**DOD USE OF CONTRACTORS FOR CIVILIAN EMPLOYEE WORK**

**SAMPLE LETTER – FORMAL 7114**

THIS SAMPLE LETTER IS DESIGNED TO MEET THE STATUTORY REQUIREMENTS OF AN INFORMATION REQUEST ESTABLISHED BY THE FLRA AT 5 U.S.C. §7114(b)(4), ALTHOUGH THERE IS NO GUARANTEE THAT THE AGENCY WON’T ARGUE OTHERWISE.

THIS SAMPLE REPRESENTS A MORE FORMAL APPROACH TO MANAGEMENT THAN THE ALTERNATIVE LESS-FORMAL NON-7114 SAMPLE.  CONSIDER USING THIS LETTER IF:

* YOU DID NOT RECEIVE THE INFORMATION YOU REQUESTED USING THE LESS FORMAL LETTER,
* YOU HAVE A DIFFICULT RELATIONSHIP WITH MANAGEMENT, OR
* YOU ARE NOT INTERESTED IN PURSUING A CONGRESSIONAL INQUIRY OR A HIGH LEVEL ADMINISTRATIVE INQUIRY.

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**DOD USE OF CONTRACTORS FOR CIVILIAN EMPLOYEE WORK**

**SAMPLE LETTER – FORMAL 7114**

Date: \_\_\_\_\_\_\_\_\_\_\_

[Name of Agency Official RFI normally submitted to]

[Title]

[Installation]

[Address and email]

Subject: Request for Information on the Use of Contractors to Perform Work Performed By/Designated for Civilian Employees

Dear\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [name of agency official]:

I write on behalf of \_\_\_\_\_\_\_\_\_\_\_\_ [Local/Council and number] of the American Federation of Government Employees (AFL-CIO), which represents \_\_\_ [estimated number] civilian employees at \_\_\_\_\_\_\_\_\_\_\_ [DoD installation] in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_ [city, state]. I am concerned that work normally performed by/designated for civilian employees, \_\_\_\_\_\_\_\_\_\_\_, [name of function] is or will be performed by contractor personnel. Such action would mean that \_\_\_\_\_\_\_\_\_\_\_ [DoD Component or Agency], and therefore the Department of Defense (DoD), would be in violation of federal law, DoD guidance, and Office of Management and Budget (OMB) guidance, all of which prohibit direct conversions (i.e., the contracting out of functions performed by/designated for civilian employees without first performing a formal cost comparison). *(See attached summary of laws and guidance.)*

Insert evidence here. For example: “Management official \_\_\_\_\_\_\_ stated on \_\_\_\_\_\_ [date] that \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Or: “In an email dated \_\_\_\_\_\_\_\_\_, management official \_\_\_\_\_\_\_\_ stated that \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Currently, \_\_\_\_\_ [add number] civilian employees work on these functions.

DoD is prohibited by law from using contractors to perform any work last or currently performed by civilian employees. Federal law 10 U.S.C. 2461 prohibits DoD from converting work performed by/designated for civilian employees to performance by a contractor without first conducting a formal cost comparison, which is now embodied in “OMB Circular A-76”. Because of documented problems, the OMB Circular A-76 cost comparison process is currently prohibited. Therefore, DoD is prohibited from using contractors to perform any function performed by/designated for civilian employee performance. This law includes the following restrictions:

* **No Gaming the System**. DoD cannot get around this rule by modifying, reorganizing, dividing or in any other way changing a function.
* **No Exception for Increase or Surge in Work**. An increase in work, temporary or not, is no exception to the law. A DoD function that is expanded (or reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient) but essentially provides the same service is not considered “new work”, and thus a formal cost comparison is required before contractor personnel can perform any or all of the work.
* **No RIF Does Not Equal No Violation**. There is no loophole that relieves DoD from compliance with the law even if there is no adverse impact on civilian employees (i.e., even when no employees will be displaced).
* **No Exception for Personnel Ceiling**. The law specifically notes that agencies cannot use contractors to perform federal employee work to circumvent a federal employee personnel ceiling.

DoD’s Office of the Under Secretary of Defense, Personnel & Readiness, has issued five directives that implement the laws and reinforce their seriousness; the most recent is the **September 17, 2013** memorandum entitled “Update on OMB Circular A-76 Public-Private Competition Prohibition”:

“…the Department continues to be prohibited in FY2013 by law from converting any work currently performed, or designated for performance, by any number of civilian personnel to private sector (contract) performance. … This prohibition applies to functions and work assigned to civilians, regardless of whether or not a position, or billet, is established for that work, and whether or not that position, or billet, is encumbered. This would include workload associated with any positions that are vacant as a result of sequester related hiring freezes or workload lost due to civilian furloughs.”

Finally, OMB has released implementation guidance in **OMB Circular A-11** (“… agencies are precluded from converting, in whole or in part, functions performed by federal employees to contract performance …”) and **OMB Memorandum M-13-05** (“Agencies must also ensure that appropriate controls are in place to prevent the increased use of contractors to perform work due to any restrictions on hiring.”)

Please see the attached information request. I ask that the agency respond to this inquiry [within 10 business days or date specified in the Collective Bargaining Agreement] and rectify any use of contractors in violation of federal law, DoD guidance, and OMB guidance as soon as possible. I look forward to working on this issue together.

Sincerely,

\_\_\_\_\_\_\_\_\_\_\_,

President

AFGE Local/Council \_\_\_\_\_\_\_\_

Enclosures

Cc: Head of Installation

Head of Component or Agency

J. David Cox, AFGE National President

**REQUEST FOR INFORMATION**

Date: \_\_\_\_\_\_\_\_\_\_\_

[Name of Agency Official RFI normally submitted to]

[Title]

[Installation]

[Address and email]

**Subject: Request for Information on the Use of Contractors to Perform Work Performed by/Designated for Civilian Employees**

Dear [name of agency official]:

I write on behalf of \_\_\_\_\_\_\_\_\_\_\_\_ [Local/Council and number] of the American Federation of Government Employees (AFL-CIO), which represents \_\_\_\_ [estimated number] civilian employees at \_\_\_\_\_\_\_\_\_\_\_ [DoD installation] in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_ [city, state]. I am concerned that work normally performed by/designated for civilian employees, \_\_\_\_\_\_\_\_\_\_\_\_\_, [name function] is or will be performed by contractor personnel. Such action would mean that \_\_\_\_\_\_\_\_\_\_\_\_ [DoD Component or Agency], and therefore the Department of Defense (DoD), would be in violation of federal law, DoD guidance, and Office of Management and Budget (OMB) guidance, all of which prohibit such action.

This request is being made under 5 U.S.C. §7114 (b) (4) and serves as the union’s interest in this matter. This notice thus preserves the right of the union to bargain changes in working conditions of represented employees and to pursue a grievance should it be determined such action is necessary in representing bargaining unit employees or in policing and enforcement of the collective bargaining agreement. Particularized need for each request is provided.

The following information is requested:

1. Facts: Please describe the planned and actual use of contractor personnel for the work described above for FY2013 and FY2014, including the number of positions/FTEs/labor hours performed by/designated for federal employee performance that will be performed by contractor personnel. *This information is necessary to determine if contractors are being used to accomplish work previously performed by represented employees and to what extent this work is being performed.*
2. Decision Factors:
	1. Was the decision to use contractor personnel for this work instead of civilian employees based to any extent on an unavailability of civilian employees, such as due to the cap on civilian personnel, hiring freezes, furloughs, or any other reason? If so, please explain. *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
	2. What other factors contributed to the decision to use contractor personnel? *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
3. Federal and DoD Guidance: Is the use of contractor personnel for the work described above consistent with federal law and DoD guidance? If so, please explain how. *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
4. Contract Vehicle: What type(s) of contracting vehicles would be used (e.g., new contract, modification of existing contract, task order, GSA Schedule, etc.)? Please provide copies of the contracts (or solicitations if contracts have not yet been awarded) and/or task orders if appropriate. *This information is necessary to determine if contractors are being used to accomplish work previously performed by represented employees and to what extent this work is being performed.*
5. Contract Details:
	1. Where would the contract be performed? *This information is necessary to determine the impact on the bargaining unit by determining whether the work will stay in the same location or will be outright moved.*
	2. Which functions would be performed? *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
	3. When would the contracts be awarded and how long would they last? *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
	4. What is the total dollar amount obligated for services? *This information is necessary to determine the impact on the bargaining unit by determining the degree of the use of contractors.*
	5. Which organizational component(s) contracted for performance of the functions? *This information is necessary to determine which parts of the agency have information on whether the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
6. Ending Use of Contractors for this Work:
	1. What actions are being taken to ensure that federal employee performance is being pursued and that contractor performance is temporary in nature?
	2. Did the installation seek an exemption from the hiring freeze to allow federal employees to perform this work? Please provide documentation. *This information is necessary to determine if the agency acted outside of instructions by the department, if the agency acted within prescribed measures for use of contractors, and any steps the agency is taking to rectify the situation.*
	3. Was the exemption from the hiring freeze granted? Please provide documentation. *This information is necessary to determine if the agency acted outside of instructions by the department, if the agency acted within prescribed measures for use of contractors, and any steps the agency is taking to rectify the situation.*
	4. When does the agency intend to return this work to federal employee performance? Please provide documentation. *This information is necessary to determine if the agency acted outside of instructions by the department, if the agency acted within prescribed measures for use of contractors, and any steps the agency is taking to rectify the situation.*
	5. Is the agency currently undergoing the hiring process to fill vacant positions? Please provide documentation. *This information is necessary to determine if the agency acted outside of instructions by the department, if the agency acted within prescribed measures for use of contractors, and any steps the agency is taking to rectify the situation.*
7. General Use of Contractors at Installation: Please describe the installation’s planned and actual use of contractor personnel in all functions for FY2013 and FY2014 to supplement the work of federal employees, or otherwise perform work performed by/designated for federal employee performance, including the number of civilian positions/FTEs/labor hours. *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
8. Cost:
	1. Is performance of this work by contractors more cost effective than civilian performance? *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*
	2. Was that determination made in accordance with DoD policies regarding the full cost of manpower in DODI 7041.04 (formerly DTM 09-007)? Please provide the analysis. *This information is necessary to determine if the agency acted outside of instructions by the department or if the agency acted within prescribed measures for use of contractors.*

The following particularized need applies to each of the items requested above, in addition to the specific need for this information stated with each numbered item above. This information is necessary to determine:

* If the agency has met its obligation for specific notice to the union of a mid-term change.
* What impact may be appropriate for bargaining and may be necessary for the union to fulfill its obligation in the representation of covered employees.
* If the agency is in compliance with the collective bargaining agreement [date of last contract].

I ask that you provide the requested information within [10 business days or date specified in the Collective Bargaining Agreement]. If you have any questions concerning this request, please contact the undersigned.

Sincerely,

[President]

[AFGE Local/Council]