

**FOR FURTHER INFORMATION CONTACT:** William W. Gross, Office of Program Operations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 219-8353. This is not a toll-free number.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Paperwork Reduction Act**

Reporting and recordkeeping requirements contained in the regulations (§ 9.9(b) and § 9.11) have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1990 (Pub. L. 96-511) for review.

The public reporting burden for information collection requirements contained in these regulations is estimated to average as follows:

15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The reporting requirements of § 9.11 are already required by the Service Contract Act regulations, 29 CFR 4.6(1)(2), OMB Number 1215-0150, and therefore impose no new burden. The only new requirement is the recordkeeping requirement in § 9.9.

Send comments regarding this burden to the Office of Information Management, U.S. Department of Labor, Room N-1301, 200 Constitution Avenue, NW., Washington, DC 20210; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

##### **II. Background**

Executive Order 12933 was signed October 20, 1994, by President Clinton, and published in the **Federal Register** on October 24, 1994 (59 FR 53560). The purpose and need for the Executive Order are clearly stated in the Executive Order itself:

When a service contract for the maintenance of a public building expires and a follow-on contract is awarded for the same service, the successor contractor typically hires the majority of the predecessor's employees. On occasion, however, a follow-on contractor will hire a new work force, and the predecessor's employees are displaced.

As a buyer and participant in the marketplace, the Government is concerned about hardships to individuals that may result from the operation of our procurement system.

Furthermore, the Government's procurement interests in economy and efficiency benefit from the fact that a carryover work force will minimize

disruption to the delivery of services during any period of transition and provide the Government the benefits of an experienced and trained work force rather than one that may not be familiar with the Government facility.

In order to address these concerns, Section 1 of the Executive Order makes the following statement of policy:

It is the policy of the Federal Government that solicitations and building service contracts for public buildings shall include a clause that requires the contractor under a contract that succeeds a contract for performance of similar services at the same public building to offer those employees (other than managerial or supervisory employees) under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal to employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor to fail to comply with any provision of any other Executive order or laws of the United States.

The Executive Order requires that the Secretary of Labor issue implementing regulations by April 20, 1995, and that the Federal Acquisition Regulatory Council issue regulations by that date which require inclusion of the contract clause in Federal solicitations and contracts. The Executive Order further provides that the order does not confer any right or benefit enforceable against the United States, but that it is not intended to preclude judicial review of final decisions by the Secretary of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

Key issues addressed in the regulations on which public comment is particularly solicited are summarized and explained in this preamble. As required by the Executive Order, the Department of Labor (DOL) has consulted with the Federal Acquisition Regulatory (FAR) Council with respect to the implementation of the Executive Order.

##### **III. Summary and Discussion**

###### *Scope of Coverage*

###### **General Coverage (9.2)**

The Executive Order applies only to "building service contracts" for "public buildings" where the contract is entered into by the United States. These terms are defined elsewhere in the regulations. The Order applies only to contracts of an amount equal to or greater than the simplified acquisition threshold, set by the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)) at \$100,000. Because the language of the

Executive Order does not specifically reference subcontracts, the regulations contain no "flow-down" requirements for subcontractors.

Where a contract is for both recurring building services and some other purpose, such as construction, the building services are subject to the Order, but only with respect to the building services portion of the contract. However, where the building services are only incidental, such as incidental maintenance performed under a contract to operate a day-care center, the Order would not apply to such services. The standards used for determining when construction work performed under a mixed contract is covered by the Davis-Bacon Act are utilized in determining when building services are more than incidental. See 29 CFR 4.116(c)(2); 48 CFR 22.402(b)(ii).

It is also important to point out that the coverage principles of the Executive Order are different than those of the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.*, although there is significant overlap between the two programs.

###### **Building Services Contract (9.3)**

Section 2(b) of the Executive Order defines the term "building services contract" to include contracts "for recurring services related to the maintenance of a public building, e.g., janitorial, window washing, food service. \* \* \*" The regulations define "recurring services" to include services performed regularly or periodically throughout a contract (and its follow-on contract) at the same building. Contracts which are for non-recurring maintenance services, such as servicing of fixed equipment which is performed only one time each year, and contracts for services which are not maintenance services, such as operation of a day care center, are not subject to the Order.

###### **Public Building (9.4)**

Section 2 of the Executive Order defines the term "public building." The definition is patterned after the definition of a public building in Section 13 of the Public Buildings Act of 1959, 40 U.S.C. 612, and the definition in the Executive Order is largely repeated in section 9.4 of the regulations. Generally, buildings suitable for office or storage space and administered by the General Services Administration (GSA) or by another Federal agency under a delegation from GSA are considered to be "public buildings."

Many buildings are specifically excluded from the term "public building," including buildings on