

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

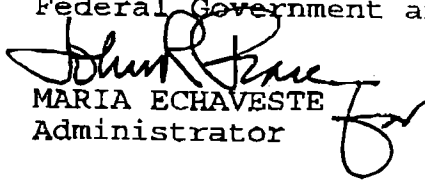


**NOTE: Executive Order (E.O.) 12933 was
revoked on February 17, 2001
(See E.O. 13204 and
Department of Labor Final Rule
66 FR 16126, March 23, 2001)**

AUG 28 1996

MEMORANDUM NO. 186

TO: All Government Contracting Agencies of the
Federal Government and the District of Columbia

FROM: 
MARIA ECHAVESTE
Administrator

SUBJECT: Nondisplacement of Qualified Workers Under Certain
Contracts

Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts (59 FR 53560), attached hereto, requires that workers on a building service contract be given the right of first refusal for employment with the successor contractor, if they would otherwise lose their jobs as a result of the termination of the contract. The Department published a notice of proposed rulemaking in the Federal Register on July 18, 1995 (60 FR 36756) and is working with the Federal Acquisition Council and other interested parties to issue implementing regulations in the near future.

However, the Department does not believe that implementation of the Executive Order must await final regulations. Accordingly, in order to effectuate an orderly transition and to ensure that workers' rights are protected, the Department is requesting that agencies take action, as required by section 4 of the Executive Order, to ensure that the attached contract clauses are included in full 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 buildings.

Attachments

Presidential Documents

Executive Order 12933 of October 20, 1994

Nondisplacement of Qualified Workers Under Certain Contracts

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.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 486(a), and in order to promote economy and efficiency, it is hereby ordered as follows:

Section 1. *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.

Sec. 2. *Definitions.* (a) "Public building" means any Government-owned building, whether single or multi-tenant occupancy, its grounds, approaches, and appurtenances, which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, and shall include the following: (1) Federal office buildings; (2) customhouses; (3) courthouses; (4) border inspection facilities; (5) warehouses; (6) records centers; (7) appraiser stores; and (8) relocation facilities and similar Federal facilities; but shall not include any such buildings: (A) on the public domain (including that reserved for national forests and other purposes); (B) on properties of the United States in foreign countries; (C) on Native American and Native Eskimo properties held in trust by the United States; (D) on lands used in connection with Federal programs for agricultural, recreational, and conservation purposes, including research in connection therewith; (E) on or used in connection with river, harbor, flood control, reclamation, or power projects; or for chemical manufacturing or development projects; or for nuclear production, research, or development projects; (F) on or used in connection with housing and residential projects; (G) on properties of the United States Postal Service; (H) on military installations (including any fort, camp, post, naval training station, airfield, proving

ground, military supply depot, military school, or any similar facility of the Department of Defense); (I) on installations of the National Aeronautics and Space Administration, except regular office buildings; and (J) on Department of Veterans Affairs installations used for hospital or domiciliary purposes.

(b) "Building services contract" means a contract for recurring services related to the maintenance of a public building, e.g. janitorial, window washing, food service, laundry, protective services, lawn and grounds care, and inspection, maintenance, and repair of fixed equipment such as elevators, air-conditioning, and heating systems.

Sec. 3. Exclusions. This order shall not apply to (a) contracts under the simplified acquisition threshold;

(b) contracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48a; and any future enacted law creating an employment preference for some group of workers under building services contracts;

(c) guard, elevator operator, messenger, or custodial services provided to the Government under contracts with sheltered workshops employing the severely handicapped as outlined in the Edgar Amendment, section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329;

(d) agreements for vending facilities entered into under the preference provisions of the Randolph-Sheppard Act, 20 U.S.C. 107; or

(e) 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 shall not be deployed in a manner that is designed to avoid the purposes of this order.

Sec. 4. Contract Clause. The following contract clause shall be included in solicitations and contracts for maintenance of public buildings that succeed contracts for performance of similar work at the same public building:

"NONDISPLACEMENT OF QUALIFIED WORKERS

(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 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), 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 no case shall the period within which the employee must accept the offer of employment be less than 10 days.

(b) Notwithstanding the contractor's obligation under paragraph (a) above, 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 whom the contractor reasonably believes, based

on the particular employee's past performance, has failed to perform suitably on the job.

(c) In accordance with Federal Acquisition Regulation 52.222-41(n), the contractor shall, not less than 60 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working at the Federal facility during the last month of contract performance. The list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each service employee. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

(d) 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, and relevant orders of the Secretary of Labor, or as otherwise provided by law."

Sec. 5. Enforcement. The Secretary of Labor is responsible for investigating and obtaining compliance with this Executive order. In such proceedings the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor and its responsible officers, and any firm in which the contractor has a substantial interest, shall be ineligible to be awarded any contract or subcontract of the United States for a period of up to 3 years. This Executive order creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause shall be disposed of only as provided by the Secretary of Labor in regulations issued under this Executive order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary of Labor shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this order, to implement the requirements of this Executive order. The Federal Acquisition Regulatory Council shall issue, within 180 days of the date of this order, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this Executive order.

Sec. 6. Judicial Review. Nothing in this order is intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, 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.*

William Clinton

THE WHITE HOUSE,
October 20, 1994.

"NONDISPLACEMENT OF QUALIFIED WORKERS

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(d) 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, and relevant orders of the Secretary of Labor, or as otherwise provided by law."