

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;

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(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

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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.