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on

"Efforts to Right-Size the Federal Employee to Contractor Mix"

Submitted to

Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

May 20, 2010

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Chairman Akaka, Ranking Member Voinovich, and distinguished members of the Subcommittee, I would like to thank you for allowing me to provide comments on efforts to right size the Federal employee to contractor mix. As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 150,000 federal workers in 31 federal agencies and departments.

Mr. Chairman, NTEU has long maintained that federal employees, given the appropriate tools and resources, do the work of the federal government better and more efficiently than any private entity. The prior administration, however, pursued an unwavering agenda of targeting federal employee jobs for public-private competition. Competitive sourcing was one of its top initiatives. As part of that Administration's efforts, we saw the rules of competition overhauled, quotas set for competed jobs, and grades given to agencies on their efforts in conducting competitions. The changes undoubtedly had the desired effect: since 2001, spending on Government contracts has more than doubled, reaching over $500 billion in 2008.

The explosion in contract spending has also led to a drastic increase in the size of the contract workforce. According to the Office of Management and Budget (OMB), this excessive reliance on contractors has eroded the in-house capacity of agencies to perform many critical functions and has undermined their ability to accomplish their missions.

One such example is the Department of Homeland Security, which now has more contractors than federal employees. According to DHS estimates, the Department has 188,000 civilian employees and 200,000 contractors working for it. As Senator Lieberman noted during a recent hearing on the DHS FY '11 budget request, "the sheer number of DHS contractors currently on board again raises the question of whether DHS itself is in charge of its programs and policies, or whether it inappropriately has ceded core decisions to contractors."

A prime example of how an agency's overreliance on contractors has undermined its ability to accomplish its mission by ceding core agency functions is the Department of Homeland Security's recent eight year, $1.2 billion contract with Lockheed Martin to manage the Transportation Security Administration's (TSA) human resources. Under the TSA contract, Lockheed Martin is put in a position of supporting core TSA functions including recruitment and hiring; handling employee records; processing paychecks, and health and retirement benefits; and providing research into strategic workforce planning.

The dangers associated with ceding such important functions such as these were highlighted recently when a contractor working for TSA's human resources department in Boston was charged with stealing the identities of dozens of TSA officers who screen passengers and baggage at U.S. airports.

I would note that DHS has stated it is aware of the problems associated with such a large contract workforce and has set a goal of converting 3,300 contractor positions to DHS positions by the end of the year. While this is a good start, the sheer size of the 200,000 plus contract workforce requires additional conversions to ensure DHS does not become over-reliant on contractors.

The previous administration's policies resulted in contractors performing functions that are clearly inherently governmental or closely associated to inherently governmental functions. In agencies delivering vital services, contractors perform critical and sensitive work such as law enforcement, government facility security, prisoner detention, budget planning, acquisition, labor-management relations, hiring, and security clearances. According to the Government Accountability Office (GAO), the Department of Homeland Security uses contractors to prepare budgets, develop policy, support acquisition, develop and interpret regulations, reorganize and plan, and administer A-76 efforts.

We have all witnessed the dangers associated with such an aggressive outsourcing agenda. Examples range from the Mellon Bank fiasco in 2001 involving the deliberate destruction of tax returns and checks to the debacle at Walter Reed Army Medical Center involving the systematic replacement of federal workers with private companies charged with facilities management, patient care and guard duty. When privatization fails, millions of tax dollars are wasted on inefficiencies and damage control, and federal workers are expected to pick up the pieces and complete the jobs that private contractors abandon.

One of the most egregious examples of misguided outsourcing is the tax privatization effort pursued by the IRS even over the objections of the National Taxpayer Advocate (who is appointed by the Secretary of the Treasury and charged with representing taxpayer interests before the IRS and Congress). It was not cost-effective, it lacked customer service for multilingual taxpayers, it was secretive (private collection agencies refused to disclose operational plans), and it proved unfair to taxpayers. Further, the IRS had to assign 65 of its own employees to oversee the work of just 75 private collection agency employees. Given the obvious failures of this undertaking, and in the face of strong opposition by NTEU and a broad range of consumer and public interest groups, and the IRS ending the program and congress voted to cut off funding for it.

ADMINISTRATION REVIEW OF FEDERAL CONTRACTING PROCESS

We are very pleased to see that the Obama Administration is focused on leveling the playing field and ensuring accountability of contractors within the federal contracting system. NTEU firmly believes that federal employees are the best value for taxpayers' dollars and welcome the opportunity for them to demonstrate their effectiveness and efficiency.

On March 4, 2009 President Obama issued a Memorandum on Government Contracting ordering the Office of Management and Budget (OMB) to undertake a comprehensive review of the federal contracting process. The Memorandum raised the concern that the proportion of contracts awarded without full and open competition has become too high, and the line between what is "inherently governmental" and what can properly be contracted out has become blurred, with contractors performing inappropriate tasks. To address these concerns, the memo directed OMB, among other things, to clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the National Defense Authorization Act (NDAA) for FY 2009. Section 321 requires OMB to (i) create a single definition for the term ''inherently governmental function'' that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (ii) establish criteria to be used by agencies to identify ''critical'' functions and positions that should only be performed by federal employees; and (iii)

provide guidance to improve internal agency management of functions that are inherently governmental or critical.

Last July, in response to an OMB solicitation for input from interested parties, NTEU provided comments on various key outsourcing issues. In particular, our comments focused on how the current definition of "inherently governmental" should be clarified to improve management of the multi-sector workforce; what criteria might help agencies to identify non-inherently governmental functions that are critical to an agency, with respect to its unique missions and structure, and need to be performed by federal employees in order for the agency to maintain control of its mission and operations; and what criteria agencies should use in deciding whether an activity should be in-sourced. A summary of NTEU's comments is below.

How might the current definition of inherently governmental be clarified to improve management of the multi-sector workforce?

NTEU believes that OMB need only clarify that the term "inherently governmental" is defined exclusively by the Federal Activities Inventory Reform (FAIR) Act. The FAIR Act defines "inherently governmental" as "a function which is so intimately related to the public interest as to mandate performance by Government employees." Listed functions include "those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government." This definition is long-standing and provides both sufficient guidance and needed flexibility in determining which functions are best reserved for government workers.

Over the years, problems in the application of this definition have arisen from inconsistencies in internal government directives, rather than from the statutory definition itself. NTEU believes that by unequivocally reaffirming the FAIR Act definition and expressly repudiating any inconsistencies, OMB will restore a workable construct of inherently governmental and level the playing field. The specific inconsistencies that we believe OMB should address in the final policy letter are discussed below.

First, OMB should clarify that an inherently governmental function requires the exercise of "discretion," without any qualifiers. This clarification would eliminate the confusion stemming from the 2003 revisions to the A-76 Circular, which referred to "substantial official discretion" and the 1992 Office of Federal Procurement Policy (OFPP) letter, which referred to "substantial discretion." These additional modifiers inappropriately elevate the level of discretion needed to show that a position is inherently governmental and insulate only the highest agency positions from outsourcing.

Second, OMB should expressly repudiate the presumption in the 2003 revisions to the A-76 Circular that a government function is commercial in nature unless affirmatively shown otherwise. This presumption is not only bad policy, but it is at odds with the FAIR Act's definition that simply delineates between commercial and inherently governmental functions. Each function must be evaluated on its own merits. In fact, if the FAIR Act includes any presumption at all, it presumes the opposite--namely, that a function is inherently governmental (because it is performed by the government) unless a contrary showing is made. A function is only designated commercial (and therefore subject to performance by a private contractor) if the

agency head determines that the function does not satisfy the definition of an inherently governmental function. The 2003 revisions have caused confusion among agency personnel charged with making this decision, and they should therefore be repudiated as inconsistent with the FAIR Act.

In short, NTEU believes that the FAIR Act's current definition of "inherently governmental" provides the needed flexibility to determine when federal employees should perform the work of the federal government. It is not the definition that has proven difficult to administer. The difficulties and confusion arose from limiting interpretations in the A-76 Circular and other policies promulgated by a contractor-friendly administration. OMB can simply reaffirm the FAIR Act's definition of inherently governmental, thereby eliminating confusion and restoring uniformity in the contracting out process.

NTEU was happy to see that in late March, OMB's Office of Federal Procurement Policy (OFPP) issued a proposed policy letter on inherently governmental functions and other "work reserved for performance by federal government employees" that adopted the definition of "inherently governmental" in the FAIR Act as advocated by NTEU.

However, we believe that the policy letter could better ensure that we avoid reverting to a system of contracting out that, by all accounts, has gone too far. Under the policy letter, OMB has created comprehensive and thoughtful guidance on two concepts related to inherently governmental--functions closely associated to inherently governmental and critical functions. These two constructs, we believe, are inextricably linked to inherently governmental and cannot be responsibly subject to performance by private contractors.

In addition, we believe that the "nature of the function" and "exercise of discretion" tests for determining whether a function is inherently governmental are too restrictive and should be revised. As drafted, the "nature of the function" test narrowly reserves only those functions that involve "the exercise of sovereign powers" and contemplates ambassadors, judges and police officers. This view is entirely too limited and only insulates a handful of positions from potential outsourcing abuses.

The "exercise of discretion" test is similarly too limited, allowing an agency to determine that a function is not inherently governmental, and therefore appropriate for outsourcing, unless the contractor's work would "preempt the federal officials' decision-making process, discretion or authority." It would be an extremely rare circumstance that an official's authority would actually be pre-empted, which means that very few (if any) functions will satisfy the "exercise of discretion" test.

Accordingly, we respectfully suggest that OMB, in issuing a final policy letter, consider whether the discussion and guidance concerning "closely associated" and "critical" are more appropriately folded into the general category of functions federal employees must perform. In collapsing these concepts into a single, comprehensive analysis, NTEU believes that OMB will create a sound policy that, first and foremost, protects the government's interest in having a workforce of federal employees performing the functions that are best reserved for in-house performance. The policy would also allow agencies to explore proper outsourcing alternatives

while safeguarding against potential abuses. Further, we recommend that OMB refine its "nature of the function" and "exercise of discretion" tests.

What criteria might help agencies to identify non-inherently governmental functions that are critical to an agency, with respect to its unique missions and structure, and need to be performed by federal employees in order for the agency to maintain control of its mission and operations?

We have learned from the public-private competition process over the years that there are certain functions performed by federal workers that arguably fall short of satisfying the definition of inherently governmental but must, nonetheless, be performed in-house. This realization has begun to gain traction as the Congress considers legislation such as S.924, the "Correction of Long-standing Errors in Agencies Unsustainable Procurement Act" (CLEAN UP Act), which refers to "mission-essential functions" in addition to inherently governmental functions. We are pleased that there is recognition that some work should be performed in-house because of its close association with an agency's mission or its inextricable connection to inherently governmental functions.

NTEU believes the unique mission of each agency will dictate the factors that an agency should consider in determining if an activity is so closely related to inherently governmental work that it should be performed in-house, even if it does not satisfy the definition of inherently governmental. For example, the IRS's mission is to administer the tax laws effectively and efficiently, which necessarily involves the handling of sensitive tax return information, including social security numbers. In light of this unique mission, the IRS should consider whether certain supporting functions, while perhaps not technically satisfying the FAIR Act's definition of inherently governmental, are nonetheless so critical to the IRS that they need to be performed by federal employees so that the IRS can maintain control of its mission and operations.

Further, because the discussion of inherently governmental involves functions (as opposed to positions), a single employee might perform both inherently governmental and commercial work. Instances where an employee performs "mixed" work seem particularly appropriate for designation as functions that are critical to an agency and need to be performed by a federal employee.

What criteria should agencies use in deciding whether an activity should be insourced?

Congress has clearly indicated the direction that should be taken in evaluating the insourcing of new and contracted out functions. Section 736 of Division D of the Omnibus Appropriations Act, 2009, P.L. 111-8, requires agencies subject to the FAIR Act to "devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Federal employees to perform new functions and functions that are performed by contractors and could be performed by Federal employees." The statute further requires that the guidelines provide for "special consideration" to be given for using federal employees to perform any function that is:

Performed by a contractor and:

- has been performed by federal employees at any time during the previous 10 years;
- is a function closely associated with the performance of an inherently governmental function;
- has been performed pursuant to a contract awarded on a noncompetitive basis; or
- has been performed poorly, as determined by a contracting officer during the 5 years preceding the date of such determination, because of excessive costs or inferior quality; or:
- a new requirement, with particular emphasis given to a new requirement that is similar to a function previously performed by federal employees or is a function closely associated with the performance of an inherently governmental function.

In addition, the statute provides that the guidelines and procedures may not include any specific limitation on the number of functions or activities that may be converted to performance by federal employees and excludes certain functions from public-private competition until certain conditions are met.

In July 2009, OMB issued guidance providing agencies with criteria to "facilitate consistent and sound application of the insourcing requirements" set forth in section 736. The criteria consist of four sections that address different aspects of the statute and describe circumstances and factors agencies should consider when identifying opportunities for insourcing. The guidance noted that agencies subject to section 736 should reflect these criteria in their guidelines to implement section 736.

Inventory of Service Contracts

NTEU believes that complete, accurate and timely government contracting information is essential for tracking how public funds are being spent government-wide, as well as how well contractors are performing their responsibilities. Unfortunately, the proliferation of service contracts in recent years has eroded the ability of agencies to effectively monitor contractor performance and has hampered efforts to eliminate waste, fraud and abuse in the federal contracting system.

That is why NTEU was happy to see the FY 2010 Consolidated Appropriations Act requires agencies to create an annual inventory of all contractors providing services for the government. By the end of 2010, agencies would be required to submit to OMB a list that includes a description and cost for the services; the contractor's name and place of performance; and whether the contract was awarded competitively. Agencies are instructed to look for services that are inherently governmental or for poorly performing contracts and to evaluate whether it makes sense to bring the work performed by the contractor "in house".

By providing agencies with the necessary framework to better monitor and oversee the vast number of service contracts, they will be better able to determine if contractors are meeting their responsibilities or if the agency would be better served by having federal employees perform that work.

In addition to the efforts outlined in the various pieces of proposed legislation, NTEU believes that OMB can further advance the government's interest in assisting agencies to identify

which functions should not have been outsourced. Other criteria that agencies should consider include the following:

- Has there been an actual monetary savings realized as a result of the contract? Agencies should document the actual costs associated with each of the contracts listed in their inventory and determine whether that figure is consistent with the contractor's bid. If--as we suspect is often the case--the documented expenses exceed the bid, the work should be re-examined for in-sourcing.

- Has the contractor defaulted on the statement of work? Agencies should examine their list of contracts to determine whether, in fact, federal employees are performing outsourced activities rather than contractors. We are aware of several examples of failed contractor performance that have led to certain outsourced activity being performed by federal workers. The IRS mailroom contractor, for instance, was unable to deliver the same level of service that agency employees had performed prior to a reduction in force, and other IRS employees were required to perform work that the contractor had promised in its statement of work. Further, a contractor that was to provide toll-free services of the IRS's Area Distribution Centers informed the IRS--after the contract was awarded--that it could not fulfill the requirements of the contract and IRS employees were called in to complete the work.

- Was the contract renewed without a re-competition? Agencies should be required to examine their contract services to determine whether work was re-competed once a contract term had run. Contracts have often been automatically renewed without any scrutiny.

- What other costs do agencies incur during the contracting out process? OMB should ask agencies to begin to document all associated costs of outsourcing to determine whether there is a savings to taxpayers. For example, agencies should consider average costs associated with the public announcement of competition, including time spent in preparing for the announcement, litigation costs, oversight costs (such as the time and expense of dedicating 65 IRS employees to oversee the work of 75 contractor employees), and all other expenses.

CONCLUSION

Mr. Chairman, thank you, again, for the opportunity to submit our views on right-sizing the Federal employee to contractor mix. Overreliance on contractors can increase cost and jeopardize mission accomplishment. Ensuring that only appropriate functions are open to contracting will save money and provide taxpayers with the most effective government services.