

§9.6

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).

(Approved by the Office of Management and Budget under control numbers 1215-0150 and 1215-0190)

(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,