

**§ 8.13**

**§ 8.13 Right to counsel.**

Each interested party shall have the right to appear in person or by counsel or other representative in any proceeding before the Board.

**§ 8.14 Consolidations.**

Upon its own initiative or upon motion of any interested party, the Board may consolidate any proceeding or concurrently consider two or more appeals which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or concurrent review will contribute to a proper dispatch of its business and to the ends of justice, and it will not unduly delay consideration of any such appeals.

**§ 8.15 Motions; extensions of time.**

(a) Except as otherwise provided in this part, any application for an order or other relief shall be made by motion. Except when made orally before the Board, motions shall be in writing and shall be accompanied by proof of service on all other parties. If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. Any party may respond to the motion within such time as may be provided by the Board.

(b) Requests for extension of time as to the filing of papers or oral presentation shall be in the form of a motion under paragraph (a) of this section.

**§ 8.16 Oral proceedings.**

(a) With respect to any proceedings before it, the Board may upon its own initiative or upon request of any interested party direct the interested parties to appear before the Board or its designee at a specified time and place in order to simplify the issues presented or to take up any other matters which may tend to expedite or facilitate the disposition of the proceeding.

(b) In its discretion, the Board or a single presiding member may permit oral argument in any proceeding. The Board or the presiding member shall prescribe the time and place for argument and the time allocated for argument. A petitioner wishing to make

oral argument should make the request therefore in the petition.

**§ 8.17 Decision of the Board.**

(a) Unless the petitioner consents to disposition by a single member, decisions of the Board shall be by majority vote.

(b) Where petitioner consents to disposition by a single member, other interested parties shall have an opportunity to oppose such disposition, and such opposition shall be taken into consideration by the Board in determining whether the decision shall be by a single member or majority vote.

**§ 8.18 Public information.**

Subject to the provisions of part 70 of this title, all papers and documents made a part of the official record in the proceedings of the Board and decisions of the Board shall be made available for public inspection during usual business hours at the Office of the Administrative Review Board, U.S. Department of Labor, Washington, DC 20210.

**§ 8.19 Equal Access to Justice Act.**

Proceedings under the Service Contract Act and the Contract Work Hours and Safety Standards Act are not subject to the Equal Access to Justice Act (Pub. L. 96-481). Accordingly, in any proceeding conducted pursuant to the provisions of this part 8, the Board shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act.

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

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AUTHORITY: Secs. 4-6, Executive Order 12933; 5 U.S.C. 301.

SOURCE: 62 FR 28185, May 22, 1997, unless otherwise noted.

### 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

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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;

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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

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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

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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,

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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 em-

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ployees 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

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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

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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

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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 ap-

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pointed 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.

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(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).

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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 sub-contract 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)

## **PART 11—DEPARTMENT OF LABOR NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) COMPLIANCE PROCEDURES**

### **Subpart A—General Provisions**

Sec.

- 11.1 Purpose and scope.
- 11.2 Applicability.
- 11.3 Responsible agency officials.

### **Subpart B—Administrative Procedures**

- 11.10 Identification of agency actions.
- 11.11 Development of environmental analyses and documents.
- 11.12 Content and format of environmental documents.
- 11.13 Public participation.
- 11.14 Legislation.

AUTHORITY: NEPA, (42 U.S.C. 4321 *et seq.*), Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977) and Council on Environmental Quality Regulations (National Environmental Policy Act, Implementation of Procedural Provisions) 40 CFR parts 1500-1508 (43 FR 55978).

SOURCE: 45 FR 51188, Aug. 1, 1980, unless otherwise noted.

### **Subpart A—General Provisions**

#### **§ 11.1 Purpose and scope.**

(a) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) directs that, "to the fullest extent possible, \* \* \* the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth" in the Act for the preservation of the environment. As a means for achieving this objective, Executive Order 11991 of May 24, 1977 (amending

E.O. 11514 of March 5, 1970) directed the Council on Environmental Quality (CEQ) to issue uniform regulations for implementation of NEPA by all Federal agencies. These regulations were published in final form on November 29, 1978 (43 FR 55978) as 40 CFR parts 1500-1508. The CEQ's NEPA regulations require that each Federal agency adopt implementing procedures to supplement their regulations (40 CFR 1507.3). Accordingly, the purpose of this part is to prescribe procedures to be followed by Department of Labor agencies when such agencies are contemplating actions which may be subject to the requirements of NEPA. These regulations do not replace 40 CFR parts 1500-1508; rather they are to be read together with, and as a supplement to, the CEQ's regulations.

(b) It is the responsibility of each agency to comply with the policies set forth in NEPA to the fullest extent possible and consistent with its statutory authority. Each agency shall comply with all applicable requirements of this part except where compliance would be inconsistent with other statutory requirements. However, no trivial violation of, or noncompliance with, these procedures shall give rise to an independent cause of action (cf. 40 CFR 1500.3 and 1507.3(b)).

#### **§ 11.2 Applicability.**

Although all Department of Labor agencies are subject to NEPA, only three of its agencies routinely propose or consider actions which may require the preparation of environment assessments or environmental impact statements. These are the Occupational Safety and Health Administration (OSHA), which acts pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*); the Mine Safety and Health Administration (MSHA), which acts pursuant to the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801, *et seq.*); and the Employment and Training Administration (ETA) (through one of its major programs, the Job Corps) which purchases and leases land and constructs Job Corps centers pursuant to the Comprehensive Employment and Training Act (29 U.S.C. 801, *et seq.*). Therefore, these procedures have been designed