**DoD Transfer of Employee Work to Contractors**

**Law and 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 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;

…

(F) demonstrates that contractor performance would be at least 10% less expensive than civilian employee performance; and

(G) does not allow a contractor an advantage for contributing less to employee health benefits and retirement plans than is paid by [DoD].

(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.” …

 …

(5) A public-private competition may not exceed 24 months, beginning on the date when [DoD] first obligates funds for the acquisition of contract support for the effort or formally assigns [DoD] personnel to carry out preliminary planning.

**41 U.S.C. 1710 (applies 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;

…

(F) demonstrates that contractor performance would be at least 10% less expensive than civilian employee performance; and

(G) does not allow a contractor an advantage for contributing less to employee health benefits and retirement plans than is paid by [DoD].

(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**

**P.L. 114-113, §742**

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, 2016.

The latest iteration of the moratorium was in the “Consolidated and Further Continuing Appropriations Act, 2015” (P.L. 113-235, §742):

“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.”

**DoD-Specific Moratorium on New Public-Private Competitions**

**P.L. 111-84, §325**

1. Temporary Suspension.— Until the Secretary of Defense submits the certification required under subsection (d), no study or competition regarding a public-private competition may be begun or announced.

…

(d) CERTIFICATION REQUIRED.—The Secretary of Defense shall publish in the Federal Register and submit to the congressional defense committees certification that—

…

(2) the Secretary of Defense has completed and submitted to the congressional defense committees a complete inventory of contracts for services for or on behalf of the Department in compliance with 10 U.S.C. §2330a(c);

(3) the Secretary of each military department and the head of each Defense Agency responsible for activities in the inventory has initiated the review and planning activities of subsection (e) of such section; and

(4) the Secretary of Defense has submitted budget information on contract services in compliance with 10 U.S.C. §236.

**DOD GUIDANCE**

Beginning in 2011, the Assistant Secretary of Defense (ASD) for Personnel & Readiness (P&R) has issued EIGHT memoranda implementing the prohibition on direct conversions of civilian employee work to contractor performance.

The **April 21, 2016** memorandum entitled “**Update on OMB Circular A-76 Public-Private Competition Prohibitions – FY 2016”** states that:

“… The Department continues to be statutorily prohibited by law from converting any work currently performed, or designated for performance, by any number of civilian personnel to private sector (contract) performance. … [This restriction] applies 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 includes workload and positions/billets that are impacted as a result of ongoing institutional reform initiatives, such as delayering or headquarters reductions; workforce reductions …; and position vacancies and workload impacted by hiring freezes or funding shortfalls.”

**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.

**OMB Memorandum M-13-05**, February 27, 2013, 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.

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