



Out of Many/**One Union**
AFGE NVAC/AFL-CIO

NATIONAL VETERANS AFFAIRS COUNCIL

American Federation of Government Employees, Affiliated with the AFL-CIO

NATIONAL GRIEVANCE

NG-11/13/17

Date: November 13, 2017

To: Kimberly McLeod
Acting Executive Director
Department of Veterans Affairs
Office of Labor-Management Relations
810 Vermont Avenue, NW
Washington, DC 20420
kimberly.mcleod@va.gov
Sent via electronic mail only

From: Shalonda Miller, Staff Counsel, National Veterans Affairs Council (#53) (“NVAC”),
American Federation of Government Employees, AFL-CIO (“AFGE”)

RE: **National Grievance against the Department of Veterans Affairs for its failure to comply with its contractual and statutory obligations when it contracted out certain acquisitions and procurement activities.**

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) (“MCBA”), American Federation of Government Employees/National Veterans Affairs Council (“NVAC” or “the Union”) is filing this National Grievance against all associated officials and/or individuals acting as agents on behalf of the Department of Veterans Affairs (“Agency”) for failure to comply with its contractual and statutory obligations to notify and bargain with NVAC regarding the direct conversion of bargaining unit work in the Network Contracting Offices (“NCOs”) and for the otherwise unlawful contracting out of said bargaining unit work.

It has come to the attention of NVAC that on an ongoing and continuous basis, the Agency has contracted out certain acquisitions and procurement activities traditionally performed by federal employees. For example, management in Network 15 Contracting Office (“NCO-15”) in Leavenworth, Kansas, hired a former employee as a contractor shortly after his retirement from federal service as a Contracting Officer. As a contractor, this former employee is performing essentially the same job functions, such as contract close-outs, previously performed as a federal employee in violation of federal law and the MCBA. Similarly, NVAC has learned of several long-standing contracts in NCO-23, in both Minneapolis, Minnesota and Black Hills, South Dakota, wherein acquisitions jobs previously conducted by federal employees



were given to contractors. The Agency's decision to contract out this work without consulting with the Union, and without providing notice and opportunity to bargain, violates the MCBA and federal law and regulation. Specifically, the Agency violated, and continues to violate, 18 USC § 207, 41 USC § 1710, 5 USC § 7116(a)(5), OMB Circular A11, Articles 2, 11 and 47 of the MCBA, and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

STATEMENT OF THE CASE

Background

NVAC has received information from its membership that the Agency has been contracting out several of its procurement and acquisitions functions in violation of the MCBA and the notice-and-bargaining provisions of 5 USC § 7116(a). Specifically, positions traditionally held by federal employees, including, but not limited to, Contract Specialists and Acquisition Management Support Specialists, have awarded to contractors. To date, NVAC is aware that such contracts have impacted bargaining unit employees in AFGE Local 85 and AFGE Local 1968. NVAC expressly reserves the right to supplement the number of affected locals until this grievance is resolved.

Federal Conflict-of-Interest Law, codified at 18 USC § 207, restricts some subsequent private employment activities of former federal employees. The restrictions bar a former federal employee from representing another person or entity when communicating with or appearing before a Federal agency, concerning the same particular matter involving specific parties with which the former employee was involved. If the former employee had "official responsibility" over the particular matter the ban is for a period of two years. However, if the former employee was "personally and substantially" involved in a particular matter, the bar is permanent. 18 USC § 207 (2017). Here, assuming the NCO-15 contractor continues to work on the close-out reports for contracts he worked on as a federal employee, his hiring, less than one year later, arguably violates the statute. Moreover, conducting contract close-outs is an inherently government function, and as fully explained below, is therefore prohibited from being performed by a contractor.

Article 2 of the MCBA requires that the Agency comply with applicable federal statutes and regulations in the administration of matters covered by the MBA. One specific federal statute concerning the federal government's use of contractors is 41 USC § 1710, which prohibits government agencies from converting work from federal employees to contractors without first conducting a formal cost comparison, in accordance with Office of Management and Budget Circular ["OMB"] A76. There is currently a moratorium on conducting cost comparisons pursuant to OMB A76. Therefore, since the Agency cannot currently perform the cost comparisons that are required before contracting out can take place, it ostensibly may not contract out work typically conducted by federal employees.

Moreover, OMB guidance proscribes agencies from contracting out work that is an "inherently government function." *See* OMB Circular A11, Section 85.5(b). An inherently

governmental function is a function that is so intimately related to the public interest as to require performance by federal government employees. *See id.* It is well-settled that certain procurement activities, such as signing contracts and authorizing the expenditure of federal funds, are inherently government functions.

Article 11 of the MCBA requires the Agency to meet and confer with the Union regarding impact from a decision to contract out. Article 47 of the MCBA requires that the Agency provide written notice and opportunity to bargain to the President of NVAC when proposed changes in conditions of employment affect two or more local unions.

Finally, by refusing to consult and negotiate in good faith with the Union regarding elimination and/or conversion of bargaining unit work to contractors, the Agency also violated 5 USC § 7116(a)(5).

Violation

By failing to fulfill its contractual obligations and follow federal laws and regulations, the Agency violated, and continues to violate, the following:

- Articles 2 and 11 of the MCBA: requiring the Agency to comply with federal law, and provide the Union notice and opportunity to bargain when the Agency contracts out bargaining unit work;
- Article 47 of the MCBA: requiring the Agency to notify the NVAC President of proposed changes in working conditions affecting the interests of two or more local unions;
- 18 USC § 207: requiring a temporary or permanent ban on former federal employees in the representation of another business that concerns the same matter and parties with which the former employee was involved;
- 41 USC § 1710: requiring the Agency to conduct a formal cost comparison prior to converting work from federal employees to contract workers;
- OMB Circular A11: prohibiting the Agency from contracting out inherently government functions;
- 5 USC § 7116(a)(5): requiring the Agency to consult and negotiate in good faith with the Union;
- And any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

Remedy Requested

The Union asks that, to remedy the above situation, the Agency agree to the following:

- To immediately cease contracting out inherently government functions, specifically with regard to acquisitions and procurement job duties;
- To return to the *status quo ante*;
- To make whole any impacted bargaining unit employee;
- To fully comply with its contractual obligations under Articles 2, 11 and 47 of the MCBA; and its statutory obligations under Title 18, 41 and 5 of the U.S. Code; and
- To agree to any and all other remedies appropriate in this matter.

Time Frame and Contact

This is a National Grievance, and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please contact the undersigned. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.

Submitted by,



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Mary-Jean Burke, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
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