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**Department of Veterans Affairs (DVA)**

**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 agencies, including DVA, except DoD and TSA and all conversions except those to Javits-Wagner-O’Day companies which hire the blind and severely disabled – now called “AbilityOne”.)

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 non-DoD agencies, including DVA)**

“(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.

* **No Direct Conversion of DVA Employee Work to Contractor Performance (applies only to DVA)**

Because the DVA has been known to violate the direct conversion prohibition, Congress passed an additional legal provision making it explicit that the DVA is subject to the prohibition:

* **“Consolidated Appropriations Act, 2014” P.L. 113-76 §221.**

None of the funds appropriated or otherwise made available by this Act or any other Act for the Department of Veterans Affairs may be used in a manner that is inconsistent with: (1) **the FY2006 Appropriations Act §842 (P.L. 109-115**); or (2) **38 U.S.C. §8110(a)(5)** (see next section).

* **FY2006 Appropriations Act (P.L. 109-115 §842)** is very similar to 41 U.S.C. §1710 (discussed above) (applies to all agencies, including DVA, except DoD and TSA and all conversions except those to Javits-Wagner-O’Day companies which hire the blind and severely disabled – now called “AbilityOne”.)

“(1) Notwithstanding any other provision of law, none of the funds appropriated by this or any other Act shall be available to convert to contractor performance an activity or function of an executive agency, that on or after the date of enactment of this Act, is performed by more than 10 Federal employees unless—

(A) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function; and

(B) the Competitive Sourcing Official determines that, over all performance periods stated in the solicitation of offers for performance of the activity or function, the cost of performance of the activity or function by a contractor would be less costly …”

* **No Use of DVA Medical Dollars for Cost-Comparison Studies (applies only to DVA)**
* **38 U.SC. §8110(a)(5)**

[DVA appropriated funds for] medical care, medical/prosthetic research, medical administration, and miscellaneous operating expenses may not be used for, and no employee compensated from such funds may carry out any activity in connection with, the conduct of any [public-private cost comparison] study … unless such funds have been specifically appropriated for that purpose.

* **Government-wide Moratorium on New Public-Private Competitions (applies to all agencies, incl. DVA and DoD)**

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.”

* **DVA has Limited Extra Authority to Contract for Health Care Services, but the Direct Conversion Prohibition Still Applies.**

Federal law allows the DVA to enter into contracts to provide medical services to veterans under exceptional circumstances, that is, when the VA is “not capable” of providing the care itself (see statutory language below). AFGE intends to use the laws prohibiting direct conversions to defend every bargaining unit position, including direct conversions resulting from VA contract care arrangements.

**38 U.S.C. §1703.** Contracts for hospital care and medical services in non-Department facilities

(a) When Department facilities are not capable of furnishing economical hospital care or medical services because of geographical inaccessibility or are not capable of furnishing the care or services required, the Secretary, as authorized in section 1710 of this title, may contract with non-Department facilities in order to furnish any of the following:

(1) Hospital care or medical services to a veteran for the treatment of—

(A) a service-connected disability;

(B) a disability for which a veteran was discharged or released from the active military, naval, or air service; or

(C) a disability of a veteran who has a total disability permanent in nature from a service-connected disability.

(2) Medical services for the treatment of any disability of—

(A) a veteran described in section 1710(a)(1)(B) of this title;

(B) a veteran who (i) has been furnished hospital care, nursing home care, domiciliary care, or medical services, and (ii) requires medical services to complete treatment incident to such care or services…

**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.