

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: Final rule.

SUMMARY: This document provides the text of final regulations to implement Executive Order 12933, "Nondisplacement of Qualified Workers Under Certain Contracts" (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 a successor contractor, if they would otherwise lose their jobs as a result of the termination of the contract. The final rules contain a contract clause that must be incorporated into each covered contract, implementing regulations, and enforcement procedures.

DATES: These rules are effective on July 21, 1997.

FOR FURTHER INFORMATION CONTACT: Ethel P. Miller, Government Contracts Team, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3018, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 219-7541. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:**I. Paperwork Reduction Act**

The reporting and recordkeeping requirements contained in §§ 9.6(c), 9.9(b) and 9.11 of this rule were submitted to and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 and assigned OMB Control No. 1215-0190.

The reporting requirements of §§ 9.6(c) and 9.11 are already required by the McNamara-O'Hara Service Contract Act regulations, 29 CFR 4.6(l)(2), assigned OMB Control No. 1215-0150, and impose no additional burdens.

No comments were received from the public regarding this burden or these regulatory provisions.

No material change has been made in this final rule which affect the reporting

or recordkeeping requirements and estimated burdens previously submitted to OMB and discussed in the proposed rule.

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 implementing regulations to be issued by the Secretary of Labor in consultation with the Federal Acquisition Regulatory (FAR) Council, and that DOL and FAR regulations be issued which require inclusion of the contract clause in covered Federal solicitations and contracts. The Executive Order 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.*

To obtain public input and assist in the development of these regulations, the Department published a notice of proposed rulemaking in the **Federal Register** on July 18, 1995 (60 FR 36756), inviting comments until September 1, 1995, on a variety of questions and issues. As required by the Executive Order, the Department of Labor (DOL) has consulted with the FAR Council with respect to the implementation of the Executive Order.

III. Summary of Comments and Discussion

Comments were received in response to the notice from the Building Service Contractors Association International (BSCAI), the Service Employees International Union, AFL-CIO (SEIU), the Laborers' International Union of North America (LIUNA), and from Mr. Russell E. Willis.

The BSCAI questioned the legality of and the rationale for the Executive Order. These issues are clearly not within the purview of this rulemaking action. All other comments are summarized in the preamble under the relevant subsections.

*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 in the Executive Order and 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.

Where a contract is for both recurring building services and some other purpose, such as construction or other types of services, the building services for the public building are subject to the Order, but not any other portions of the contract. However, where the building services are only incidental to a contract for another purpose, 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 incorporated in the regulation as the standard for determining when building services for

a public building are more than incidental. See 29 CFR 4.116(c)(2); 48 CFR 22.402(b)(ii).

As discussed under § 9.3, below, the regulation is amended to make it clear that if a contract provides services for more than one public building, only buildings for which services were provided under a predecessor contract are covered.

It should be recognized that the coverage principles of the Executive Order differ from 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. SCA prevailing wage requirements apply to service contracts of Federal agencies and the District of Columbia, the principal purpose of which is to furnish services in the United States through the use of service employees. 29 CFR 4.110. The Executive Order covers service contracts of \$100,000 or more with the Federal government for the maintenance of a public building and contains no principal purpose requirement. Therefore, not all SCA covered contracts are within the scope of the Executive Order, and it may be that some contracts covered under the Executive Order are not covered by the SCA.

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.

SEIU suggested that the last sentence in § 9.3(a) be clarified to indicate which contracts are excluded. LIUNA expressed concern that restricting the Executive Order's coverage to successor or follow-on contracts "at the same building" may exclude a workforce that is employed at multiple locations, all of which are public buildings. LIUNA suggests that the final regulations should expressly state that the Executive Order applies to contracts such as pest control, trash removal, and window washing where the contractor's workforce is employed only at buildings covered by the Executive Order.

We agree that the intent of the Executive Order was to cover contracts which provided recurring building services at more than one public building. However, as provided in § 9.5(b)(5), the Executive Order does not apply in certain cases to services where the contractor's employees perform work both at a covered public building and at other locations under contracts not covered by the Executive Order. To avoid possible confusion, the discussion in § 9.3 of contracts which may be excluded from coverage has been moved to § 9.5. Sections 9.3 and 9.5 have been clarified in accordance with this discussion.

Public Building (9.4)

Section 2 of the Executive Order defining the term "public building" is patterned after the definition of a public building in Section 13 of the Public Buildings Act of 1959, 40 U.S.C. 612. The definition in the Executive Order is set forth and explained in § 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 (including that reserved for national forests and other purposes)" are not "public buildings." We have been unable to find any regulation, opinion, or case law interpreting "public domain" as the term is used in the Public Buildings Act of 1959, but the term is commonly considered to refer to public lands in the West. Because these lands are administered by the Department of Interior, Bureau of Land Management (BLM) (see 43 CFR 2091.0-5(c)), "public domain" was so defined in the proposed regulations. In addition, because national forests are specifically referenced in the Executive Order, lands administered by the Department of Agriculture, U.S. Forest Service were included in the definition. Buildings on other Federal property are not considered to be "on the public domain" for purposes of the Executive Order.

SEIU and LIUNA objected to the proposed definition of "public domain" as too broad, because it includes all lands administered by the BLM and the

U.S. Forest Service. LIUNA suggested a definition which would exclude from the "public domain" land that "has not been specifically designated for a public or governmental use." SEIU suggests that the public domain exception apply to buildings on land "which has not been reserved for any specific governmental purpose or purchased for a specific purpose such as an office building."

These suggestions would be contrary to the plain meaning of the Executive Order, which states that "public domain" includes land "reserved for national forests and other purposes. For purposes of the Executive Order, the Department agrees that the term "public domain" should be construed narrowly. The Department believes that an appropriate definition of "public domain" is (1) any public lands owned by the United States and administered by the Department of the Interior, Bureau of Land Management, and (2) the National Forest System administered by the Department of Agriculture, U.S. Forest Service. However, the Department agrees with the commenters that the "public domain" does not include Federal office buildings occupied by BLM or the U.S. Forest Service where such buildings are not on *lands administered* by those agencies, such as office buildings in cities and towns. The regulation has been clarified accordingly.

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 (not an exempt "military installation"). 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. For these reasons, and consistent with the purpose of the Executive Order to cover Government office buildings, the preamble to the proposed regulations stated that the Department of Labor considers the Pentagon to be a "public building" within the meaning of the Executive Order.

Russell Willis commented that by covering the Pentagon, the Executive Order appears to provide broader coverage than coverage under GSA's authority. SEIU and LIUNA commented that the Pentagon should be covered by the Executive Order.

As explained above, the Pentagon was removed from GSA's jurisdiction without similarly restricting the definition of "public building." The

final rule has been revised to expressly provide that the Pentagon is not excluded from the Executive Order.

Leased buildings are not public buildings covered by the Executive Order unless they are being leased to the Government 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.

LIUNA expressed concern that excluding other leased facilities would create a gap in protection for building service employees. The plain language of the Executive Order, however, limits coverage to "Government-owned building(s)."

Coverage Limitations (9.5)

The Order does *not* apply to contracts under the simplified acquisition threshold, which is currently \$100,000. In addition, certain other contracts are excluded from coverage pursuant to sections 3 (b)–(d) of the Executive Order, including: 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, Pub. L. 103–329; and vending service contracts operated by the blind, awarded pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107.

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 (the) 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 employees are deployed by the successor contractor to perform the contract services, 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.

The following discussion of comments regarding the exclusion of contracts for services at a public building which are also performed at

locations under contracts not subject to the Executive Order, also addresses the corresponding provision § 9.8(b)(3) regarding when a successor contractor must offer employment to the predecessor's employees.

In commenting on these sections (§§ 9.5 and 9.8(b)(3)) of the proposed rule, SEIU suggested that these sections erroneously interpret the Executive Order. SEIU is of the view that there is no basis in the Executive Order for excluding "positions" as provided in § 9.8(b)(3) of the proposed regulations, and that the exclusion refers only to "services." SEIU asserts that this reference is to services performed under a particular building service contract. SEIU maintains that a particular contract should either be covered or not covered by the Executive Order, and once a building service contract is covered, the only "positions" excluded are those positions which are not deemed to be "service employees" within the meaning of SCA, 41 U.S.C. 357(d), citing section 4(b)(2) of the Executive Order.

In support of their view, SEIU explained that to exclude certain positions under covered contracts will mean that coverage depends upon whether particular employees of the predecessor contractor coincidentally decided to work for the same contractor at another building. SEIU contends that this result is inconsistent with the purpose of section 3(e) of the Executive Order and is likely to lead to confusion.

In a similar manner, LIUNA and SEIU also commented that the regulations could be read to exclude from coverage building service contracts where all or part of the workforce was incidentally employed by the contractor at other non-covered buildings. They suggested that, under the proposed regulation, the exclusion would depend upon whether the predecessor's employees happen to work for the contractor at another location; that contract coverage will be determined at any particular time based upon who the incumbent contractor is and the employment needs of that contractor's employees, rather than on the nature of the service contract itself and how those services are typically rendered to the government. They contend that such an unworkable result was not intended by the Executive Order. Similar or even identical building service contracts might be covered in one case and excluded in another.

SEIU pointed out that federal service contracts often have a work force that is employed less than full time under that contract. The employees will sometimes also apply to work for the same

contractor under another non-federal contract. SEIU reports that the practice in the industry is for the workers to apply separately for work on the non-federal job. The SEIU notes the difference between this situation and one in which the entire workforce moves from location to location performing the same work under many different contracts, only a few of which are covered by the Executive Order.

SEIU recommends that § 9.8(b)(3) be deleted and that the final regulations clarify that entire contracts are either covered or not covered based upon whether the workforce that performs the contract was normally hired to (1) perform only that contract or (2) perform a number of contracts including contracts not covered by the Executive Order.

In a similar manner, LIUNA and SEIU also commented that the Executive Order provides examples of services which are excluded from coverage, where the employees only periodically visit the site and where the employees respond to service calls at other non-covered locations. As an exclusion from coverage, they contend that this provision should be given a narrow interpretation.

LIUNA suggests that § 9.8(b)(3) of the regulation be qualified by the addition of language identical to that found in proposed § 9.3(b)(1), limiting the exclusion to services offered "once a year" or on a "one-time or annual basis." LIUNA asserts that otherwise, large categories of typical building service contracts which were intended to be covered, such as janitorial contracts performed continuously, but only for several hours a day, will be excluded from the Executive Order.

The Executive Order expressly excludes 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. The Executive Order provides examples of services which are excluded from coverage, where the employees only periodically visit the Federal building site to perform contract work and where the employees typically respond as well to service calls at non-covered locations. As an exclusion from coverage, this provision should be given a narrow interpretation. The Department agrees that the proposed regulations are confusing and could allow results which would be inconsistent with the intent of the Executive Order.

The regulations have been amended to look at how the services in question are performed, by examining whether a majority of the employees performing the services in question under the contract work both at buildings under contracts subject to the Executive Order and at other locations not subject to the Executive Order. Where a majority of the workers furnishing the contract services in question go from location to location, including other locations under contracts not subject to the Order, the exclusion will apply. In addition, the regulation provides that the exclusion does not apply where the employees separately applied for the non-federal job.

The Executive Order's exclusion would not apply if the employees are deployed in a manner designed to avoid the purposes of the Executive Order. The regulation has been clarified to provide that in examining whether or not there is an attempt to avoid coverage under the Executive Order, the Department will look carefully at how the predecessor contractor deployed its workforce. The Department may also consider the manner in which the work force is typically deployed to perform the services in question and the manner in which the contracts are structured to determine whether the building services contract meets the coverage provisions of 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 implement 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 Department of Labor procedures rather than pursuant to the general disputes clause of the Contract Disputes Act, 41 U.S.C. 601 *et seq.*

Other provisions state that contract funds may be withheld 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 require contractors to cooperate in investigations by the Department of Labor or the contracting agency.

Introductory language has been added so that the clauses would not be included in contracts which are excluded from the Executive Order pursuant to subsections (b), (c) and (d)

of section 3 of the Order and §§ 9.5(b) (2), (3) and (4) of these regulations. However, the clauses must be included in contracts which may be exempt pursuant to subsection (e) (§ 9.5(b)(5) of the regulations) since exclusion of such a contract is dependent upon how workers are deployed by the successor contractor, rather than just the nature of the contract services and how the workers were deployed by the predecessor contractor, and therefore cannot be known at the time of the bid solicitation. A new paragraph (d) has been added, and the remaining paragraphs have been re-ordered accordingly, to address the exclusion from coverage in § 9.5(b)(5), where the services are performed by workers who also work at other locations under contracts not subject to the Executive Order.

The application of the clause in paragraph (c), concerning the list of employees to be provided by the predecessor contractor, is explained in § 9.11 of the regulations. Because paragraph (c) is confusing, however, and this provision rather than § 9.11 will be included in contracts, the language is revised to conform to § 9.11 by stating that the list must contain the names of all employees working for the contractor at the time the list is provided, to make it clear that compliance with this provision will constitute compliance with the referenced provision in the Service Contract Act regulations, and to use the title of the clause utilized in the Federal Acquisition Regulations. The Department notes that the situation may arise where the clauses are not included in a contract because it does not itself succeed a contract for the performance of similar services. In such circumstances, in order to assist the successor contractor, it is suggested that contracting agencies request that the predecessor contractor, where possible, provide the list required by the SCA regulations 60 days before the end of the contract.

Because the phrase "[d]isputes arising out of this clause" may be construed too broadly to include disputes over issues such as whether contractors should be reimbursed for costs incurred, paragraph (h) is revised to provide language similar to the SCA provision entitled "Disputes Concerning Labor Standards" in the FAR at 48 CFR 52.222-42(t).

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 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 is offered declines 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 suggest such a result, it would be impractical and unduly burdensome. Therefore, the proposed regulations provided at § 9.8(c) that once the contract had been fully staffed and contract performance had commenced, the obligation to offer the right of first refusal ceased, and any subsequent vacant positions could be filled in accordance with the successor's normal business practices. The only proposed exception to this provision was if the evidence showed 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 any necessary staffing adjustments during the start-up period would be covered, and at the same time to discourage attempts to manipulate the starting work force. The proposed regulation required that the right of first refusal be offered to any eligible employees of the predecessor contractor during this three-month period, or until the full staffing level is reached, whichever comes first.

Both SEIU and LIUNA believe the Department of Labor incorrectly interpreted the Executive Order in § 9.8(c) as relieving the successor contractor of its obligation to offer a right of first refusal to the predecessor's employees once the successor contractor reaches a full staffing level. They contend there is nothing in the Executive Order that relieves the successor employer of its obligation to offer a right of first refusal when vacancies become available under the contract. They believe the obligation by the successor contractor should continue until all predecessor employees have been offered employment or until three months after the successor contract has begun.

In that regard, these commenters stated that proposed § 9.8(c) (1) and (2) are inconsistent. Under proposed § 9.8(c)(2), a successor contractor who employs fewer employees than the predecessor contractor must continue to offer a right of first refusal during the first three months of the contract if the successor contractor decides to increase the size of the workforce. However, under proposed § 9.8(c)(1), the successor contractor does not need to continue to offer a right of first refusal if vacancies occur during the first three months of the contract due to termination of one of the employees who was employed under the successor contract. According to SEIU and LIUNA, the successor contractor should first be required to offer employment for that vacancy to any predecessor employees who have not yet received an offer of employment. They suggest that because DOL apparently determined in proposed § 9.8(c)(2) that three months is a reasonable time to continue the obligation of the contractor where vacancies occur due to increases in the workforce, that same time limitation should also be applied to vacancies created for other reasons and § 9.8(c)(1) should be so revised.

The Department agrees with the commenters and § 9.8(c)(1) is amended to reflect a continuing obligation of the successor contractor to offer employment to the predecessor's

employees for any position vacancies which occur for any reason during the first three months of the contract, until all of the predecessor's employees have received a bona fide offer of employment.

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.

No comments were received on this provision set forth in proposed § 9.7(b) and no revisions have been made.

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 proposed regulations provided at § 9.8(b)(1) 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, but the successor contractor is under no obligation to make an offer to such a position.

The successor contractor has complete discretion to decide who will be employed as managers and supervisors on the contract. If a service employee of the predecessor is qualified for a management/supervisory position, an offer of employment in that classification would satisfy the successor's obligation to offer the employee a right of first refusal, but the successor contractor is under no

obligation to make an offer to such a position.

No comments were received on this provision and no revisions have been made.

Unsuitable employees. The successor contractor is not required to offer a 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 proposed regulation implementing this provision, § 9.8(b)(2), did not define what constituted a "reasonable belief" or "suitable performance." However, the successor contractor must base the conclusion that an employee failed to perform suitably on information relative to a particular employee's past performance on the job obtained from a credible source, 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 predecessor contract may not be used as a basis for failing to offer a right of first refusal.

BSCAI commented that the Executive Order will require a successor contractor to assume responsibility for workers that the contractor has not screened or trained. In addition, BSCAI stated that requiring the successor contractor to retain the predecessor's employees would defeat the purpose of changing contractors—i.e., quality, performance and cost could be compromised. The Executive Order expressly states, however, that the contractor "is not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job."

SEIU and LIUNA both commented that the exception should not become a loophole to allow contractors to avoid their obligations under the Executive Order based upon undocumented oral conversations. They stated that the regulations should ensure the exception is limited to the employee who clearly has not performed suitably. In that regard, both commenters suggested that the regulations should make clear that an employer's reasonable belief as to a particular employee's past performance should be based upon a contemporaneous written record of the predecessor contractor. It was their view that a written record would help avoid disputes in the administration of the Executive Order with regard to what the contractor knew or did not know when it made the decision not to offer a right

of first refusal. If there is no written record, SEIU would require that reports of the employee's performance be from persons with first-hand knowledge of the employee's past performance. Putting the burden of proof on the employer rather than the employee is clearly justified, according to SEIU and LIUNA.

SEIU further commented that the regulations should state clearly that a contractor's determination that an employee has not suitably performed his or her job must be based on that employee's particular past performance and not on the past performance of the predecessor contractor. The Executive Order, by using the phrase "based on the particular employee's past performance," makes clear that the general performance of the predecessor contractor is irrelevant to the successor contractor's assessment of an employee's ability to perform the work. Further, SEIU recommended that the regulations provide that where an employee has worked for more than thirty days for the predecessor contractor and has not been disciplined for inadequate performance during that period of time, there would be a presumption that the employee can suitably perform the job. The presumption would make it more difficult for contractors to abuse this exception, while making it rebuttable would still allow contractors to eliminate any truly unsuitable employee. SEIU believes that the presumption would not cause an undue hardship on successor contractors since the Executive Order does not impose a continuing obligation to employ an employee after the employee starts work with the successor contractor. The successor employer will have an opportunity to evaluate the employee on the job and to take appropriate action against the employee if that employee is not performing adequately.

LIUNA recommended the creation of a similar presumption where an employee has not been subject to discipline by the predecessor contractor. The presumption would be greater for employees with greater seniority and no record of disciplinary action.

The Department agrees with the comments that the Executive Order does put the responsibility on the employer rather than the employee regarding establishing a reasonable belief that the employee has failed to perform suitably based on the employee's past performance. Therefore, the regulation is revised to provide a presumption that an employee has performed suitably. This presumption can be rebutted by showing the contractor's reasonable

belief that the employee had failed to perform suitably—e.g., by evidence of past discipline for unsuitable performance or evidence directly from contracting agency officials that the particular employee had not performed suitably. The Department is of the view that it is not necessary in every case to have written or first-hand evidence, since such evidence frequently will not be available to contractors. The evidentiary standard has been tightened, however, to provide that the evidence must be "based on credible information provided by a knowledgeable source * * *" Establishing a presumption based on a specific time frame under which an employee has performed without disciplinary action goes beyond the intent of the Executive Order, which requires only the successor contractor's "reasonable belief." In addition, the requirement that past performance be based on the particular employee's performance rather than the general performance of the predecessor contractor is further clarified.

Services at buildings not covered by the Order. The proposed regulation provided at § 9.8(b)(3) that the successor contractor is not obligated to offer a right of first refusal to employment in a position which will perform building services both at public buildings covered by the Executive Order and at other buildings not covered by the Order.

The comments on and discussion of this section are included above in § 9.5, which has been amended to include a new explanatory paragraph in § 9.5(b)(5)(ii). Section 9.8(b)(3) has been revised to include the language of the Executive Order exclusion, together with a cross-reference to § 9.5(b)(5)(ii), which applies this exclusion only where a majority of the contractor's employees perform work at the public building and at other locations under contracts not covered by the Executive Order.

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 proposed regulation at § 9.9 stated that the offer could be made either in writing or orally at a meeting of the predecessor contractor's employees, and required that the contractor keep either a copy of the offer or documentation regarding the meeting at which the offer was made, which could consist of notations on the attendance roster and a copy of any written notice distributed.

The proposed regulations provided that the successor's obligation to extend a right of first refusal applied to all employees employed at the end of the contract, including any who began work within 60 days before the end of the predecessor contract and thus do not appear on the list of employees which § 9.11 requires the predecessor contractor to provide at least 60 days before the end of the contract. Given that successor contractors commonly hire the predecessor's work force without the convenience of such a list, it is not likely that the absence of such employees' names from the list would be unduly burdensome.

The proposed regulations at § 9.10 discussed 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 held a position under the predecessor contractor that did not require or utilize such education, training or experience. The proposed regulation further provided that 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, *i.e.*, based on valid business reasons.

Both SEIU and LIUNA suggested that the final regulations should require that the "express offer of employment" be made in writing in order to avoid disputes regarding whether an offer is properly made. Both parties also recommend that the offer be made in a language in which the employees are fluent in order to make it meaningful. SEIU does not believe this would be a hardship on the employer since the employer must have a supervisory employee fluent in the language of the employees in order to properly supervise them.

The regulations have been revised to state that the employer should take reasonable efforts to make the employment offer in a language that the workers understand. We do not anticipate that this will place significant burden on contractors since both the predecessor and successor contractor will need to have some mechanism to communicate with the workers. This may be accomplished, for example, by having a co-worker or other person fluent in the workers' language at the meeting to translate or otherwise assist

employees who are not fluent in English. The Department recognizes that there may be a rare case where a contractor may need to hire an interpreter or translate a written offer.

SEIU, while noting that there is nothing in the Executive Order that requires a successor contractor to offer employment to the employee in the same position that he or she held with the predecessor contractor, stated concerns that employers may offer employment in lower level positions or different positions in order to discourage acceptance of offers of employment. SEIU believes that the regulations should go further than to state that where an employee is offered a position at a lower level, the basis for doing so should be "closely examined to insure that the offers are bona fide." SEIU and LIUNA believe that the final regulation should create a presumption that offers of employment to a lower or less favorable position are not bona fide offers, but that the presumption can be overcome by the employer showing a valid business reason for offering that particular employee employment at a lower or less favorable position. They state that the creation of this presumption will help to protect against contractors frustrating the purposes of the Executive Order. Otherwise, according to LIUNA, this proposed subsection does not provide sufficient protections to employees who may have performed acceptably at higher level positions under previous contractors.

In addition, SEIU believes the final regulations should provide that there is a presumption that an employer has not made a good faith offer of employment if the employer terminates the employee within the first ninety days of employment. The presumption could be overcome by the employer by showing a valid business reason, such as a reduction in force or unsatisfactory performance by the employee. SEIU expressed the view that the use of the term "good faith offer" in the Executive Order was intended to guard against successor employers frustrating the intent of the Executive Order by making an offer, employing the individual and then terminating the individual immediately without any valid reason for doing so.

The Department agrees with the concerns expressed by the commenters and has revised § 9.10(b) to provide that an offer may be made to a position providing lower pay or benefits than the employee held with the predecessor if the contractor shows valid business reasons. The Department does not believe that it is appropriate to have a presumption that an offer is not bona

fide where an employee is terminated from employment shortly after being hired. Terminations which are not for valid reasons would not ordinarily be in the employer's interest, due to such concerns as unemployment insurance obligations and similar reasons. However, the regulation has been revised to state that the Department will closely examine cases, including the facts and circumstances of the dismissal, where the timing of an employee's termination suggests that the offer of employment may not have been bona fide.

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 (as appropriate), 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(l)(2) that the predecessor furnish the names and anniversary dates at least ten days before contract termination. By providing the names of all service employees working on the contract 60 days in advance of termination, as required by the Executive Order, the predecessor contractor also fulfills its obligation under 29 CFR 4.6(l)(2). 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 at the time the list is submitted. The successor in turn must assume the employees listed will be working during the final month of the contract unless the facts demonstrate otherwise.

No comments were received on this provision, but language was added to clarify that the list is to contain the names of all employees working for the contractor at the Federal location.

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 proposed regulations required that the agency either post a notice or give individual notice to the predecessor contractor's employees. A prototype notice was included in an Appendix to the proposed regulations.

SEIU and LIUNA urged the Department to require that the notice also be provided by the predecessor contractor. They also suggested that the notice be posted both in English and in other languages spoken by the employees, if they are not fluent in English.

It remains the Department's view that the predecessor should have no obligation to provide notice. The Executive Order places no obligation on the predecessor contractor except providing a list of employees. The Department does not consider it appropriate to impose unnecessary notice obligations on predecessor contractors. The Executive Order clearly places the responsibility upon the successor contractor to "make an express offer of employment" to each service employee. Therefore, the Department continues to believe that notice to employees of their right of first refusal should be accomplished by placing the responsibility with the contracting agency. The Department expects the contracting agency to provide notice in English and in any other language that is understandable by a substantial portion of the service employees performing work under the predecessor contract. In response to comments, the Department expanded and clarified the prototype notice in the Appendix.

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 employees' and the contractor's need for resolution.

Role of the Contracting Officer (9.100)

The enforcement provisions of the regulations seek to provide a process that encourages resolution at the earliest possible stage with fairness and efficiency. For this reason, the proposed regulations provided 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 proposed regulations provided that the contracting officer will obtain statements from the parties of their respective positions and submit a report to the Department of Labor.

While SEIU is not opposed to DOL requiring that contracting officers attempt to resolve violations of the Executive Order as a first step, SEIU expressed concern that contracting officers not become an impediment to effective and quick resolution of disputes. SEIU contends the proposed regulations are seriously deficient because they permit contracting officers to block enforcement of employee rights by simply delaying completion of their responsibilities. SEIU and LIUNA suggest that this problem can be alleviated by placing a time limit on when the contracting officers must take action and recommend that the final regulations in § 9.100(b) provide that the contracting officer must perform his or her duties within ten days of receiving a complaint from an employee of the predecessor contractor. LIUNA suggests that if the matter is not resolved within ten days, the contracting officer should have ten additional days to obtain the statements from the parties and prepare a report to submit to the Wage and Hour Division. SEIU recommends that where a contracting officer has failed to gather information and report to Wage and Hour within ten days, an employee may go directly to the Wage and Hour Division to file a complaint. SEIU also suggests that when the contracting officer files his/her report with Wage and Hour, the statements of position

submitted by the parties should be included.

The Department agrees with the thrust of these comments and has modified the regulations to establish a time frame of 30 days for the contracting officer to forward to Wage and Hour any unresolved complaints, together with the contracting officer's summary of the relevant facts and issues and the statements of the parties. In addition, the regulation is revised to permit an employee to file a complaint directly with Wage-Hour if the complaint has not been timely forwarded to Wage-Hour.

Role of the Department of Labor (9.101, 9.102)

If the contracting officer cannot resolve the dispute, proposed § 9.100(b) provided that the contracting officer will submit a report to the Wage and Hour Division. Based on the contracting officer's report, Wage and Hour could attempt to resolve the dispute through conciliation procedures; however, if that is not successful, Wage and Hour would investigate as necessary to determine the facts and issue a determination as to whether a violation occurred. The proposed regulations also provided that the Administrator has the authority to conduct an investigation on his or her own initiative, without a complaint.

SEIU contends the proposed regulations regarding conciliation efforts are inadequate as they do not set a time limit on how long the conciliation efforts should continue. SEIU believes conciliation procedures should not drag on unnecessarily and recommends the final regulations place a ten day limitation on conciliations, with a caveat that this period can be extended by the mutual consent of the parties. LIUNA also favors a ten day limit.

SEIU and LIUNA suggest that there ought to be a 30-day time limit from the date the conciliation effort is over for issuance of a written determination by the Administrator. LIUNA also states that if any time limits set forth in this section are not met, the complainant should have an automatic right to appeal to the next level of the complaint procedure and at the same time there should be an automatic employment offer to the employee who is the subject of the complaint. According to LIUNA, these revisions would ensure that the rights of employees are not rendered meaningless by a delay in the complaint procedures.

The Department is committed to prompt resolution of complaints under the Executive Order because employees' jobs and livelihood are at issue. Therefore §§ 9.101 and 9.102 are

amended to provide that an investigation shall be commenced within 15 days of receipt of the contracting officer's report or the complaint unless the parties agree that the investigation should be delayed so that conciliation efforts can be completed.

However, the Department believes that setting a 30-day limit from the date a conciliation effort is terminated for issuance of a written determination by the Administrator is not appropriate. Where the conciliation effort is unsuccessful and the Department undertakes an investigation, 30 days may not be sufficient to conduct a thorough investigation and issue the Administrator's determination. Finally, the Department cannot concur with the suggestion that the contractor be required to hire an employee if the government fails to meet regulatory deadlines. This section, therefore, remains as proposed with minor clarification.

SEIU and LIUNA also suggest that § 9.102(c) should state how an aggrieved party may appeal a decision of the Administrator, how the request is made, and how long an aggrieved party has to file that appeal. Both commenters also state that the last sentence of this section should be clarified to make sure that copies of the Administrator's determination are given by certified mail to the complainant's representative, as well as to the successor contractor and the successor contractor's representative. They assert that under the proposed regulations, it is unclear whether there is a requirement to give copies to the complainant's representative.

The parties' concern in § 9.102(c) regarding appeal procedures are addressed in § 9.103. The Department concurs with the suggestion to clarify that copies of the Administrator's decision are to be sent to the complainant's representative(s) and the regulations are amended accordingly.

Hearing Procedures (9.103–9.107)

The proposed regulations provided that the Administrator's determination becomes a final order of the Secretary unless a request for a hearing is filed within 20 days of the date of the determination 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). Section 9.103 provided the procedures and time frames for appeal to the BSCA.

SEIU and LIUNA urge the Department to include clarifying language indicating that the Administrator will notify the

employee representative, if any, of her determination if there is no relevant issue of fact. The language of the regulations was intended to provide such notice. However, for the sake of clarification, § 9.103(b) of the regulations now expressly provides that the Administrator will notify the parties and their representatives, if any, "where no relevant facts are in dispute." In addition, § 9.102(c) is clarified by providing that the notice of determination of a violation will be given to the parties and their representatives, if any. Finally, § 9.103(a) is clarified to provide that "the Administrator shall advise the parties" including their representatives, that the notice of determination shall become final unless a hearing is requested.

Sections 9.103, 9.106 and 9.107 have been amended to provide for review by the Administrative Review Board (ARB). (Effective May 3, 1996, the Administrative Review Board was established within the Department of Labor as a reorganization and consolidation of the functions of the former Board of Service Contract Appeals, the Wage Appeals Board, and the Office of Administrative Appeals, which prepared decisions for the Secretary in all other programs). See Secretary's Order 2-96, 61 FR 19,978 (May 3, 1996).

Consistent with the Executive Order's directive to favor the resolution of disputes by efficient and informal alternative dispute methods, § 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.

Like the Department's "whistleblower" proceedings under 29 CFR part 24, it is anticipated that complainants may often appear *pro se*. Therefore § 9.105(f)(1) has been amended to provide that the ALJ's Rules of Evidence shall not apply. See 29 CFR 24.5(e).

If a complaint cannot be resolved informally through the conciliation or the settlement judge process, then § 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 have been sought. The contracting agency may also appear as *amicus curiae*.

As provided in § 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 (§ 9.106(c)). Section 9.107 provides the procedures for appealing an ALJ decision to the ARB.

The proposed regulations provided for assessment of costs and stated in the preamble that the Department was considering providing for payment of attorney fees or costs where the complainant prevails.

SEIU urged that §§ 9.106(c) and 9.107(f) of the final regulations be amended to empower the ALJ and the ARB to award attorney fees to a prevailing complaining employee. The SEIU further suggests that an award of attorney fees should be mandatory where the employee prevails.

LIUNA also commented that the ALJ should be expressly permitted to assess attorney fees, since it would be a permissible interpretation of the Executive Order's requirements and a reasonable means to enforce the Executive Order. LIUNA further states that § 9.107(f) should contain a similar provision to allow an employee to pursue his or her appeal rights.

Russell Willis commented that express statutory authority is necessary to provide for payment of attorney fees and costs.

The Supreme Court has held that under the American Rule, which governs the award of attorney's fees in the United States, the prevailing party may not recover attorney's fees as costs or otherwise absent statute or enforceable contract. See *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 245-247 (1975). Because neither the Executive Order nor any statutes provide for the award of attorney fees, there is an insufficient legal basis to provide for attorney fees by regulation in disputes arising under the Executive Order. Sections 9.106(c) and 9.107(f) have been clarified by expressly excluding attorney fees from an assessment of costs by the Administrative Law Judge or the Administrative Review Board.

Finally, the legislative history of the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, indicates that the Act excludes from coverage those hearings which are not required by an underlying statute. Similarly, the EAJA regulations promulgated by the Department of Labor exclude from coverage those proceedings which are established by

regulation, but are not required by the governing statute. See 29 CFR part 16. Neither the underlying statute, nor Executive Order 12933, require hearings. Accordingly, in any proceeding conducted pursuant to the provisions of §§ 9.105-9.107, the Administrative Review Board shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act. Appropriate language has been included in the regulations.

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. Proposed § 9.108 also set 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 proposed regulations at § 9.109 prescribed a three-year period for debarment in all cases.

SEIU stated that the ineligibility sanctions should be mandatory whenever there are violations unless the contractor can show that it acted in good faith; LIUNA suggested that the regulation specify that all violations are presumed to be willful.

The plain language of the Executive Order grants the Secretary the discretion to impose debarment where a contractor fails to comply with any order of the Secretary or has committed a willful violation. Thus, the standard proposed by the commenters is not consistent with that provided by the Executive Order and is not adopted in the final rule.

Definitions (9.200)

The regulations include definitions of several important terms. The definition of "service employee" is based on the Service Contract Act, as the Executive Order provides. Coverage under the

Executive Order, however, applies only to those service employees performing recurring building services, and not to other employees on contracts subject to SCA.

LIUNA suggested that the term "contract" and "building service contract" should include "subcontracts."

Because the language of the Executive Order does not specifically refer to subcontracts, and because the requirements are not practical as applied to subcontracts, the regulations contain no "flow-down" requirements for subcontractors. No amendment is made to this provision.

Dates of Applicability

The clauses contained in § 9.6 must be included in all contracts awarded after the effective date of these regulations. In addition, the regulations shall apply as of the effective date to all contracts awarded prior to the effective date which contain the clauses set forth in section 4 of the Executive Order (§ 9.6 (a), (b), (c), and (e) of the regulations), and those contracts should be amended where practicable to incorporate the additional clauses set forth in the regulations (§ 9.6 (d), (f), (g), and (h)).

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, all existing contracts (whether or not they contain the clauses of the Executive Order) should be amended to include the clause in § 9.6(c).

Executive Order 12866/§ 202 of the Unfunded Mandates Reform Act of 1995/Executive Order 12875/Small Business Regulatory Enforcement Fairness Act

Because this rule provides the initial implementing regulations for an Executive Order issued by the President, it is being treated as a "significant regulatory action" within the meaning of Executive Order 12866. However, no economic analysis is required because the rule will not have a significant economic impact. For the same reason, the rule is not a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act. 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.

In addition, the rule does not require a § 202 statement under the Unfunded Mandates Reform Act of 1995. Although State, local, and tribal governments are not precluded from receiving Federal contracts to provide building services at public buildings, the Department is not aware of any governmental entities that are performing public building service contracts within the purview of this rule. Thus this rule would not result in a mandate upon a State, local, or tribal government for purposes of Executive Order 12875. The Executive Order simply requires contractors to the Federal Government 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.

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 Administrator 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 John R. Fraser, Acting 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, Labor, Law enforcement.

Signed at Washington, DC, on this 16th day of May, 1997.

John R. Fraser,

Acting Administrator, Wage and Hour Division.

Accordingly, for the reasons set out in the preamble, 29 CFR part 9 is added 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 a "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 will 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 or the Administrator's determination 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 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, a contract which includes a requirement for recurring building services is subject to the Executive Order and these regulations even if the contract also contains other non-covered services or non-service requirements, such as construction or supplies, 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, and only to those buildings for which services were provided under a predecessor 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.

(i) Building service requirements will not be considered incidental, and therefore will be subject to the Executive Order, where

(A) 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

(B) 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.

(ii) Building services performed on a building being leased to the Government pursuant to a lease-purchase contract are considered incidental and not covered unless the services are being performed under a contract directly with the Government.

§ 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(s) at one or more of the same buildings. 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.

(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 "building service contracts" as defined in paragraph (a) of this section 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. The public domain includes only: those public lands owned by the United States and administered by the Department of Interior, Bureau of Land Management; and the National Forest System administered by the Department of Agriculture, U.S. Forest Service. The public domain does not include Federal buildings, such as office buildings in cities or towns, which are occupied by the Bureau of Land Management or U.S. Forest Service where such buildings are not on lands administered by those agencies.

(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 projects; 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, but not including the Pentagon);

(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 to 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 one or more of the same public building(s).

(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, Pub. 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)(i) As explained in paragraph (b)(5)(ii) of this section, 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.

(ii) The successor contractor is not required to offer a right of first refusal for employment where a majority of the successor contractor's employees performing the particular service under

the contract work at the public building and at other locations under contracts not subject to the Executive Order and these regulations. 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 make service calls to repair equipment at various Government and non-Government buildings. This exclusion does not apply, however, where the service employees' work on non-covered contracts is not performed as a part of the same job as their work on the Federal contract in question, or where they separately apply for work on the non-Federal contracts. This exclusion also does not apply where the employees are deployed in a manner that is designed to avoid the purposes of the Executive Order. In making this determination, all the facts and circumstances are examined, including particularly the manner in which the predecessor contractor deployed its workforce to perform the services, the manner in which the work force is typically deployed to perform such services, and the manner in which the contract is structured.

Contract Clauses

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

The clauses set forth in paragraphs (a) through (h) of this section 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 the simplified acquisition threshold of \$100,000, where the contract requires the provision of building services and succeeds a contract for the performance of similar services at one or more of the same public building(s), except that such clauses need not be included in any contract which is excluded from coverage of the Executive Order pursuant to paragraph (b) (2), (3) or (4) of § 9.5 of this part.

(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. 357(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 paragraph (n) of the clause of this contract entitled "Service Contract Act of 1965, as Amended" and 29 CFR 4.6(l)(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 at the time the list is submitted. The list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each service employee, as appropriate. The Contracting Officer will provide the list to the successor contractor and the list shall be provided on request to employees or their representatives. Compliance with this paragraph shall constitute compliance with paragraph (n) of the clause entitled "Service Contract Act of 1965, as Amended" and 29 CFR 4.6(l)(2).

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(d) The requirements of this clause do not apply to services where a majority of the contractor's employees performing the particular services under the contract work at the public building and at other locations under contracts not subject to Executive Order 12933, *provided* that the employees are not deployed in a manner that is designed to avoid the purposes of the Executive Order.

(e) 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.

(f) 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, the Administrative Law Judge, or the Administrative Review Board, 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.

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

(h) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause 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 or among any of the following: The contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract.

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 and § 9.8.

(b) A successor contractor may employ on the contract any employee who the contractor demonstrates has worked for that contractor for at least 3 months immediately preceding the commencement of the contract and 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 at one or more of the same public building(s) 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) The successor contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract. However, a successor contractor is not required to offer a right of first refusal to an employee of the predecessor contractor if the successor contractor is able to demonstrate its reasonable belief that

the employee in fact failed to perform suitably on the predecessor contract—for example, through evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. The successor contractor must demonstrate that its belief that an employee has failed to perform suitably on the predecessor contract is reasonable and based upon credible information provided by a knowledgeable source such as the predecessor contractor, the employee's supervisor, or the contracting agency. Information regarding the general performance of the predecessor contractor is not sufficient.

(3) The successor contractor is not required to offer a right of first refusal for employment where a majority of the contractor's employees performing the service in question under the contract work both at the public building and at other locations under contracts not subject to the Executive Order and these regulations. See § 9.5(b)(5)(ii) of this part.

(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 for three months after commencement of the contract to fill vacancies created by employee termination, either voluntarily or for cause. 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. Further, if an employee quits or is terminated within three months of contract commencement and the contractor determines that it must hire an additional employee to sufficiently perform the contract requirements, the contractor must first offer a right of first

refusal to an eligible employee of the predecessor contractor and must continue to offer a right of first refusal to the predecessor's employees until one of the employees accepts the contractor's employment offer, or, except as otherwise provided in this Section, until all of the employees have refused a 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 the predecessor's employees until ten (10) of the employees accept the contractor's employment offer, or, except as otherwise provided in this Section, until all of the employees have refused a job offer.

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

(a) Except as provided in § 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 successor contractor must offer employment to each employee, either individually in writing or orally at a meeting attended by a group of the predecessor contractor's employees. In order to ensure that the offer is effectively communicated, the successor contractor should take reasonable efforts to make the offer in a language that each worker understands, for example, by having a co-worker or other person fluent in the worker's language at the meeting to translate or otherwise assist an employee who is not fluent in English.

(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.

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(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 to a position providing lower pay or benefits than the employee held with the predecessor contractor will be considered bona fide if the contractor shows valid business reasons (not related to a desire that the employee refuse the offer, or that other employees be hired). Where the timing of an employee's termination suggests that the offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined to be sure the offer was bona fide.

§ 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 for the contractor at the Federal facility at the time the list is submitted, 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.

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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 (or designee) will provide written 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 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?

(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 (or designee) 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, within 30 days from receipt of the complaint, obtain statements of the positions of the parties and forward the complaint and statements, together with a summary of the issues and any relevant facts known to the contracting officer, to the nearest District Office of the Wage and Hour

Division, Employment Standards Administration, U.S. Department of Labor, with copies to the contractor and the complaining employee(s).

(c) If the contracting officer has not forwarded the complaint to the Wage and Hour Division within 30 days of receipt of the complaint, as required by paragraph (b) of this section, the complainant may refile the complaint directly with the nearest District Office of the Wage and Hour Division.

§ 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 may promptly 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. The Wage and Hour Division will commence an investigation in accordance with § 9.102 of this part if the dispute has not been satisfactorily resolved within 15 days of receipt of the contracting officer's report or the complaint, unless the successor contractor and the complainant(s) agree to a delay in the commencement of the investigation.

§ 9.102 How are complaints resolved if conciliation is unsuccessful?

(a) Upon receipt of a contracting officer's report or a complaint filed in accordance with § 9.100(c) of this part, the Wage and Hour Division, U.S. Department of Labor, will investigate as necessary to gather sufficient data concerning such case unless the dispute has been resolved through conciliation between the parties. Such an investigation will be commenced within 15 days of receipt of the contracting officer's report or the complaint unless conciliation efforts are still underway and the complainant(s) and the successor contractor have agreed to a delay in the investigation so that conciliation efforts may be completed. 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 § 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 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) and his/her representatives (if any), and to 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, where 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) of this section, the determination of the Administrator shall advise the parties (ordinarily the complainant (if any), the successor contractor, and their representatives (if any)), 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. Any aggrieved party may file 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, and their representatives, if any, 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, DC 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 and their representatives, if any, 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 Administrative Review Board pursuant to § 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 parties and their representatives, if any, of the Administrator's determination that there is no relevant issue of fact and that a petition for review may be filed with the Administrative Review Board within 20 days of the date of the notice, in accordance with the procedures at § 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 Administrative Review Board) 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 Administrative Review Board 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

§§ 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 and their representatives, if any, 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) 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.

(c) 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.

(d) 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, DC 20210.

(e) 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 a case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

(f)(1) 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, except that the Rules of Evidence at 29 CFR part 18, subpart B shall not apply. 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 repetitive.

(2) 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 completion of 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 (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding.

(d) A proceeding under subpart B of this part is not subject to the Equal

Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

(e) 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 Administrative Review Board.

Appeal Procedures

§ 9.107 How may an administrative law judge's decision or the Administrator's determination be appealed?

(a) The Administrative Review Board 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 aggrieved 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 Administrative Review Board. No administrative or judicial review shall be available unless a timely petition for review to the Administrative Review Board 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 (where the case involves an appeal from an administrative law judge's decision). If a timely petition for review is filed, the decision of the administrative law judge (or Administrator) shall be inoperative unless and until the Administrative Review Board issues an order affirming the decision or declining review of the matter. If a petition for review concerns only the imposition of ineligibility sanctions, however, the remainder of the decision 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, DC 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 (in cases involving an appeal from an administrative law judge's decision).

(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 (not including attorney fees) 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.

(h) Proceedings under Executive Order 12933 are not subject to the Equal Access to Justice Act (Pub. L. 96-481). Accordingly, in any proceeding conducted pursuant to the provisions of §§ 9.105-9.107, the Administrative Review Board shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act.

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 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 (successor contractor) is required to offer employment to the employees of (predecessor contractor) working at (the contract worksite or worksites) except in the following situations:

- Managerial or supervisory employees on the current contract are not entitled to an offer of employment.
- (successor contractor) may reduce the size of the current work force. Therefore, only a portion of the existing work force may receive employment offers. However, (successor contractor) must offer employment to the employees of (predecessor contractor) if any vacancies occur in the first three months of the new contract.

(successor contractor) may employ a current employee on the new contract before offering employment to (predecessor contractor's) employees only if the current employee has worked for (successor contractor) for at least three months immediately preceding the commencement of the new contract and would face layoff or

discharge if not employed under the new contract.

- Where (successor contractor) has reason to believe, based on credible information from a knowledgeable source, that an employee's performance has been unsuitable on the current contract, the employee is not entitled to employment with the new contractor.

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

Any employee of (predecessor contractor) who believes that he or she is entitled to an offer of employment with (successor contractor) and has not received an offer, may file a complaint with (contracting officer or representative), the contracting officer handling this contract at: (address and telephone number of contracting officer). If the contracting officer is unable to resolve the complaint, the contracting officer shall promptly forward a report to the U.S.

Department of Labor, Wage and Hour Division.

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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