DVA USE OF CONTRACTORS FOR FEDERAL EMPLOYEE WORK

SAMPLE LETTER (Less formal, non-7114)

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THIS LETTER REPRESENTS A LESS FORMAL APPROACH TO MANAGEMENT. CONSIDER USING THIS LETTER IF YOU HAVE A GOOD RELATIONSHIP WITH MANAGEMENT.

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**DVA USE OF CONTRACTORS FOR FEDERAL EMPLOYEE WORK**

**SAMPLE LETTER (Less formal, non-7114)**

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

[Head of Local Organization]

[Title]

[Local Organization]

[Address and email]

**Subject:** Use of Contractors to Perform Work Performed By/Designated for DVA 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] federal employees at the Department of Veterans Affairs’ (DVA) \_\_\_\_\_\_\_\_\_\_\_\_\_ [name of facility] in \_\_\_\_\_\_\_\_\_ [city, state]. I am concerned that work normally performed by federal employees, \_\_\_\_\_\_\_\_\_\_\_\_\_ [name of function] is or will be performed by contractors. Such action would mean that the DVA would be in violation of federal law and OMB guidance, which prohibit direct conversions (i.e., contracting for functions performed by/designated for federal employees without first performing a formal cost comparison).

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

**Laws and OMB Guidance**

Government-wide Prohibitions on Direct Conversions

Federal agencies are prohibited by law from using contractors to perform any work last or currently performed by federal employees. Federal laws (41 U.S.C. §1710 and the FY2008 Consolidated Appropriations Act (P.L. 110-161, §739(a)(1)) prohibit agencies from converting work performed by/designated for federal employees to performance by contractor personnel without first conducting a formal cost comparison, now embodied in “OMB Circular A-76”. Because of well-documented problems with the OMB Circular A-76 process, that process is currently prohibited by law. Therefore, federal agencies are prohibited from using contractors to perform any function performed by/designated for federal employee performance.

DVA-Specific Prohibitions

Due to DVA violations of the direct conversion prohibition in the past, Congress has enacted additional provisions emphasizing the restrictions for DVA. In the FY2014 Consolidated Appropriations Act (P.L. 113-76, §221), Congress prohibited the DVA from using general appropriations for direct conversions (by referring to FY2006 Appropriations Act P.L. 109-115 §842) and from using medical care funds to conduct formal cost comparisons (i.e., OMB Circular A-76 studies) (by referring to 38 U.S.C. §8110(a)(5)).

OMB Circular A-76 Moratorium

Because of documented problems with the OMB Circular A-76 process which have not been addressed by OMB, federal laws currently prohibit the use of the OMB Circular A-76 cost comparison process.

DVA Statutory Authority to Contract for Medical Services

Federal law authorizes the DVA to enter into contracts for medical services in exceptional circumstances. However, this authority does not relieve the DVA from the direct conversion law, which is obvious from the repeated efforts by Congress to hammer home the prohibition to the DVA.

OMB has also released guidance implementing these laws:

OMB has released guidance implementing these laws 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.”)

**Implications**

* **No Contracting Out. Period.** The DVA cannot use contractors for federal employee work without conducting an OMB Circular A-76 study, and the DVA is prohibited from conducting OMB Circular A-76. Ergo, no use of contractors for federal employee work.
* **No Gaming the System.** The DVA cannot get around the prohibition 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 prohibition. An agency function that is expanded (or reengineered, reorganized, modernized, upgraded, 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 contractors can perform any or all of the work.
* **No RIF Does Not Equal No Violation**. There is no loophole that relieves an agency from compliance with the law even if there is no adverse impact on federal 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.
* **No Exception for Medical Services**. The DVA cannot use the statutory authority to enter into contracts for medical services in exceptional circumstances unless the DVA first performs a formal cost comparison (when the moratorium is listed) and lifts all personnel ceilings and hiring restrictions.

**I ask that you provide me with answers to the following questions within 10 business days.**

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 designated for federal employee performance that will be performed by contractor personnel.
2. Decision Factors:
   1. Was the decision to use contractors for this work instead of federal employees based to any extent on an unavailability of federal employees, such as due to a personnel cap, hiring freezes, furloughs, or any other reason? If so, please explain.
   2. What other factors contributed to the decision to use contractor personnel?
3. Federal and OMB Guidance: Is the use of contractor personnel for the work described above consistent with federal law and OMB guidance? If so, please explain how.
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).
5. Contract Details:
   1. Where would the contracts be performed?
   2. Which functions would be performed?
   3. When would the contracts be awarded and how long would they last?
   4. What is the total dollar amount obligated for services?
   5. Which organizational component(s) contracted for performance of the functions?
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? Please provide documentation.
   2. Did the agency seek an exemption from the hiring freeze to allow federal employees to perform this work? Please provide documentation.
   3. Was the exemption from the hiring freeze granted? Please provide documentation.
   4. When does the agency intend to return this work to federal employee performance? Please provide documentation.
   5. Is the agency currently undergoing the hiring process to fill vacant positions? Please provide documentation.
7. General Use of Contractors at Location: Please describe the agency location’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 designated for federal employee performance, including the number of federal positions/FTEs/labor hours by function.
8. Cost: Is performance of this work by contractors more cost effective than civilian performance? How was that determination made? Please provide the analysis.

I request that the agency respond to this inquiry **within 10 business days** and rectify any use of contractors in violation of federal law and OMB guidance as soon as possible. I look forward to working on this issue together.

Sincerely,

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

President

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

Enclosure

Cc: Head of Agency or Organization

The Honorable \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Senator’s Name)

The Honorable \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Senator’s Name)

The Honorable \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Member of US House of Representative’s Name)

The Honorable \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Member of US House of Representative’s Name)

The Honorable \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Member of US House of Representative’s Name)

J. David Cox, AFGE National President