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**DoD Use of Contractors for Civilian Employee Work**

**Federal Law, DoD Guidance, and OMB Guidance**

**FEDERAL LAW**

**No Direct Conversion of Civilian Employee Work to Contractor Performance**

**10 U.S.C. §2461 (applies only to DoD)**

“(1) No function of the Department of Defense performed by [any number of DoD] civilian employees may be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that —

(A) formally compares the cost of performance of the function by [DoD] civilian employees with the cost of performance by a contractor;

(B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A–76, as implemented on May 29, 2003, or any successor circular;

(C) includes the issuance of a solicitation;

…

(2) A function that is performed by [DoD] and is reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient, but still essentially provides the same service, shall not be considered a new requirement.

(3) In no case may a function being performed by [DoD] personnel be—

(A) modified, reorganized, divided, or in any way changed for the purpose of exempting the conversion of the function from the requirements of this section; or

(B) converted to performance by a contractor to circumvent a civilian personnel ceiling.”

**Moratorium on Public-Private Competitions in DoD**

In accordance with the FY2010 Defense Authorization Act (P.L. 111-84, §325), DoD cannot begin a public-private competition for any function until the Secretary of Defense certifies that DoD has completed an inventory of service contracts (10 U.S.C. §2330a(c)); initiated review and planning activities based on an analysis of the inventory (10 U.S.C. §2330a(e)); and submitted budget information on contract services in compliance with [10 U.S.C. §236].

**Government-wide Moratorium on New Public-Private Competitions**

Since FY2009, Congress has imposed a government-wide moratorium on new public-private competitions, whether conducted under OMB Circular A-76 or any other policy. The moratorium has been extended through September 30, 2014.

The latest iteration of the moratorium was in the “Consolidated Appropriations Act, 2014” (P.L. 113-76, §737): “None of the funds appropriated or otherwise made available by this or any other Act may be used to begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy.”

**No personnel ceilings or hiring freezes.**

**10 U.S.C. §129. Prohibition of certain civilian personnel management constraints**

(a) The civilian personnel of the Department of Defense shall be managed each fiscal year solely on the basis of and consistent with (1) the total force management policies and procedures established under section 129a of this title, (2) the workload required to carry out the functions and activities of the department, and (3) the funds made available to the department for such fiscal year. The management of such personnel in any fiscal year shall not be subject to any constraint or limitation in terms of man years, end strength, full-time equivalent positions, or maximum number of employees.

…

(d) With respect to each budget activity within an appropriation for a fiscal year for operations and maintenance, the Secretary of Defense shall ensure that there are employed during that fiscal year employees in the number and with the combination of skills and qualifications that are necessary to carry out the functions within that budget activity as determined under the total force management policies and procedures established under section 129a of this title.

### Workforce Mix Should be based on Cost and Risk Mitigation, Not Personnel Ceilings.

### 10 U.S.C. §129a. General policy for total force management

(a) Policies and Procedures -The Secretary of Defense shall establish policies and procedures for determining the most appropriate and cost efficient mix of military, civilian, and contractor personnel to perform the mission of the Department of Defense.

(b) Risk Mitigation Over Cost -In establishing the policies and procedures under subsection (a), the Secretary shall clearly provide that attainment of a Department of Defense workforce sufficiently sized and comprised of the appropriate mix of personnel necessary to carry out the mission of the Department and the core mission areas of the armed forces (as identified pursuant to section 118b of this title) takes precedence over cost.

…

(d) Use of Plan, Inventory, and List -The policies and procedures established by the Secretary under subsection (a) shall specifically require the Department of Defense to use the following when making determinations regarding the appropriate workforce mix necessary to perform its mission:

(1) The civilian strategic workforce plan (10 U.S.C. §115b).

(2) The civilian positions master plan (10 U.S.C. §1597(c)).

(3) The inventory of contracts for services (10 U.S.C §2330a(c)).

(4) The list of activities required by the Federal Activities Inventory Reform Act (P.L. 105–270).

(e) Considerations in Converting Performance of Functions - If conversion of functions to performance by either Department of Defense civilian personnel or contractor personnel is considered, the Under Secretary of Defense for Personnel and Readiness shall ensure compliance with-

(1) 10 U.S.C §2463 (relating to guidelines and procedures for use of civilian employees to perform Department of Defense functions); and

(2) 10 U.S.C. §2461 (relating to public-private competition required before conversion to contractor performance).

(f) Construction With Other Requirements -Nothing in this title may be construed as authorizing-

(1) a military department or Defense Agency to directly convert a function to contractor performance without complying with section 2461 of this title;

(2) the use of contractor personnel for functions that are inherently governmental even if there is a military or civilian personnel shortfall in the Department of Defense;

 (4) the establishment of numerical goals or budgetary savings targets for the conversion of functions to performance by either Department of Defense civilian personnel or for conversion to performance by contractor personnel; or

(5) the imposition of a civilian hiring freeze that may inhibit the implementation of the policies and procedures established under subsection (a).

### Utilities and Housing Direct Conversions

There are arguable exceptions for utilities and housing direct conversions because old legal provisions allow for the “privatization” of both of these functions.  However, these provisions were written before the prohibitions on direct conversions noted above, and most recent law trumps older law.  Alas, the older provisions still represent a reluctance by Congress to get involved in utilities or housing privatization, so these cases are more difficult, but not impossible, to fight.  In fact, AFGE’s West Point Local was able to enact a law that prohibited the privatization of the installation’s utilities.

**Non-Appropriated Fund (NAF) Employees**

The prohibition against direct conversions applies to Non-Appropriated Fund (NAF) employees. However, the Navy and the Air Force take the position that 10 USC 2461 does not include Non-Appropriated Fund (NAF) employees, even though the law makes no exception for NAF employees.  That position was endorsed by the Government Accountability Office in a now infamous bid protest decision.  Other parts of the Department think that the same arguments that are pertinent for appropriated civilian employees also apply to NAF employees and that they should be read as being protected by the law.  In the FY13 and FY14 National Defense Authorization Acts, the House of Representatives included report language that directed the Department to revise its guidance for direct conversions to make it clear that 10 USC 2461 did indeed cover NAF employees.  However, the Pentagon’s Office of Personnel and Readiness has yet to comply.  AFGE National Office is eager to assist Locals that are threatened with direct conversions of NAF employees.

**DOD GUIDANCE**

The Assistant Secretary of Defense (ASD) for Personnel & Readiness (P&R) has issued several memoranda implementing the prohibition on direct conversions of civilian employee work to contractor performance.

The **September 17, 2013** memorandum entitled “Update on OMB Circular A-76 Public-Private Competition Prohibition” (which replaces the memorandum of the same subject dated March 8, 2012 – see below) states that:

“…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. The prohibition is expected to last through most, if not all, of FY2014. … 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.”

The **June 28, 2013** memorandum entitled “Civilian Furloughs and Total Force Management” states that:

“…in accordance with the Department’s statutory requirements, contractors are prohibited from being assigned or permitted to perform additional work or duties to compensate for the workload/productivity loss resulting from the civilian furlough.”

The **February 21, 2013** memorandum entitled “Total Force Management and Budgetary Uncertainty” states that:

“Consistent with [10 U.S.C. §2461 and the December 1, 2011 memorandum], the conversion of functions or work performed by, or designated for performance by, civilian employees to contract performance without a public-private competition is expressly prohibited … Workload currently performed by, or designated for performance by, civilian employees may not be transferred or assumed by contractors performing against prior year obligations. … DoD Component heads, as well as field commanders and line managers, are urged to be particularly vigilant to prevent the inappropriate conversion of work to contract performance.”

The **March 8, 2012** memorandum entitled “Update on OMB Circular A-76 Public-Private Competition Prohibitions” states that:

“As a result of statutory restrictions, delineated below, the Department is prohibited from converting any work currently performed, or designated for performance, by any number of civilian personnel to private sector (contract) performance.

A government-wide moratorium on the use of funds for public-private competitions has been extended through fiscal year 2012…

Furthermore, consistent with §325 of the National Defense Authorization Act for FY2010 (P.L. 111-84), [DoD] is prohibited from beginning or announcing any public-private competitions under OMB Circular A-76 until certain certification requirements are met … The Department has not met all of the certification requirements to lift this prohibition, specifically those related to the Inventory of Contracts for Services …

[C]onsistent with [10 U.S.C. §2461, these moratoriums prohibit the conversion of any work currently performed (or designated for performance) by civilian personnel to 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.”

The **December 1, 2011** memorandum entitled “Prohibition on Converting Certain Functions to Contract Performance” states that:

“ … [Under 10 U.S.C. §2461], [DoD] is prohibited from converting work currently performed (or designated for performance) by civilian personnel to private sector (contract) performance without first conducting a public-private competition. The National Defense Authorization Act for FY2010 (P.L. 111-84) included a significant modification to this statute, extending the requirement for a public-private competition prior to the conversion of work by any number of civilian employees. …

DoD is currently precluded, under a moratorium, from conducting public-private competitions. This prohibits the conversion of any work currently performed (or designated for performance) by civilian personnel to contract performance. This prohibition applies to functions and work assigned to civilians, regardless of whether or not the position is encumbered. When new requirements arise, such as those that may occur as military end-strength levels are reduced, special consideration must first be provided, consistent with [10 U.S.C. §2464], and applicable Department policies, to using [DoD] civilian employees. This includes billets and work that may have been unencumbered for an extended period of time.”

**OMB GUIDANCE**

 **No Direct Conversions of Federal Employee Work to Contractor Performance**

**OMB Circular A-11: Preparation, Submission, and Execution of the Budget** (Section 85.5(b): Workplace Conversions)

Agencies cannot contract out work performed by federal employees unless an OMB Circular A-76 study indicates that contracting out would save money.

Pursuant to federal law, agencies are precluded from converting, in whole or in part, functions performed by federal employees to contract performance absent a public-private competition, currently known as an OMB Circular A-76 study. Appropriations acts since 2009, however, have prohibited agencies from using funds to conduct OMB Circular A-76 studies.

February 27, 2013 **OMB Memorandum M-13-05**, Agency Responsibilities for Implementation of Potential Joint Committee Sequestration:

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. Agencies should bear in mind the statutory restrictions contained in 10 U.S.C. 2461 and 41 U.S.C. 1710 on the conversion of functions from performance by federal employees to performance by contractors.