

properties of the United States Postal Service, on military installations, and on Department of Veterans Affairs installations used for hospital or domiciliary purposes. In addition, buildings "on the public domain" are not "public buildings". "Public domain" is commonly considered to be public lands in the West. Accordingly, "public domain" in these regulations is defined to include lands administered by the Department of the Interior, Bureau of Land Management, and the Department of Agriculture, U.S. Forest Service. Buildings on other Federal property are not considered to be "on the public domain" for purposes of the Executive Order.

A unique situation arises with respect to the Pentagon. Originally, the Pentagon was considered a "public building" within the scope of the Public Buildings Act. Subsequently, Section 2804 of the National Defense Authorization for FY 1991 (10 U.S.C. 2674) removed the Pentagon from GSA's authority under the Public Buildings Act; however, that legislation did not change the Public Buildings Act's definition of a public building. This, while not specifically addressed in the regulations, DOL considers the Pentagon to be a "public building" within the meaning of the Executive Order. Furthermore, this interpretation is consistent with the purpose of the Executive Order, to cover Government office buildings. Commenters are invited to address this issue in their comments.

Leased buildings are not public buildings covered by the Executive Order unless they are being leased pursuant to lease-purchase contracts. It should be noted, however, that building services performed on a building being leased pursuant to a lease-purchase contract would be covered only if the services are being performed under a contract directly with the Government; building services performed by the lessor would be considered incidental to the lease (see § 9.2) and would not be covered.

#### Coverage Limitations (9.5)

The Order does *not* apply to contracts under the simplified acquisition threshold, which is currently \$100,000. In addition, contracts for commodities or services by the blind or severely handicapped awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48a; contracts for certain services provided by sheltered workshops for the severely handicapped, awarded pursuant to the Edgar Amendment of the Treasury, Postal Services and General Government Appropriations

Act, Public Law 103-329; and vending service contracts operated by the blind, awarded pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107, are excluded from coverage pursuant to section 3(b)-(d) of the Executive Order.

The Executive Order also excludes "services where the contractor's employees perform work at the public building and at other locations under contracts not subject to this Order (e.g., pest control or trash removal where the contractor's employees visit the site periodically and where the employees under the contract respond to service calls)," provided that employees are not deployed in a manner designed to avoid the purposes of the Order. Thus, the manner in which the services will be performed by the successor contractor as well as the nature of the services must both be considered in determining whether a building services contract is subject to the Executive Order.

#### Contract Clause (9.6)

Section 4 of the Executive Order specifies the contract clause that must be included in solicitations and contracts for building services that succeed contracts for the performance of similar work at the same public building. The regulations set forth additional provisions which are necessary to implementation of the Order. In accordance with Section 5 of the Order, a provision of the clause makes it clear that disputes under the Order are to be resolved in accordance with DOL procedures rather than pursuant to the general disputes clause of the Contract Disputes Act, 41 U.S.C. 601 *et seq.* Provisions also provide for withholding of contract funds in the event the contractor is determined to have violated the provisions of the Executive Order and is found liable for lost wages or other monetary relief; and to require contractors to cooperate in investigations by DOL or the contracting agency.

#### Contractor Obligations

##### Employee Coverage/Staffing (9.7/9.8)

With certain exclusions, all employees performing recurring building services on the predecessor contract whose employment would otherwise be terminated as the result of the award of the contract to a new contractor, must in good faith be offered the right of first refusal to employment under the successor contract before any other employees may be hired. Because the successor contractor will not know whether an individual employee of the predecessor contractor will continue to be employed or will be terminated

because of the change in contracts, the regulations state a presumption that all employees will be terminated when the predecessor's contract expires. This presumption can be defeated by specific evidence to the contrary, which the successor contractor could obtain through inquiries of, or contact with, the contracting officer, the employees, or the predecessor contractor after award of the contract to the successor.

The Executive Order does not require that a successor contractor perform a contract with the same number of employees as the predecessor. For example, if the predecessor employed twenty (20) custodial workers, the successor may determine it can perform the contract work with only eighteen (18) custodial workers. Thus if the contractor continues to employ five (5) of its existing workers, the offer of the right of first refusal would initially be limited to thirteen (13) employees of the predecessor. The successor contractor has complete discretion, within the constraints of these regulations, to determine which employees will first be offered a right of first refusal. If any of the predecessor's employees to whom the right of first refusal was offered decline that offer, then the successor must offer the right of first refusal to any remaining employees of the predecessor who were not originally offered the right of first refusal.

The question arises, however, whether the successor contractor's obligations continue throughout the performance of the contract. Although the language of the Executive Order could arguably suggest such a result, it would be impractical and unduly burdensome. Therefore the regulations provide that once the contract is fully staffed and contract performance has commenced, the obligation to offer the right of first refusal ceases, and any subsequent vacant positions may be filled in accordance with the successor's normal business practices. The only exception to this provision would be if the evidence shows that the successor contractor increased the initial staffing level within the first three months after commencement of the contract. Three months was selected as a reasonable period for continuing to impose an obligation to offer a right of first refusal in order to ensure that necessary staffing adjustments during the start-up period will be covered, and at the same time to discourage attempts to manipulate the work force. During this three month period the right of first refusal must be offered to any eligible employees until the final staffing level is reached.

Services at buildings not covered by the Order. The contractor is not