tending to lead to the conclusion that the labor dispute has ended.

(b) If the Assistant Secretary determines that the labor dispute has been resolved, he or she shall terminate the debarment and notify the General Services Administration of this action. Notification shall also be given to the public, federal agencies, federal contractors, and other interested persons, through publication in the **Federal Register**, of this action.

Subpart C—Ancillary Matters

§ 270.20 Cooperation with the Assistant Secretary.

Consistent with section 7 of the Order, each contracting agency shall cooperate with the Assistant Secretary and provide such information and assistance as the Assistant Secretary may require in the performance of the Assistant Secretary's functions under the Order and the regulations in this part.

§ 270.21 Rulings and interpretations.

Rulings under or interpretations of the Order or the regulations contained in this part shall be made by the Assistant Secretary or his or her designee.

§ 270.22 Delegation of authority by the Secretary.

Consistent with section 8 of the Order, the Secretary may delegate any function or duty of the Secretary under this Order to any officer in the Department or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 270.23 General.

(a) The regulations in this part implement Executive Order 12954 only and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 10 of the Order, nothing contained in the Order or this part, or promulgated pursuant to the Order or this part, is intended to confer any substantive or procedural right, benefit, or privilege enforceable at law by a party against the United States, its agencies or instrumentalities, its officers, or its employees.

[FR Doc. 95–12960 Filed 5–24–95; 8:45 am]

BILLING CODE 4510–86–P