

obligated to offer a right of first refusal to employment in any position which will perform services both at buildings covered by the Executive Order and buildings not covered by the Order.

Managerial and supervisory employees. The successor contractor is not required to offer a right of first refusal to employees who performed as managers or supervisors under the predecessor contract or to employees who are not service employees within the meaning of the SCA. Thus the regulations provide that those employees who are employed as bona fide executive, administrative, or professional employees within the meaning of the regulations issued under the Fair Labor Standards Act (FLSA) at 29 CFR Part 541 (and therefore are exempt from the provisions of the FLSA and SCA), need not be offered a right of first refusal.

The successor contractor has complete discretion to decide who will be employed as managers and supervisors on the contract. However, if a service employee of the predecessor is qualified for a management/supervisory position, an offer of employment in that exempt classification would satisfy the successor's obligation to offer the employee a right of first refusal.

Existing employees of the successor contractor. The Executive Order provides that employees who worked for the successor contractor for at least three months immediately preceding the commencement of the successor contract and who would otherwise face lay-off or discharge, may be employed on the successor contract without regard to the successor's obligation to offer the right of first refusal. The key elements are that the employee (1) must have been employed by the successor for at least three months prior to the commencement of the successor contract and (2) would otherwise face lay-off or discharge. Employees who had been laid-off by the successor prior to the commencement of the successor contract or existing employees of the successor who are not facing lay-off or termination because, for example, they would continue to be employed on another contract, may not be employed on the successor contract until all eligible employees of the predecessor have been offered the right of first refusal.

Unsuitable employees. The successor contractor is not required to offer the right of first refusal to any employee who the successor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job. The regulation implementing this provision does not

define what constitutes a "reasonable belief" or "suitable performance". However, the successor contractor must base the conclusion that an employee failed to perform suitably on information from a credible source relative to a particular employee's past performance on the job, such as the predecessor contractor, the employee's supervisor or foreman, or the contracting agency. Information that does not directly relate to an employee's performance on the job may not be used as a basis for failing to offer a right of first refusal.

Offer of Employment/Recordkeeping (9.9, 9.10)

The Executive Order requires the successor to make an express offer of employment to each employee and state the time within which the employee must accept such offer, which must be at least ten (10) days. The regulation at section 9.9 states that the offer may be made either in writing or orally at a meeting of the predecessor contractor's employees, and requires that the contractor keeps either a copy of the offer or minimum documentation regarding the meeting at which the offer was made, which may consist of notations on the attendance roster and a copy of any written notice distributed.

The regulations require the predecessor contractor to give the contracting officer a list of current employees at least 60 days before the end of the contract. However, the successor's obligation to extend a right of first refusal applies to all employees employed at the end of the contract, including any who may begin work after the list of employees is provided. It is not envisioned that the omission of such employees' name from the list will be unduly burdensome since successor contractors commonly hire the predecessor's work force without the convenience of such a list.

The regulations at section 9.10 discuss what is a bona fide offer of employment. In general, an offer of employment will be presumed to be bona fide. Employees need not be offered employment in the same job that they were employed in under the predecessor contract, provided the employee is qualified for the position offered. Thus an employee may be equipped by education, training or experience to perform the duties of a position to be filled by the successor contractor, even though he or she encumbered a position under the predecessor contractor that did not require or utilize such education, training or experience. However, an offer of employment at a lower level or

to a different position may be a basis for closely examining whether the offer is bona fide, based on valid business reasons.

Predecessor's Obligation to Provide a List of Employees (9.11)

The Executive Order requires that, no less than 60 days before the completion of the contract, the predecessor contractor provide the contracting officer with a certified list of all service employees working at the Federal facility during the last month of the contract. The list is also required to contain anniversary dates of employment, either with the current or predecessor contractor, of each service employee. The contracting officer in turn will provide the list to the successor contractor, and it will be provided on request to employees or their representatives.

Except for the timing of submission of the list, this requirement is the same as the requirement under the SCA at 29 CFR 4.6(1)(2) that the predecessor furnish the names and anniversary dates at least ten days before contract termination. Thus the Executive Order does not create any new obligation on the predecessor, but simply moves forward the date the list must be submitted.

Because the predecessor contractor cannot know with certainty, 60 days in advance of termination, who will be performing on the contract in the final month, the regulations provide that the predecessor will provide the names of all service employees working on the contract. The successor in turn must assume the employees listed will be working during the final month of the contract unless the evidence demonstrates otherwise.

Notice to Employees (9.12)

Service employees need to be advised of their right of first refusal in the event of contract transition. Various options were considered regarding how the employees should be so advised. Notice could easily be accomplished by the predecessor contractor, but it has no substantive obligations under the Order. The Department also considered placing the obligation on the successor contractor, but concluded that it would be more efficient to require notification by the contracting agency since the predecessor's employees are working regularly at the Federal building. Therefore the regulations require that the agency either post a notice or give individual notice to the predecessor contractor's employees. An optional, prototype notice is included in an Appendix to the regulations.