



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of the Workforce Restructuring Act

June 2, 1995



A Lawyer's View of The Federal Workforce Restructuring Act

by

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"To Contract (out) or not to Contract (out)-- That is the Question"

Whether tis nobler [t]o suffer the slings and arrows of outrageous downsizing Or to take arms against a sea of red-tape, and by cost-comparing, cut it?

Tis a consummation devoutly to be wished.

Certain aspects of The Federal Workforce Restructuring Act of 1994 (Public Law 103-226) have dominated the news for over a year. It is this statute which mandates the "downsizing of Government" by reducing Full Time Equivalent (FTEs) by over 150,000 between FY 1994 and 1999. It is this same statute which provides for the "buyout" incentives we have heard so much about. The statute makes it clear that an agency which loses an employee as a result of a "buyout" may not backfill that position, and although it provides for waivers, they are very difficult to obtain. But the work must go on! So what is left—contracting out?—WRONG—Well-Maybe!

Section 5(g) of the Act states:

(g) LIMITATION ON PROCUREMENT OF SERVICE CONTRACTS—

The President shall take appropriate action to ensure that there is no increase in the procurement of service contracts by reason of the enactment of this Act, except in cases in which a cost comparison demonstrates such contracts would be to the financial advantage of the Federal Government.

The newspapers haven't spoken of this aspect of the Act, and it is here that real problems have arisen and will continue to arise. These problems involve issues both of personnel and contract law.


Last month I was asked to review what was facially an extraordinarily simple 8(a) contract. It was to provide "administrative support services" to a "Commerce agency" in the nature of opening of the mail, logging in documents, and "any other administrative tasks which might be assigned," and with a "period of performance" from 8:30 A.M. to 5:00 P.M. Monday through Friday. In addition to the fact that this was written as a personal services contract, it clearly raised questions of why there was a need (all of a sudden) to "contract out" this type of administrative task. Could some secretaries have taken a buyout?

In the last several months, I have been bombarded with requests for review of service contracts (both personal and non-personal). The program offices which have sent these requests have made it clear that there are important missions that their agency can not perform without these contracts as they are losing FTE's or can not backfill positions they have lost through buy-outs.

What can be done? Clearly the statute tells you—or does it? As stated in Section 5(g), you can do a "cost comparison which demonstrates such contracts would be to the financial advantage of the Federal Government." But what does that mean? Are we back to OMB Circular A-76, which could, as everyone recalls, be quite cumbersome? My review of the legislative history of the statute revealed absolutely no discussion of this issue in any of the conference reports. Seemingly, a full A-76 analysis should satisfy the statute. But that doesn't help the program manager who needs to "make it happen yesterday." How much less than a full A-76 evaluation

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 **A Lawyer's View** is a periodic publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at 202-482-1122, or via e-mail to Jerry Walz@FinLit@OGC or jwalz@doc.gov.



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would pass OMB scrutiny? Is the cost analysis as contemplated by A-76 directed toward the same issues as the "financial advantage analysis" in 5(g)?"

At the present we understand that there are on-going discussions among OMB and various executive agencies to determine whether to apply A-76 criteria to the present problem or to rewrite the Circular by supplementing it to make it more user friendly by streamlining the conduct of A-76 cost studies. It may be several months before there is any definitive answer to the question. In the meantime, program offices should be aware that requirements for the performance of work by service contractors which arguably are being necessitated by the loss of FTE's should initially be evaluated and documented with a cost comparison. This should be done even before it gets to the procurement offices, which, in conjunction with CLD, will be reviewing these requirements, *inter alia*, for their applicability to and compliance with the Act.

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SEC. 5. REDUCTION OF FEDERAL FULL-TIME EQUIVALENT POSITIONS.

(a) DEFINITION.--For the purpose of this section, the term "agency" means an Executive agency (as defined by section 105 of title 5, United States Code), but does not include the General Accounting Office.

(b) LIMITATIONS ON FULL-TIME EQUIVALENT POSITIONS.--The President, through the Office of Management and Budget (in consultation with the Office of Personnel Management), shall ensure that the total number of full-time equivalent positions in all agencies shall not exceed--

- (1) 2,084,600 during fiscal year 1994;
- (2) 2,043,300 during fiscal year 1995;
- (3) 2,003,300 during fiscal year 1996;
- (4) 1,963,300 during fiscal year 1997;
- (5) 1,922,300 during fiscal year 1998; and
- (6) 1,882,300 during fiscal year 1999.

(c) MONITORING AND NOTIFICATION.--The Office of Management and Budget, after consultation with the Office of Personnel Management, shall--

(1) continuously monitor all agencies and make a determination on the first date of each quarter of each applicable fiscal year of whether the requirements under subsection (b) are met; and

(2) notify the President and the Congress on the first date of each quarter of each applicable fiscal year of any determination that any requirement of subsection (b) is not met.

(d) COMPLIANCE.--If, at any time during a fiscal year, the Office of Management and Budget notifies the President and the Congress that any requirement under subsection (b) is not met, no agency may hire any employee for any position in such agency until the Office of Management and Budget notifies the President and the Congress that the total number of full-time equivalent positions for all agencies equals or is less than the applicable number required under subsection (b).

(e) WAIVER.--

(1) EMERGENCIES.--Any provision of this section may be waived upon a determination by the President that--

(A) the existence of a state of war or other national security concern so requires; or

(B) the existence of an extraordinary emergency threatening life, health, safety, property, or the environment so requires.

(2) AGENCY EFFICIENCY OR CRITICAL MISSION.--

(A) Subsection (d) may be waived, in the case of a particular position or category of positions in an agency, upon a determination of the President that the efficiency of the agency or the performance of a critical agency mission so requires.

(B) Whenever the President grants a waiver pursuant to subparagraph (A), the President shall take all necessary actions to ensure that the overall limitations set forth in subsection (b) are not exceeded.

(f) EMPLOYMENT BACKFILL PREVENTION.--

(1) IN GENERAL.--The total number of funded employee positions in all agencies (excluding the Department of Defense and the Central Intelligence Agency) shall be reduced by one position for each vacancy created by the separation of any employee who has received, or is due to receive, a voluntary separation incentive payment under section 3(a)-(e). For purposes of this subsection, positions and vacancies shall be counted on a full-time-equivalent basis.

(2) RELATED RESTRICTION.--No funds budgeted for and appropriated by any Act for salaries or expenses of positions eliminated under this subsection may be used for any purpose other than authorized separation costs.

(g) LIMITATION ON PROCUREMENT OF SERVICE CONTRACTS.--The President shall take appropriate action to ensure that there is no increase in the procurement of service contracts by reason of the enactment of this Act, except in cases in which a cost comparison demonstrates such contracts would be to the financial advantage of the Federal Government.