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Administrative Review Board means the Administrative Review Board, U.S. Department of Labor.

Contractor means a prime contractor and all of its first or lower tier subcontractors on a Federal service contract.

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

Day means, unless otherwise specified, a calendar day.

Employee or *service employee* means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. The term *employee* or *service employee* includes all such persons, as defined in the McNamara-O'Hara Service Contract Act of 1965, as amended, regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

Employment opening means any vacancy in a position on the contract, including any vacancy caused by replacing an employee from the predecessor contract with a different employee.

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

Managerial employee and *supervisory employee* mean a person engaged in the performance of services under the contract who is employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541.

Month means a period of 30 consecutive days, regardless of the day of the calendar month on which it begins.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Secretary means the U.S. Secretary of Labor or an authorized representative of the Secretary.

Same or similar service means a service that is either identical to or has one or more characteristics that are alike in

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substance to a service performed at the same location on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract.

Service contract or *contract* means any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the McNamara-O'Hara Service Contract Act of 1965, as amended, and its implementing regulations.

Solicitation means any request to submit offers or quotations to the Government.

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

Wage and Hour Division means the Wage and Hour Division, U.S. Department of Labor.

§9.3 Coverage.

This part applies to all service contracts and their solicitations, except those excluded by §9.4 of this part, that succeed contracts for the same or similar service at the same location.

§9.4 Exclusions.

(a) *Small contracts*—(1) *General*. The requirements of this part do not apply to contracts or subcontracts under the simplified acquisition threshold set by the Office of Federal Procurement Policy Act, as amended.

(2) *Application to subcontracts*. While the §9.4(a)(1) exclusion applies to subcontracts that are less than the simplified acquisition threshold, the prime contractor must comply with the requirements of this part, if the prime contract is at least the threshold amount. When a contractor that is subject to the nondisplacement requirements of this part discontinues the services of a subcontractor at any time during the contract and performs those services itself at the same location, the contractor shall offer employment on

the contract to the subcontractor's employees who would otherwise be displaced and would otherwise be qualified in accordance with this part but for the size of the subcontract.

(b) *Certain contracts or subcontracts awarded for services produced or provided by persons who are blind or have severe disabilities.* (1) The requirements of this part do not apply to contracts or subcontracts pursuant to the Javits-Wagner-O'Day Act.

(2) The requirements of this part do not apply to contracts or subcontracts for guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the *severely handicapped* as described in sec. 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995.

(3) The requirements of this part do not apply to agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act.

(4) The exclusions provided by paragraphs (b)(1) through (3) of this section apply when either the predecessor or successor contract has been awarded for services produced or provided by the severely disabled, as described in paragraphs (b)(1)–(3) of this section.

(c) *Federal service work constituting only part of employee's job.* This part does not apply to employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of Executive Order 13495.

(d) *Contracts exempted by Federal agency.* This part does not apply to any contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders as to which the head of a contracting department or agency finds that the application of any of the requirements of this part would not serve the purposes of Executive Order 13495 or would impair the ability of the Federal Government to procure services on an economical and efficient basis.

(1) Any agency determination to exercise its exemption authority under Section 4 of the Executive Order shall be made no later than the solicitation date. As an alternative to exempting the agency from all provisions of this part, the head of a contracting department or agency may exempt the agency from one or more individual provisions no later than the contract solicitation date. Any agency determination to exercise its exemption authority under Section 4 of the Executive Order made after the solicitation date shall be inoperative and in such a circumstance the contract clause set forth in appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(2) When an agency exercises its exemption authority with respect to any contract, subcontract, or purchase order, the contracting agency shall ensure that the contractor notifies affected workers and their collective bargaining representatives in writing of the agency's determination no later than five business days after the solicitation date. The notification shall include facts supporting the determination that the application of one or more requirements of this part would not serve the purposes of Executive Order 13495 or would impair the ability of the Federal Government to procure services on an economical and efficient basis. Where a contracting agency exempts a class of contracts, subcontracts, or purchase orders, the contractor shall provide the notice to incumbent workers and their collective bargaining representatives for each individual solicitation. A contracting agency's failure to ensure that the contractor notifies incumbent workers and their collective bargaining representatives in writing of the agency's determination to exercise its exemption authority under Section 4 of the Executive Order no later than five business days after the solicitation date shall render the exemption decision inoperative and in such a circumstance the contract clause set forth in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations. The contracting agency also shall notify the

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Department of its exemption decision and provide the Department with a copy of its written analysis no later than five business days after the solicitation date, which the Department will post on its Web site at <http://www.dol.gov>. The contracting agency's failure to follow this requirement shall render any agency exemption decision inoperative and in such a circumstance the clause in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(3) The agency shall ensure that the predecessor contractor uses the notification method specified in §9.11(b) of this part to inform workers and their collective bargaining representatives of the exemption determination. The failure by a contracting agency to ensure that the contractor uses the notification method specified in §9.11(b) of this part shall render the exemption decision inoperative and in such a circumstance the contract clause set forth in appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(4)(i) In exercising the authority to exempt contracts under this section based on a finding that any of the requirements of Executive Order 13495 would not serve the purposes of the Order, or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the agency shall prepare a written analysis by the solicitation date supporting such determination. The written analysis shall be retained in accordance with FAR 4.805. 48 CFR 4.805. Such a written analysis shall, among other things, compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce. The consideration of cost and other factors in exercising the agency's exemption authority shall reflect the general finding made by the Executive Order that the government's procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor's employees, and shall specify how the particular circumstances support a contrary conclusion. Any agency determination to ex-

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ercise its exemption authority under Section 4 of the Executive Order without a written analysis as required by this part shall be inoperative and in such a circumstance the contract clause set forth in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(ii) When analyzing whether the application of the Executive Order's requirements would not serve the purposes of the Order and impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of a contracting department or agency shall consider the specific circumstances associated with the services to be acquired. General assertions or presumptions of an inability to procure services on an economical and efficient basis using a carryover workforce shall be deemed insufficient. Factors that may be considered include, but are not limited to the following:

(A) Whether the use of a carryover workforce would greatly increase disruption to the delivery of services during the period of transition between contracts (*e.g.*, the carryover workforce in its entirety would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements as pertinent to the contract, subcontract, purchase order, class of contracts, subcontracts, or purchase orders at issue and would require extensive training to learn new technology or processes that would not be required of a new workforce).

(B) Emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the location of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order.

(C) Situations where the head of the contracting department or agency reasonably believes, based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively, to perform suitably on the job and that it is not in the interest of

economy and efficiency to provide supplemental training to the predecessor's workers.

(iii) Factors the head of a contracting department or agency shall not consider in making an exemption determination (because consideration of such factors would contravene the Executive Order's purposes and findings) include whether the use of a carryover workforce, in general, would greatly increase disruption to the delivery of services during the period of transition between contracts; whether, in general, a carryover workforce would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements; the job performance of the predecessor contractor; the seniority of the workforce; and the reconfiguration of the contract work by a successor contractor. The head of a contracting department or agency also shall not consider wage rates and fringe benefits of service employees in making an exemption determination except in the following exceptional circumstances:

(A) In emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order;

(B) When a carryover workforce in its entirety would not constitute an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements but rather would require extensive training to learn new technology or processes that would not be required of a new workforce; or

(C) Other, similar circumstances in which the cost of employing a carryover workforce on the successor contract would be prohibitive.

(5) Any request by interested parties for reconsideration of a contracting department or agency head's determination to exercise its exemption authority under Section 4 of the Executive Order shall be directed to the head of the contracting department or agency.

(e) *Managerial and supervisory employees.* This part does not apply to employees who are managerial or super-

visory employees of Federal service contractors or subcontractors. See §9.2(9) of this part, definition of *managerial employee* and *supervisory employee*.

Subpart B—Requirements

§9.11 Contracting agency requirements.

(a) *Contract clause.* The contract clause set forth in Appendix A of this part shall be included in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar services at the same location.

(b) *Notice.* Where a contract will be awarded to a successor for the same or similar services to be performed at the same location, the Contracting Officer will ensure that the predecessor contractor provide written notice to service employees of the predecessor contractor of their possible right to an offer of employment. Such notice shall be either posted in a conspicuous place at the worksite or delivered to the employees individually. Where the predecessor contractor's workforce is comprised of a significant portion of workers who are not fluent in English, the notice shall be provided in both English and a language with which the employees are more familiar. Multiple foreign language notices are required where significant portions of the workforce speak different foreign languages and there is no common language. Contracting Officers may advise contractors to provide the notice set forth in appendix B to this part in either a physical posting at the job site, or another format that effectively provides individual notice such as individual paper notices or effective email notification to the affected employees. To be effective, email notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice. Any particular determination of the adequacy of a notification, regardless of the method used, must be fact-dependent and made on a case-by-case basis.

(c) *Disclosures.* The Contracting Officer shall provide the incumbent contractor's list of employees referenced in §9.12(e) of this part to the successor