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**Use of Contractors for Federal Employee Work**

**Federal Law and OMB Guidance**

**FEDERAL LAW**

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

**FY2008 Consolidated Appropriations Act (P.L. 110-161, §739(a)(1)), as amended by FY2009 Omnibus Appropriations Acts (P.L. 111-8, §735)** (applies to all government agencies except DoD and TSA and all conversions except those to Javits-Wagner-O’Day companies.)

No funds shall be available to convert to contractor performance an activity or function of an executive agency that … is performed by Federal employees unless the conversion is based on the result of a public-private competition that showed that contractor performance would result in larger than de minimus cost savings.

**41 U.S.C. 1710 (applies to all agencies government-wide)**

“(1) A function of an executive agency performed by 10 or more agency civilian employees may not 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 agency 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 A76, as implemented on May 29, 2003, or any successor circular;

(C) includes the issuance of a solicitation;

(2) A function that is performed by the executive agency 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) Prohibitions.— In no case may a function being performed by executive agency 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.

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

Since FY2009, Congress has imposed a 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 is 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.”

**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 the work is not inherently governmental, the agency can outsource the work without losing control of its mission, and 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.

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

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.