

IRS Auditorium. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments by October 26, 1995 and submit an outline of the topics (signed original and eight (8) copies) to be discussed by October 26, 1995.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

#### Drafting Information

These regulations were drafted by personnel from the Treasury Department and the IRS.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

**Par. 2.** In § 1.1502-13, paragraph (f)(6) is added to read as follows:

**§ 1.1502-13 Intercompany transactions.** [The text of proposed paragraph (f)(6) is the same as the text of § 1.1502-13T(f)(6) published elsewhere in this issue of the **Federal Register**].

**Michael P. Dolan,**

*Acting Commissioner of Internal Revenue.*

[FR Doc. 95-16971 Filed 7-12-95; 12:56 pm]

BILLING CODE 4830-01-U

#### 26 CFR Part 301

[DL-21-94]

RIN 1545-AS52

#### Disclosure of Return Information to the U.S. Customs Service; Hearing

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Notice of public hearing on proposed regulations.

**SUMMARY:** This document provides notice of a public hearing on proposed regulations which would authorize the IRS to disclose certain return information to the U.S. Customs Service. The regulations would specify the procedure by which return information may be disclosed and describe the conditions and restrictions on the use of the information by the U.S. Customs Service.

**DATES:** The public hearing will be held on Thursday, August 24, 1995, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by Thursday, August 3, 1995.

**ADDRESSES:** The public hearing will be held in the IRS Commissioner's Conference Room, Room 3313, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:DOM:CORP:T:R [DL-21-94], room 5228, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Mike Slaughter of the Regulations Unit, Assistant Chief Counsel (Corporate), (202) 622-7190, (not a toll-free number). **SUPPLEMENTARY INFORMATION:** The subject of the public hearing is proposed regulations that would implement section 6103(l)(14) of the Internal Revenue Code. The notice of proposed rulemaking by cross-reference to temporary regulations were published in the **Federal Register** on Friday, March 11, 1994 (59 FR 11566).

The rules of § 601.601 (a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice and who also desire to present oral comments at the hearing on the regulations should submit not later than Thursday, August 3, 1995, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attenders cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying.

Copies of the agenda will be available free of charge at the hearing.

**Cynthia E. Grigsby,**

*Chief, Regulations Unit, Assistant Chief Counsel (Corporate).*

[FR Doc. 95-17537 Filed 7-17-95; 8:45 am]

BILLING CODE 4830-01-P

#### DEPARTMENT OF LABOR

#### Employment Standards Administration; Wage and Hour Division

#### 29 CFR Part 9

RIN 1215-AA95

#### Executive Order 12933 of October 20, 1994; "Nondisplacement of Qualified Workers Under Certain Contracts"

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Notice of proposed rulemaking, request for comments.

**SUMMARY:** This document proposes regulations to implement Executive Order 12933, "Nondisplacement of Qualified Workers Under Certain Contracts," signed by the President on October 20, 1994 (59 FR 53560, October 24, 1994). The Executive Order requires that workers on a building service contract for a public building be given the right of first refusal for employment with the successor contractor, if they would otherwise lose their jobs as a result of the termination of the contract. The proposed rules contain a contract clause that must be incorporated into each covered contract, implementing regulations, and enforcement procedures.

**DATES:** Comments on the proposed rule are due on or before September 1, 1995.

**ADDRESSES:** Submit written comments to Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card or to submit them by certified mail, return receipt requested. As a convenience to commenters, comments may be transmitted by facsimile ("FAX") machine to (202) 219-5122. This is not a toll-free number. If transmitted by FAX and a hard copy is also submitted by mail, please indicate on the hard copy that it is a duplicate copy of the FAX transmission.

**FOR FURTHER INFORMATION CONTACT:** William W. Gross, Office of Program Operations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 219-8353. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

**I. Paperwork Reduction Act**

Reporting and recordkeeping requirements contained in the regulations (§ 9.9(b) and § 9.11) have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1990 (Pub. L. 96-511) for review.

The public reporting burden for information collection requirements contained in these regulations is estimated to average as follows:

15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The reporting requirements of § 9.11 are already required by the Service Contract Act regulations, 29 CFR 4.6(1)(2), OMB Number 1215-0150, and therefore impose no new burden. The only new requirement is the recordkeeping requirement in § 9.9.

Send comments regarding this burden to the Office of Information Management, U.S. Department of Labor, Room N-1301, 200 Constitution Avenue, NW., Washington, DC 20210; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

**II. Background**

Executive Order 12933 was signed October 20, 1994, by President Clinton, and published in the **Federal Register** on October 24, 1994 (59 FR 53560). The purpose and need for the Executive Order are clearly stated in the Executive Order itself:

When a service contract for the maintenance of a public building expires and a follow-on contract is awarded for the same service, the successor contractor typically hires the majority of the predecessor's employees. On occasion, however, a follow-on contractor will hire a new work force, and the predecessor's employees are displaced.

As a buyer and participant in the marketplace, the Government is concerned about hardships to individuals that may result from the operation of our procurement system.

Furthermore, the Government's procurement interests in economy and efficiency benefit from the fact that a carryover work force will minimize

disruption to the delivery of services during any period of transition and provide the Government the benefits of an experienced and trained work force rather than one that may not be familiar with the Government facility.

In order to address these concerns, Section 1 of the Executive Order makes the following statement of policy:

It is the policy of the Federal Government that solicitations and building service contracts for public buildings shall include a clause that requires the contractor under a contract that succeeds a contract for performance of similar services at the same public building to offer those employees (other than managerial or supervisory employees) under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal to employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor to fail to comply with any provision of any other Executive order or laws of the United States.

The Executive Order requires that the Secretary of Labor issue implementing regulations by April 20, 1995, and that the Federal Acquisition Regulatory Council issue regulations by that date which require inclusion of the contract clause in Federal solicitations and contracts. The Executive Order further provides that the order does not confer any right or benefit enforceable against the United States, but that it is not intended to preclude judicial review of final decisions by the Secretary of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

Key issues addressed in the regulations on which public comment is particularly solicited are summarized and explained in this preamble. As required by the Executive Order, the Department of Labor (DOL) has consulted with the Federal Acquisition Regulatory (FAR) Council with respect to the implementation of the Executive Order.

**III. Summary and Discussion**

*Scope of Coverage*

General Coverage (9.2)

The Executive Order applies only to "building service contracts" for "public buildings" where the contract is entered into by the United States. These terms are defined elsewhere in the regulations. The Order applies only to contracts of an amount equal to or greater than the simplified acquisition threshold, set by the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)) at \$100,000. Because the language of the

Executive Order does not specifically reference subcontracts, the regulations contain no "flow-down" requirements for subcontractors.

Where a contract is for both recurring building services and some other purpose, such as construction, the building services are subject to the Order, but only with respect to the building services portion of the contract. However, where the building services are only incidental, such as incidental maintenance performed under a contract to operate a day-care center, the Order would not apply to such services. The standards used for determining when construction work performed under a mixed contract is covered by the Davis-Bacon Act are utilized in determining when building services are more than incidental. See 29 CFR 4.116(c)(2); 48 CFR 22.402(b)(ii).

It is also important to point out that the coverage principles of the Executive Order are different than those of the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.*, although there is significant overlap between the two programs.

Building Services Contract (9.3)

Section 2(b) of the Executive Order defines the term "building services contract" to include contracts "for recurring services related to the maintenance of a public building, e.g., janitorial, window washing, food service. \* \* \*" The regulations define "recurring services" to include services performed regularly or periodically throughout a contract (and its follow-on contract) at the same building. Contracts which are for non-recurring maintenance services, such as servicing of fixed equipment which is performed only one time each year, and contracts for services which are not maintenance services, such as operation of a day care center, are not subject to the Order.

Public Building (9.4)

Section 2 of the Executive Order defines the term "public building." The definition is patterned after the definition of a public building in Section 13 of the Public Buildings Act of 1959, 40 U.S.C. 612, and the definition in the Executive Order is largely repeated in section 9.4 of the regulations. Generally, buildings suitable for office or storage space and administered by the General Services Administration (GSA) or by another Federal agency under a delegation from GSA are considered to be "public buildings."

Many buildings are specifically excluded from the term "public building," including buildings on

properties of the United States Postal Service, on military installations, and on Department of Veterans Affairs installations used for hospital or domiciliary purposes. In addition, buildings "on the public domain" are not "public buildings". "Public domain" is commonly considered to be public lands in the West. Accordingly, "public domain" in these regulations is defined to include lands administered by the Department of the Interior, Bureau of Land Management, and the Department of Agriculture, U.S. Forest Service. Buildings on other Federal property are not considered to be "on the public domain" for purposes of the Executive Order.

A unique situation arises with respect to the Pentagon. Originally, the Pentagon was considered a "public building" within the scope of the Public Buildings Act. Subsequently, Section 2804 of the National Defense Authorization for FY 1991 (10 U.S.C. 2674) removed the Pentagon from GSA's authority under the Public Buildings Act; however, that legislation did not change the Public Buildings Act's definition of a public building. This, while not specifically addressed in the regulations, DOL considers the Pentagon to be a "public building" within the meaning of the Executive Order. Furthermore, this interpretation is consistent with the purpose of the Executive Order, to cover Government office buildings. Commenters are invited to address this issue in their comments.

Leased buildings are not public buildings covered by the Executive Order unless they are being leased pursuant to lease-purchase contracts. It should be noted, however, that building services performed on a building being leased pursuant to a lease-purchase contract would be covered only if the services are being performed under a contract directly with the Government; building services performed by the lessor would be considered incidental to the lease (see § 9.2) and would not be covered.

#### Coverage Limitations (9.5)

The Order does *not* apply to contracts under the simplified acquisition threshold, which is currently \$100,000. In addition, contracts for commodities or services by the blind or severely handicapped awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48a; contracts for certain services provided by sheltered workshops for the severely handicapped, awarded pursuant to the Edgar Amendment of the Treasury, Postal Services and General Government Appropriations

Act, Public Law 103-329; and vending service contracts operated by the blind, awarded pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107, are excluded from coverage pursuant to section 3(b)-(d) of the Executive Order.

The Executive Order also excludes "services where the contractor's employees perform work at the public building and at other locations under contracts not subject to this Order (e.g., pest control or trash removal where the contractor's employees visit the site periodically and where the employees under the contract respond to service calls)," provided that employees are not deployed in a manner designed to avoid the purposes of the Order. Thus, the manner in which the services will be performed by the successor contractor as well as the nature of the services must both be considered in determining whether a building services contract is subject to the Executive Order.

#### Contract Clause (9.6)

Section 4 of the Executive Order specifies the contract clause that must be included in solicitations and contracts for building services that succeed contracts for the performance of similar work at the same public building. The regulations set forth additional provisions which are necessary to implementation of the Order. In accordance with Section 5 of the Order, a provision of the clause makes it clear that disputes under the Order are to be resolved in accordance with DOL procedures rather than pursuant to the general disputes clause of the Contract Disputes Act, 41 U.S.C. 601 *et seq.* Provisions also provide for withholding of contract funds in the event the contractor is determined to have violated the provisions of the Executive Order and is found liable for lost wages or other monetary relief; and to require contractors to cooperate in investigations by DOL or the contracting agency.

#### Contractor Obligations

##### Employee Coverage/Staffing (9.7/9.8)

With certain exclusions, all employees performing recurring building services on the predecessor contract whose employment would otherwise be terminated as the result of the award of the contract to a new contractor, must in good faith be offered the right of first refusal to employment under the successor contract before any other employees may be hired. Because the successor contractor will not know whether an individual employee of the predecessor contractor will continue to be employed or will be terminated

because of the change in contracts, the regulations state a presumption that all employees will be terminated when the predecessor's contract expires. This presumption can be defeated by specific evidence to the contrary, which the successor contractor could obtain through inquiries of, or contact with, the contracting officer, the employees, or the predecessor contractor after award of the contract to the successor.

The Executive Order does not require that a successor contractor perform a contract with the same number of employees as the predecessor. For example, if the predecessor employed twenty (20) custodial workers, the successor may determine it can perform the contract work with only eighteen (18) custodial workers. Thus if the contractor continues to employ five (5) of its existing workers, the offer of the right of first refusal would initially be limited to thirteen (13) employees of the predecessor. The successor contractor has complete discretion, within the constraints of these regulations, to determine which employees will first be offered a right of first refusal. If any of the predecessor's employees to whom the right of first refusal was offered decline that offer, then the successor must offer the right of first refusal to any remaining employees of the predecessor who were not originally offered the right of first refusal.

The question arises, however, whether the successor contractor's obligations continue throughout the performance of the contract. Although the language of the Executive Order could arguably suggest such a result, it would be impractical and unduly burdensome. Therefore the regulations provide that once the contract is fully staffed and contract performance has commenced, the obligation to offer the right of first refusal ceases, and any subsequent vacant positions may be filled in accordance with the successor's normal business practices. The only exception to this provision would be if the evidence shows that the successor contractor increased the initial staffing level within the first three months after commencement of the contract. Three months was selected as a reasonable period for continuing to impose an obligation to offer a right of first refusal in order to ensure that necessary staffing adjustments during the start-up period will be covered, and at the same time to discourage attempts to manipulate the work force. During this three month period the right of first refusal must be offered to any eligible employees until the final staffing level is reached.

Services at buildings not covered by the Order. The contractor is not

obligated to offer a right of first refusal to employment in any position which will perform services both at buildings covered by the Executive Order and buildings not covered by the Order.

Managerial and supervisory employees. The successor contractor is not required to offer a right of first refusal to employees who performed as managers or supervisors under the predecessor contract or to employees who are not service employees within the meaning of the SCA. Thus the regulations provide that those employees who are employed as bona fide executive, administrative, or professional employees within the meaning of the regulations issued under the Fair Labor Standards Act (FLSA) at 29 CFR Part 541 (and therefore are exempt from the provisions of the FLSA and SCA), need not be offered a right of first refusal.

The successor contractor has complete discretion to decide who will be employed as managers and supervisors on the contract. However, if a service employee of the predecessor is qualified for a management/supervisory position, an offer of employment in that exempt classification would satisfy the successor's obligation to offer the employee a right of first refusal.

Existing employees of the successor contractor. The Executive Order provides that employees who worked for the successor contractor for at least three months immediately preceding the commencement of the successor contract and who would otherwise face lay-off or discharge, may be employed on the successor contract without regard to the successor's obligation to offer the right of first refusal. The key elements are that the employee (1) must have been employed by the successor for at least three months prior to the commencement of the successor contract and (2) would otherwise face lay-off or discharge. Employees who had been laid-off by the successor prior to the commencement of the successor contract or existing employees of the successor who are not facing lay-off or termination because, for example, they would continue to be employed on another contract, may not be employed on the successor contract until all eligible employees of the predecessor have been offered the right of first refusal.

Unsuitable employees. The successor contractor is not required to offer the right of first refusal to any employee who the successor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job. The regulation implementing this provision does not

define what constitutes a "reasonable belief" or "suitable performance". However, the successor contractor must base the conclusion that an employee failed to perform suitably on information from a credible source relative to a particular employee's past performance on the job, such as the predecessor contractor, the employee's supervisor or foreman, or the contracting agency. Information that does not directly relate to an employee's performance on the job may not be used as a basis for failing to offer a right of first refusal.

#### Offer of Employment/Recordkeeping (9.9, 9.10)

The Executive Order requires the successor to make an express offer of employment to each employee and state the time within which the employee must accept such offer, which must be at least ten (10) days. The regulation at section 9.9 states that the offer may be made either in writing or orally at a meeting of the predecessor contractor's employees, and requires that the contractor keeps either a copy of the offer or minimum documentation regarding the meeting at which the offer was made, which may consist of notations on the attendance roster and a copy of any written notice distributed.

The regulations require the predecessor contractor to give the contracting officer a list of current employees at least 60 days before the end of the contract. However, the successor's obligation to extend a right of first refusal applies to all employees employed at the end of the contract, including any who may begin work after the list of employees is provided. It is not envisioned that the omission of such employees' name from the list will be unduly burdensome since successor contractors commonly hire the predecessor's work force without the convenience of such a list.

The regulations at section 9.10 discuss what is a bona fide offer of employment. In general, an offer of employment will be presumed to be bona fide. Employees need not be offered employment in the same job that they were employed in under the predecessor contract, provided the employee is qualified for the position offered. Thus an employee may be equipped by education, training or experience to perform the duties of a position to be filled by the successor contractor, even though he or she encumbered a position under the predecessor contractor that did not require or utilize such education, training or experience. However, an offer of employment at a lower level or

to a different position may be a basis for closely examining whether the offer is bona fide, based on valid business reasons.

#### Predecessor's Obligation to Provide a List of Employees (9.11)

The Executive Order requires that, no less than 60 days before the completion of the contract, the predecessor contractor provide the contracting officer with a certified list of all service employees working at the Federal facility during the last month of the contract. The list is also required to contain anniversary dates of employment, either with the current or predecessor contractor, of each service employee. The contracting officer in turn will provide the list to the successor contractor, and it will be provided on request to employees or their representatives.

Except for the timing of submission of the list, this requirement is the same as the requirement under the SCA at 29 CFR 4.6(1)(2) that the predecessor furnish the names and anniversary dates at least ten days before contract termination. Thus the Executive Order does not create any new obligation on the predecessor, but simply moves forward the date the list must be submitted.

Because the predecessor contractor cannot know with certainty, 60 days in advance of termination, who will be performing on the contract in the final month, the regulations provide that the predecessor will provide the names of all service employees working on the contract. The successor in turn must assume the employees listed will be working during the final month of the contract unless the evidence demonstrates otherwise.

#### Notice to Employees (9.12)

Service employees need to be advised of their right of first refusal in the event of contract transition. Various options were considered regarding how the employees should be so advised. Notice could easily be accomplished by the predecessor contractor, but it has no substantive obligations under the Order. The Department also considered placing the obligation on the successor contractor, but concluded that it would be more efficient to require notification by the contracting agency since the predecessor's employees are working regularly at the Federal building. Therefore the regulations require that the agency either post a notice or give individual notice to the predecessor contractor's employees. An optional, prototype notice is included in an Appendix to the regulations.

**Enforcement (Subpart B)**

Section 5 of the Executive Order provides that the Secretary of Labor is responsible for investigating and obtaining compliance with the Executive Order. It further provides that the Secretary has the authority to issue final orders prescribing appropriate sanctions and remedies, including but not limited to, orders requiring employment and payment of wages lost.

The executive Order also requires that alternative dispute mechanisms be utilized to the maximum extent possible in resolving enforcement issues. Thus, the thrust of the Executive Order is to keep the enforcement processes as simple and timely as possible, given the immediacy of both the employee's and the contractor's need for a response.

**Role of the Contracting Officer (9.100)**

In developing the enforcement provisions of the regulations, we have attempted to provide a process that encourages resolution at the earliest possible stage with fairness and efficiency. For this reason, the regulations provide that complaints alleging violations shall be filed with the contracting officer, who will provide the employee and the successor contractor with information about the requirements of the Executive Order. If this is not sufficient to resolve the matter, the regulations provide that the contracting officer will obtain statements from the parties of their respective positions and submit a report to the Department of Labor.

**Role of the Department of Labor (9.101, 9.102)**

If the contracting officer cannot resolve the dispute, section 9.100(b) provides that the contracting officer will submit his or her report. Based on the contracting officer's report, Wage and Hour may attempt to resolve the dispute through informal negotiations; however, if that is not successful, Wage and Hour will conduct a full investigation of the facts and issue a determination as to whether a violation has occurred. The Administration also has the authority to conduct an investigation on his or her own initiative.

**Hearing Procedures (9.103–9.107)**

The Administrator's determination shall become a final order of the Secretary unless a request for a hearing is filed within 20 days or, where the Administrator determines that relevant facts are not in dispute, a petition for review is filed with the Board of Service Contract Appeals (BSCA), which shall have the authority to hear all appeals under the Executive Order. Section

9.103 provides the procedures and time frames for appeal to the Board. The BSCA is delegated the authority to hear and decide appeals on behalf of the Secretary under the Executive Order because it currently hears appeals under the Service Contract Act and his expertise in service contract labor standards disputes.

Consistent with the Executive Order's directive to favor the resolution of disputes by efficient and informal alternative dispute methods, section 9.104 encourages parties to utilize settlement judges to mediate settlement negotiations prior to an Administrative Law Judge (ALJ) hearing. The general ALJ regulations, 29 CFR Part 18, § 18.9, already provide settlement judge procedures, and these procedures have been expressly adopted for use under the Executive Order.

If a complaint cannot be resolved informally through the conciliation or the settlement judge process, then section 9.105 provides procedures for a hearing before an ALJ. In most cases it is envisioned that the parties to the proceeding will be the contractor and the complainant (if any). However, the Wage-Hour Administrator may appear in any proceeding as a party or as *amicus curiae*, and will appear as a party in all cases in which ineligibility sanctions are imposed. The contracting agency may also appear as *amicus curiae*.

As provided in section 9.106, the ALJ shall issue a decision within 60 days after the proceeding at which evidence was submitted. If the ALJ determines that a violation has occurred, the ALJ may order appropriate relief, and may assess against the successor contractor an amount equal to the employees' costs and expenses (§ 9.106(c)). Section 9.107 provides the procedures for appealing an ALJ decision to the BSCA.

Since the Department does not anticipate participating in most proceedings under the Executive Order where debarment is not an issue, the Department is considering providing for payment of attorney fees or costs where the complainant prevails. The Department seeks the views of commenters regarding the permissibility of such a provision in the absence of express statutory authority. In the alternative, because it is anticipated that many complainants may lack the ability to hire counsel if fees are not available, the Department is considering providing that parties may obtain the Administrator's investigation record and submit it into evidence in proceedings where the Department is not a party.

**Remedies/Ineligibility Sanction (9.108–9.109)**

Section 5 of the Executive Order provides that the Secretary has the authority to prescribe appropriate remedies, including orders requiring employment and payment of wages lost. Section 9.108 also sets forth withholding procedures to obtain wages due, and a provision for suspension of payments if the predecessor fails to provide the contracting officer with a list of employees on the contract. Furthermore, where a contractor has failed to comply with any order of the Secretary or has committed willful violations of the Executive Order or its regulations, the contractor and its responsible officers, and any firm in which the contractor has a substantial interest, shall be ineligible to be awarded any contract or subcontract of the United States for a period of up to three years. Since debarment is only imposed for the most serious of violations—i.e., violations that are willful or failure to comply with an order of the Secretary, which in itself is a willful violation—the regulations at section 9.109 prescribe a three-year period for debarment in all cases.

**Definitions (9.200)**

The regulations include definitions of several of the important terms. The definition of "service employee" is based on the Service Contract Act, as the Executive Order provides, but references back to the coverage requirements of the Order (employees performing recurring building services), rather than to employees on contracts subject to the SCA.

**Dates of Applicability**

The regulations will apply to all contracts awarded after the effective date, and the clauses contained in section 9.6 must be included in all such contracts. In addition, in order to provide successor contractors with the convenience of a list of names from the predecessor contractor earlier than the SCA requirement of 10 days before completion of the contract, it is suggested that existing contracts be amended to include the clause in section 9.6(c).

**Executive Order 12866**

Because this rule provides the initial implementing regulations for an executive order issued by the President, it will be treated as a "significant regulatory action" within the meaning of Executive Order 12866. However, no economic analysis is required since the rule will not have a significant economic impact. The Executive Order

simply requires contractors to follow the practice which is currently followed in most cases in any event as a good business practice, and will improve Government efficiency and economy in those few cases where the practice would not otherwise have been followed by decreasing or eliminating the loss of productivity that may occur when experienced employees are terminated.

Furthermore, the total value of Federal contracts covered by Executive Order 12933 is less than \$100 million, and only a small fraction of that total may involve terminations of predecessor employees. General Services Administration data for Fiscal Year 1994 indicate that no more than 88 new building service contract actions were taken, with a value of \$39.2 million. Since only a very small percentage of that dollar value involves terminations, the economic impact of the Executive Order is minimal.

#### Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) requires agencies to prepare regulatory flexibility analyses, and to develop alternatives, whenever possible, in drafting regulations that will have a "significant economic impact on a substantial number of small entities." The Department has determined that such an analysis is not required for this rulemaking. This conclusion is based on the fact that the Executive Order mandates a practice which is already followed in almost all cases. Accordingly, this regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Therefore, no regulatory flexibility analysis is required.

#### Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

#### List of Subjects in 29 CFR Part 9

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

Signed at Washington, D.C. on this 12th day of July, 1995.

**Maria Echaveste,**

*Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, 29 CFR Part 9 is proposed to be added to read as follows:

### PART 9—NONDISPLACEMENT OF QUALIFIED WORKERS UNDER CERTAIN CONTRACTS

#### Subpart A—How is Executive Order 12933 Applied?

##### Covered Contracts Generally

Sec.

- 9.1 What is the purpose of Executive Order 12933?
- 9.2 Which contracts are covered by Executive Order 12933?
- 9.3 What is a "building service contract?"
- 9.4 What is "public building?"
- 9.5 Which contracts are not covered by Executive Order 12933?

##### Contract Clauses

- 9.6 What contract clauses must be included in covered contracts?

##### Contractor Obligations

- 9.7 May a contractor employ persons other than the predecessor contractor's employees?
- 9.8 Must the successor contractor offer a right of first refusal to all employees of the predecessor contractor?
- 9.9 In what manner must the successor contractor offer employment?
- 9.10 What constitutes a bona fide offer of employment?
- 9.11 What are the obligations of the predecessor contractor?

##### Notice to Employees

- 9.12 How ill employees learn of their rights?

#### Subpart B—What Enforcement Mechanisms Does Executive Order 12933 Provide?

##### Complaint Procedures

- 9.100 What may employees do if they believe that their rights under the Executive Order have been violated?
- 9.101 What action will the Wage and Hour Division take to try to resolve the complaint?
- 9.102 How are complaints resolved if conciliation is unsuccessful?
- 9.103 How are decisions of the Administrator appealed?

##### Administrative Law Judge Procedures

- 9.104 How may cases be settled without formal hearing?
- 9.105 What procedures are followed if a complaint cannot be resolved through conciliation or settlement agreement?
- 9.106 What rules apply to the decision of the administrative law judge?

##### Appeal Procedures

- 9.107 How may an administrative law judge's decision be appealed?

#### Enforcement Remedies

- 9.108 What are the consequences to a contractor of not complying with the Executive Order?
- 9.109 Under what circumstances will ineligibility sanctions be imposed?

#### Subpart C—Definitions

- 9.200 Definitions

### Appendix A to Part 9—Notice to Building Service Contract Employees

**Authority:** Secs. 4–6, Executive Order 12933; 5 U.S.C. 301.

#### Subpart A—How is Executive Order 12933 Applied?

##### Covered Contracts Generally

#### § 9.1 What is the purpose of Executive Order 12933?

The Government's procurement interests in both economy and efficiency are furthered when a successor contractor carries over an existing work force. A carryover work force minimizes disruption in the delivery of services during a period of transition and provides the Government the benefit of an experienced and trained work force. Executive Order 12933 therefore generally requires that successor contractors performing building service contracts for public buildings offer a right of first refusal to employment under the contract to those employees under the predecessor contract whose employment will be terminated as a result of the award of the successor contract.

#### § 9.2 Which contracts are covered by Executive Order 12933?

(a) The Executive Order and these rules apply to "building service contracts" for "public buildings" where the contract is entered into by the United States in an amount equal to or greater than the simplified acquisition threshold of \$100,000, as set forth in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)).

(b)(1) Except as provided in paragraph (b)(2) of this section, contracts which include a requirement for recurring building services are subject to the Executive Order and these regulations even if the contract also contains non-service requirements, such as construction or supplies, or requirements for other types of services, and even if the contract is not subject to the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* However, the requirements of the Executive Order apply only to the building services portion of the contract.

(2) The requirements of the Executive Order do not apply to building services

which are only incidental to a contract for another purpose, such as incidental maintenance under a contract to operate a day-care center. Building services performed on a building being leased pursuant to a lease-purpose contract would be considered incidental and would not be covered unless the services are being performed under a contract directly with the Government. Building service requirements will not be considered incidental, and therefore will be subject to the Executive Order, where:

(i) The contract contains specific requirements for a substantial amount of building services or it is ascertainable that a substantial amount of building services will be necessary to the performance of the contract (the word "substantial" relates to the type and quantity of building services to be performed and not merely to the total value of such work (whether in absolute dollars or cost percentages) as compared to the total value of the contract); and

(ii) The building services work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from the other work called for by the contract.

#### **§ 9.3 What is a "building service contract?"**

(a) A "building service contract" is a contract for "recurring services" related to the maintenance of a public building. "Recurring services" are services which are required to be performed regularly or periodically throughout the course of a contract, and throughout the course of the succeeding or follow-on contract at the same building. Examples of building services contracts include, but are not limited to, contracts for the recurring provision of custodial or janitorial services; window washing; laundry; food services; guard or other protective services; landscaping and groundskeeping services; and inspection, maintenance, and repair of fixed equipment such as elevators, air conditioning, and heating systems. However, as provided in section 9.5(b)(5) of this part, excluded from the Executive Order are those services where the employees work at both the public building and at other locations not subject to the Executive Order.

(b)(1) Contracts which provide maintenance services only on a non-recurring basis are not "building service contracts" within the meaning of the Executive Order and are not subject to its provisions. For example, a contract to perform servicing of fixed equipment once a year, or to mulch a garden on a one-time or annual basis, is a non-

recurring maintenance contract that is not covered by the Executive Order.

(2) Contracts for the provision of services which may be performed in a public building but are not related to the maintenance of that public building are not "building service contracts" and are not covered by the Executive Order and these rules. For example, a contract for day care services in a Federal office building would not be subject to the Executive Order.

#### **§ 9.4 What is a "public building?"**

(a) A "public building" is any building owned by the United States which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, together with its grounds, approaches, and appurtenances. Public buildings shall include:

- (1) Federal office buildings;
- (2) Customhouses;
- (3) Courthouses;
- (4) Border inspection facilities;
- (5) Warehouses;
- (6) Records centers;
- (7) Appraiser stores;
- (8) Relocation facilities; and
- (9) Similar Federal facilities.

(b)(1) Public buildings do not include any building on the public domain, including that reserved for national forests and other purposes. The public domain includes only those lands administered by the Department of the Interior, Bureau of Land Management, and the Department of Agriculture, U.S. Forest Service.

(2) Also not covered are any buildings:

- (i) On properties of the United States in foreign countries;
- (ii) On Native American and Native Eskimo properties held in trust by the United States;
- (iii) On lands used in connection with Federal programs for agricultural, recreational, and conservation purposes, including research in connection therewith;
- (iv) On or used in connection with river, harbor, flood control, reclamation, or power objects; or for chemical manufacturing or development projects; or for nuclear production, research, or development projects;
- (v) On or used in connection with housing and residential projects;
- (vi) On properties of the United States Postal Service;
- (vii) On military installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any similar facility of the Department of Defense);

(viii) On installations of the National Aeronautic and Space Administration, except regular office buildings; and

(ix) On Department of Veterans Affairs installations used for hospital or domiciliary purposes.

(3) Buildings leased by the Government are not public buildings unless the building is leased pursuant to a lease-purchase contract.

#### **§ 9.5 Which contracts are not covered by Executive Order 12933?**

(a) A contract is not covered by the Executive Order unless it requires the provision of recurring building services, and unless the contract succeeds a contract for similar work at the same public building.

(b) The Executive Order expressly excludes:

(1) Contracts for services under the simplified acquisition threshold (\$100,000);

(2) Contracts for commodities or services produced or provided by the blind or severely handicapped, awarded pursuant to the Javits-Wagner O'Day Act, 41 U.S.C. 46-48a; and any future enacted law creating an employment preference for some group of workers under building service contracts;

(3) Guard, elevator operator, messenger, or custodial services provided to the Government under contracts with sheltered workshops employing the severely handicapped as outlined in the Edgar Amendment, section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, P.L. 103-329;

(4) Agreements for vending facilities operated by the blind, entered into under the preference provisions of the Randolph-Sheppard Act, 20 U.S.C. 107; and

(5) Services where the contractor's employees perform work at the public building and at other locations under contracts not subject to the Executive Order and these regulations, provided that the employees are not deployed in a manner that is designed to avoid the purposes of the Order. Examples include, but are not limited to, pest control or trash removal services where the employees periodically visit various Government and non-Government sites, and service calls to repair equipment at various Government and non-Government buildings.

#### **Contract Clauses**

##### **§ 9.6 What contract clauses must be included in covered contracts?**

The clauses set forth in the following paragraphs shall be included in full by the contracting agency in every solicitation and contract entered into by

the United States equal to or in excess of \$100,000, where the contract requires the provision of building services and succeeds a contract for the performance of similar services at the same public building:

(a) Consistent with the efficient performance of this contract, the contractor shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal to employment under the contract in positions for which the employees are qualified. The contractor shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) of this section, there shall be no employment opening under the contract, and the contractor shall not offer employment under the contract, to any person prior to having complied fully with this obligation. The contractor shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept such offer be less than 10 days.

(b) Notwithstanding the contractor's obligation under paragraph (a) of this section, the contractor:

(1) May employ on the contract any employee who has worked for the contractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, and

(2) Is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 257(b), and

(3) Is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who the contractor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

(c) In accordance with Federal Acquisition Regulation 52.222-4(n) and 29 CFR 4.6(1)(2), the contractor shall, no less than 60 days before completion of this contract, furnish the Contracting Officer with a certified list of the names

of all service employees working at the Federal facility during the last month of contract performance. The list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each service employee. The Contracting Officer will provide the list to the successor contractor and the list shall be provided on request to employees or their representatives.

(d) If it is determined, pursuant to regulations issued by the Secretary of Labor, that the contractor is not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor, as provided in Executive Order No. 12933, the regulations of the Secretary of Labor at 29 CFR Part 9, and relevant orders of the Secretary of Labor, or as otherwise provided by law.

(e) The Contracting Officer shall withhold or cause to be withheld from the prime contractor under this or any other Government contract with the same prime contractor such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator that the prime contractor failed to comply with the terms of this clause, and that wages lost as a result of the violations are due to employees or that other monetary relief is appropriate.

(f) The contractor shall cooperate in any investigation by the contracting agency or the Department of Labor into possible violations of the provisions of this cause and shall make records requested by such official(s) available for inspection, copying, or transcription upon request.

(g) Disputes arising out of this clause shall not be subject to the general disputes of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Part 9. Disputes within the meaning of this clause include disputes between the contractor and the contracting agency, the U.S. Department of Labor, or the employees under the contract or its predecessor contractor or their representatives.

#### **Contractor Obligations**

##### **§ 9.7 May a contractor employ persons other than the predecessor contractor's employees?**

(a) There shall be no employment openings under a contract subject to the Executive Order and the successor contractor shall not offer employment under the contract until it fully complies with its obligation to offer a

right of first refusal, except as provided under paragraph (b) of this section.

(b) A successor contractor may employ on the contract any employee who has worked for that contractor for at least 3 months immediately preceding the commencement of the contract and who would face lay-off or discharge if not employed on the subject contract.

##### **§ 9.8 Must the successor contractor offer a right of first refusal to all employees of the predecessor contractor?**

(a)(1) Except as provided in this section, a successor contractor shall offer employment under the contract (i.e., a "right of first refusal") to those employees of the predecessor contractor who, in the final month of the contract, provided recurring building services similar to the services to be performed under the successor contract, and whose employment will be terminated as a result of the award of the successor contract or expiration of the contract under which the employees were hired.

(2) Unless the predecessor contractor (either directly or through the contracting agency) or the individual employee in question provides evidence to the contrary, the successor contractor must presume that *all* service employees of the predecessor contractor who are working at the same public building during the final month of contract performance will be terminated when the contract ends.

(b)(1) A successor contractor is *not* required to offer a right of first refusal to any managerial or supervisory employee or to any employee of the predecessor contractor who is not a service employee within the meaning of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 357(b). "Managerial and supervisory" employees and employees who are not "service employees" are those persons engaged in the performance of services under the contract who are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Fair Labor Standards Act regulations, 29 CFR Part 541.

(2) A successor contractor is not required to offer a right of first refusal to any employee of the predecessor contractor who the successor contractor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job. An assessment of the employee's past performance must be based on information provided by a credible source such as the predecessor contractor, the employee's supervisor, or the contracting agency.

(3) The contractor is not required to offer a right of first refusal for

employment in a position which will perform building services both at public buildings covered by the Executive Order and these regulations, and at other buildings not covered by the Executive Order.

(c) The successor contractor shall determine the number of employees necessary for the efficient performance of the contract. The contractor may, for bona fide staffing or work assignment reasons, employ fewer employees than the predecessor contractor. Thus, the successor contractor need not extend the right of first refusal to *all* employees of the predecessor contractor, but must offer employment only to the number of eligible employees it believes necessary to meet its anticipated staffing pattern, except that:

(1) Where a successor contractor offers a right of first refusal to fewer employees than were employed by the predecessor contractor, its obligation to offer employment under the contract to the predecessor's employees continues until the successor contractor reaches full staffing levels. For example, a contractor with eighteen (18) employment openings and a list of twenty (20) predecessor contractor's employees must continue to offer a right of first refusal to individuals on the list until eighteen (18) of the employees accept the contractor's employment offer, or until all of the employees have either accepted or refused the job offer.

(2) If a successor contractor raises its staffing level within three months of the commencement of contract performance, its obligation to offer employment under the contract to eligible employees continues until the higher staffing level is reached. For example, if a contractor determines two months into the contract period that it must hire an additional ten (10) employees to sufficiently perform the contract requirements, the contractor must first offer a right of first refusal to ten (10) eligible employees of the predecessor contractor (or to all of the employees of the predecessor contractor who have not previously been offered a right of first refusal if less than ten remain), and must continue to offer a right of first refusal to individuals on the list until ten (10) of the employees accept the contractor's employment offer, or until all of the employees have refused the job offer.

**§ 9.9 In what manner must the successor contractor offer employment?**

(a) Except as provided in sections 9.7 and 9.8 of this part, a successor contractor must make a bona-fide express offer of employment to each of the predecessor contractor's employees

before offering employment on the contract to any other person. The employment offer to each employee may be either in writing on an individual basis, or orally at a meeting attended by a group of the predecessor contractor's employees.

(b) For a period of one year, the contractor must maintain copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location and attendance roster of any employee meeting(s) at which the offers were extended, a summary of each meeting and a copy of any written notice which may have been distributed, and the names of the predecessor contractor's employees to whom an offer was made. The contractor must provide copies of such documentation upon request of any authorized representative of the contracting agency or Department of Labor.

(c) The contractor shall state the time within which an employee must accept an employment offer, but in no case may the period in which the employee has to accept the offer be less than 10 days.

(d) The successor contractor's obligation to offer a right of first refusal exists even if the successor contractor has not been provided a list of the predecessor contractor's employees, or the list does not contain the names of all persons employed during the final month of contract performance.

**§ 9.10 What constitutes a bona fide offer of employment?**

(a) As a general matter, an offer of employment will be presumed to be a bona fide offer of employment. An offer of employment need not be to a position similar to that which the employee previously held, but the employee must be qualified for the position. Information regarding an employee's qualifications shall ordinarily come directly from the employee. If a question arises concerning an employee's qualifications, that question shall be decided based upon the employee's education and employment history with particular emphasis on the employee's experience on the predecessor contract.

(b) An offer of employment at a lower level or to different positions than employees held before may be a basis for closely examining the offers of employment to ensure they are bona fide, based on valid business reasons (not related to a desire that the employee refuse the offer, or that other employees be hired).

**§ 9.11 What are the obligations of the predecessor contractor?**

(a) Not less than 60 days before completion of its contract, the predecessor contractor must furnish the contracting officer with a certified list of the names of all service employees working at the Federal facility, together with their anniversary dates of employment. The contracting officer in turn shall provide the list to the successor contractor and, if requested, to employees of the predecessor contractor or their representatives.

(b) Unless the predecessor contractor (either directly or through the contracting agency) or the individual employee in question provides evidence to the contrary, the successor contractor must presume that *all* service employees of the predecessor contractor who are working at the same public building during the final month of contract performance will be terminated when the contract ends.

**Notice to Employees**

**§ 9.12 How will employees learn of their rights?**

Where the successor contract is a contract subject to the Executive Order and these regulations, the contracting officer will provide notice to service employees of the predecessor contractor who are engaged in building services of their possible right to an offer of employment. Such notice may either be posted in a conspicuous place at the worksite or may be delivered to the employees individually. Contracting officers may either use the notice set forth in Appendix A to this part or another form with the same information.

**Subpart B—What Enforcement Mechanism Does Executive Order 12933 Provide?**

**Complaint Procedures**

**§ 9.100 What may employees do if they believe that their rights under the Executive Order have been violated?**

(a) Any employee of the predecessor contractor who believes he or she was not offered employment by the successor contractor as required by the Executive Order and these regulations may file a complaint with the contracting officer of the appropriate Federal agency.

(b) Upon receipt of a complaint, the contracting officer shall provide information to the employee(s) and the successor contractor about their rights and responsibilities under the Executive Order. If the matter is not resolved through such actions, the contracting officer shall obtain statements of the

positions of the parties and prepare a report, including the issues and any relevant facts known to the contracting officer. The report shall promptly be forwarded to the nearest District Office of the Wage and Hour Division or to the Administrator of the Wage and Hour Division, Employment Standards Administration, Room S-3502, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**§ 9.101 What action will the Wage and Hour Division take to try to resolve the complaint?**

After obtaining the necessary information from the contracting officer regarding the alleged violations, the Wage and Hour Division investigator may contact the successor contractor and attempt, through conciliation procedures, to obtain a resolution to the matter which is satisfactory to both the complainant(s) and the successor contractor and consistent with the requirements of the Executive Order and these regulations.

**§ 9.102 How are complaints resolved if conciliation is unsuccessful?**

(a) Upon receipt of a contracting officer's report, the Administrator shall investigate and gather data concerning such case. Where conciliation efforts have been attempted, the Administrator need not initiate the investigation unless and until the efforts fail. The Administrator may also initiate an investigation at any time on his or her own initiative. As part of the investigation, the Administrator may inspect the records of the predecessor and successor contractors (and make copies thereof), may question the predecessor and successor contractors and any employees of these contractors, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the Executive Order (including conduct warranting imposition of ineligibility sanctions pursuant to section 9.109 of this part) has been committed.

(b) The contractor and the predecessor contractor shall cooperate in any investigation conducted pursuant to this subpart, and shall not interfere with the investigation or intimidate, blacklist, discharge, or in any other manner discriminate against any person because such person has cooperated in an investigation or proceeding under this subpart or has attempted to exercise any rights afforded under this part.

(c) Upon completion of the investigation, the Administrator shall issue a written determination of whether a violation has occurred which

shall contain a statement of reasons for the findings and conclusions. A determination that a violation occurred shall address appropriate relief and the issue of ineligibility sanctions where appropriate. Notice of the determination shall be given by certified mail to the complainant (if any), the successor contractor and their representatives (if any).

(d) The Administrator may conduct a new investigation or issue a new determination if the Administrator concludes circumstances warrant, such as where the proceedings before an Administrative Law Judge reveal that there may have been violations with respect to other employees of the predecessor contractor, or that imposition of ineligibility sanctions is appropriate, or where the contractor has failed to comply with an order of the Secretary.

**§ 9.103 How are decisions of the Administrator appealed?**

(a) Except as provided in paragraph (b), the determination of the Administrator shall advise the parties (ordinarily the complainant (if any) and the successor contractor) that the notice of determination shall become the final order of the Secretary and shall not be appealable in any administrative or judicial proceeding unless, within 20 days of the date of the determination of the Administrator, the Chief Administrative Law Judge receives a request for a hearing. The request for a hearing shall be accompanied by a copy of the Administrator's determination and may be filed by U.S. mail, facsimile (FAX), telegram, hand delivery, or next-day delivery service. At the same time, a copy of any request for a hearing shall be sent to the complainant(s) or successor contractor, as appropriate; the Administrator of the Wage and Hour Division; and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. The Administrator's failure or refusal to seek ineligibility sanctions shall not be appealable.

(b) If the Administrator concludes that no relevant facts are in dispute, the parties will be so advised and will be further advised that the determination shall become the final order of the Secretary and shall not be appealable in any administrative or judicial proceeding unless, within 20 days of the date of the determination of the Administrator, a petition for review is filed with the Board of Service Contract Appeals pursuant to section 9.107 of this part. The determination will further advise that if an aggrieved party disagrees with the factual findings or

believes there are relevant facts in dispute, the aggrieved party may advise the Administrator of the disputed facts and request a hearing by letter, which must be received within 20 days of the date of the determination. The Administrator will either refer the request for a hearing to the Chief Administrative Law Judge, or notify the aggrieved party of the Administrator's determination that there is no relevant issue of fact and that a petition for review may be filed with the Board of Service Contract Appeals within 20 days of the date of the notice, in accordance with the procedures at section 9.107 of this part.

(c) If any party desires review of the determination of the Administrator, including judicial review, a request for an administrative law judge hearing (or petition for review by the Board of Service Contract Appeals) must first be filed in accordance with paragraph (a) (or (b)) of this section. If a timely request for hearing (or petition for review) is filed, the determination of the Administrator shall be inoperative unless and until the administrative law judge or the Board of Service Contract Appeals issues an order affirming the determination.

**Administrative Law Judge Procedures**

**§ 9.104 How may cases be settled without formal hearing?**

(a) In accordance with the Executive Order's directive to favor the resolution of disputes by efficient and informal alternative dispute resolution methods, the parties are encouraged to resolve disputes in accordance with the conciliation procedures set forth in sections 9.100 and 9.101 of this subpart, or, where such efforts have failed, to utilize settlement judges to mediate settlement negotiations pursuant to 29 CFR Part 18, § 18.9. At any time after commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding.

(b) A settlement judge may be appointed by the Chief Administrative Law Judge upon a request by a party or the presiding administrative law judge. The Chief Administrative Law Judge has sole discretion to decide whether to appoint a settlement judge, except that a settlement judge shall not be appointed when a party objects to referral of the matter to a settlement judge.

**§ 9.105 What procedures are followed if a complaint cannot be resolved through conciliation or settlement agreement?**

(a) If the case is not stayed to attempt settlement, the administrative law judge to whom the case is assigned shall within fifteen (15) calendar days following receipt of the request for hearing, notify the parties of the day, time and place for hearing. The date of the hearing shall not be more than 60 days from the date of receipt of the request for hearing.

(b) Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(c) The administrative law judge may, at the request of a party, or on his/her own motion, dismiss a challenge to a determination of the Administrator upon the failure of the party requesting a hearing or his/her representative to attend a hearing without good cause; or upon the failure of said party to comply with a lawful order of the administrative law judge.

(d) At the Administrator's discretion, the Administrator has the right to participate as a party or as *amicus curiae* at any time in the proceedings, including the right to petition for review of a decision of an administrative law judge in a case in which the Administrator has not previously participated. The Administrator shall participate as a party in any proceeding in which the Administrator's determination has sought imposition of ineligibility sanctions.

(e) Copies of the request for hearing and documents filed in all cases, whether or not the Administrator is participating in the proceeding, shall be sent to the Administrator, Wage and Hour Division, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

(f) A Federal agency which is interested in a proceeding may participate as *amicus curiae* at any time in the proceedings, at the agency's discretion. At the request of a Federal agency which is interested in a proceeding, copies of all pleadings in the case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

(g) The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR Part 18 shall be applicable to the proceedings provided by this section. To the extent the rules

in 29 CFR Part 18 are inconsistent with a rule of special application provided by these regulations or the Executive Order, these regulations and the Executive Order are controlling.

**§ 9.106 What rules apply to the decision of the administrative law judge?**

(a) The administrative law judge shall issue a decision within 60 days after the proceeding at which evidence was submitted. The decision shall contain appropriate findings, conclusions, and an order and be served upon all parties to the proceeding.

(b) Upon the conclusion of the hearing and the issuance of a decision that a violation has occurred, the administrative law judge shall issue an order that the successor contractor take appropriate action to abate the violation, which may include hiring the affected employee(s) in the same or a substantially equivalent position(s) to that which the employee(s) held under the predecessor contract, together with compensation (including lost wages), terms, conditions, and privileges of that employment. Where ineligibility sanctions have been sought by the Administrator, the order shall also address whether such sanctions are appropriate.

(c) If an order is issued finding that the contractor violated the Executive Order and these regulations, the administrative law judge may assess a sum equal to the aggregate amount of all costs and expenses reasonably incurred by the aggrieved employee(s) in the proceeding.

(d) The decision of the administrative law judge shall become the final order of the Secretary unless a petition for review is timely filed with the Board of Service Contract Appeals.

**Appeal Procedures**

**§ 9.107 How may an administrative law judge's decision be appealed?**

(a) The Board of Service Contract Appeals has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from determinations of the Administrator pursuant to § 9.103(b) of this part and from decisions of administrative law judges pursuant to § 9.106 of this part.

(b) Any party desiring review of a decision of the administrative law judge (or of the Administrator, pursuant to § 9.103(b)) shall file a petition for review, in writing, with the Board of Service Contract Appeals. No administrative or judicial review shall be available unless a timely petition for review to the Board of Service Contract Appeals is first filed. To be effective,

such a petition for review must be received within 20 days of the date of the decision of the administrative law judge (or Administrator) and shall be served on all parties and the Chief Administrative Law Judge (except in cases involving an appeal from a decision of the Administrator). If a timely petition for review is filed, the decision of the administrative law judge (or Administrator) shall be inoperative unless and until the Board of Service Contract Appeals issues an order affirming the decision. However, if a petition for review concerns only the imposition of ineligibility sanctions, the remainder of the decision of the administrative law judge shall be effective immediately.

(c)(1) A petition for review shall refer to the specific findings of fact, conclusions of law, or order at issue.

(2) Copies of the petition and all briefs shall be served on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

(d) The Board's final decision shall be issued within 90 days of the receipt of the petition for review and shall be served upon all parties by mail to the last known address, and on the Chief Administrative Law Judge (except in cases involving an appeal from the determination of the Administrator).

(e) If the Board concludes that the contractor has violated the Executive Order, the final order shall order action to abate the violation, which may include hiring the affected employee(s) in the same or a substantially equivalent position(s) to that which the employee(s) held under the predecessor contract, together with compensation (including lost wages), terms, conditions, and privileges of that employment. Where the Administrator has sought imposition of ineligibility sanctions, the Board shall also determine whether an order imposing ineligibility sanctions is appropriate.

(f) If a final order finding violations of the Executive Order is issued, the Board may assess against the successor contractor a sum equal to the aggregate amount of all costs and expenses reasonably incurred by the employee(s) in the proceeding.

(g) In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters. The Board shall not have jurisdiction to pass on the validity of any provision of this part. The Board is an appellate body and shall decide cases properly before it on

the basis of all relevant matter contained in the entire record before it. The Board shall not hear cases *de novo* or receive new evidence into the record.

### Enforcement Remedies

#### § 9.108 What are the consequences to a contractor of not complying with the Executive Order?

(a) The Executive Order provides that the Secretary shall have the authority to issue orders prescribing appropriate remedies, including, but not limited to, requiring employment of the predecessor contractor's employees and payment of wages lost.

(b) After an investigation and a determination by the Administrator that lost wages or other monetary relief is due, the Administrator may direct that so much of the accrued payments due on either the contract or any other contract between the contractor and the Government shall be withheld in a deposit fund as are necessary to pay the moneys due. Upon the final order of the Secretary that such moneys are due, the Administrator may direct that such withheld funds be transferred to the Department of Labor for disbursement.

(c) If the contracting officer or the Secretary finds that the predecessor contractor has failed to provide a list of the names of employees working under the contract in accordance with § 9.6(c), the contracting officer may take such action as may be necessary to cause the suspension of the payment of funds until such time as the list is provided to the contracting officer.

#### § 9.109 Under what circumstances will ineligibility sanctions be imposed?

(a) Where the Secretary finds that a contractor has failed to comply with any order of the Secretary or has committed willful violations of the Executive Order or these regulations, the Secretary may order that the contractor and its responsible officers, and any firm in which the contractor has a substantial interest, shall be ineligible to be awarded any contract or subcontract of the United States for a period of three years.

(b) Upon order of the Secretary, the names of persons or firms found to be ineligible for contracts in accordance with this section shall be added to the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs," compiled, maintained and distributed by the General Services Administration in accordance with 48 CFR 9.404. No contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or

firms have a substantial interest until three years have elapsed from the date the persons' or firms' name was entered on the electronic version of the list.

### Subpart C—Definitions

#### § 9.200 Definitions.

For purposes of this part:

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

*Contract* means any prime contract subject wholly or in part to the provisions of the Executive Order.

*Contracting officer* means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

*Executive Order or Order* means Executive Order 12933 (59 FR 53559, October 24, 1994).

*Federal Government* means an agency or instrumentality of the United States which enters into a contract pursuant to authority derived from the Constitution and the laws of the United States.

*Secretary* means the Secretary of Labor or his/her authorized representative.

*Service employee* means any person engaged in the performance of recurring building services other than a person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Part 541 of Title 29, Code of Federal Regulations, and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor and such person.

*United States* means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations, all or substantially all of the stock of which is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities.

#### Appendix A to Part 9—Notice to Building Service Contract Employees

The contract for (type of service) services currently performed by (predecessor contractor) has been awarded to a new contractor. (Successor contractor) will begin performance on (date successor contract begins).

As a condition of the new contract:

fi (Successor contractor) may be required to offer employment to most current contract employees.

fi If you are offered employment on the new contract, you will have at least ten (10) days to accept the offer.

The following factors are reasons why some current employees may not be offered employment on the new contract:

fi Managerial or supervisory employees on the current contract are not entitled to an offer of employment.

fi The new contractor may reduce the size of the current work force. Therefore, only a portion of the existing work force may receive employment offers.

fi The new contractor may have the right to employ some or all of its current employees on the new contract before offering employment to the existing contract employees.

fi Employees whose performance has been unsuitable on the current contract are not entitled to employment with the new contractor.

If you have any questions about your right to employment on the new contract, contact: (Name, address, and telephone # for the contracting officer or the contracting officer's representative)

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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### 36 CFR Parts 215, 217, and 219

RIN 0596-AB20

#### National Forest System Land and Resource Management Planning

AGENCY: Forest Service, USDA.

ACTION: Notice; reopening of public comment period.

**SUMMARY:** On April 13, 1995, the Forest Service gave notice in the **Federal Register** (60 FR 18886) of a proposed rule comprehensively revising the National Forest System Land and Resource Planning regulations in 36 CFR Part 219 and invited public comment. The comment period of this proposed rule ended July 12, 1995. However, the agency has received numerous requests from reviewers for additional time to complete the review and prepare responses; accordingly, the Forest Service is granting an additional 30-day comment period during which reviewers may submit written comments on the proposed rule.

**DATES:** Comments must be received in writing by August 17, 1995.

**ADDRESSES:** Send written comments to Director, Ecosystem Management (1920), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.