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American Federation of State, County and Municipal Employees

AFSCME Council 13

AFSCME Council 24

AFSCME Council 40

AFSCME District Council 48

AFSCME Local 375 DC 37

AFSCME Local 882

AFSCME Minnesota Council 5

Alaska Public Employees Association/AFT

AFT Public Employees

Association of Engineering Employees of Oregon (AEE)

Communications Workers of America (CWA)

Communications Workers of America Local 1032

Connecticut State Employees Association (CSEA), SEIU Local 2001

Council of Engineers and Scientists Organizations (CESO)

CSEA Local 1000, AFSCME, AFL-CIO

Department for Professional Employees, AFL-CIO

International Federation of Professional & Technical Engineers Local 17

International Federation of Professional & Technical Engineers Local 21

International Federation of Professional & Technical Engineers Local 195

International Federation of Professional & Technical Engineers Local 400, RIDOT Professional Employees Association

International Federation of Professional & Technical Engineers, AFL-CIO & CLC

Maine State Employees Association/SEIU Local 1989

Massachusetts Organization of State Engineers and Scientists (M.O.S.E.S.)

Michigan Public Employees SEIU Local 517M

Minnesota Government Engineers Council (MGEC)

Montana Public Employees Association

New York State Public Employees Federation (PEF), AFL-CIO

OCSEA/AFSCME Local 11, Chapter 2513

Ohio Civil Service Employees Association (AFSCME), Local 11 AFL-CIO

Oklahoma Public Employees Association (OPEA)

Professional Engineers in California Government (PECG)

SEIU Local 285

SEIU Local 503, Oregon Public Employees Union

Service Employees International Union (SEIU)

State Highway and Transportation Employees Association of Missouri

Teamsters Local Union No. 916/IBT

Wisconsin State Engineering Association (SEA)

May 25, 2010

Mr. Daniel I. Gordon
Administrator, Office of Federal Procurement Policy
Executive Office of the President
1650 Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Mr. Gordon:

The National Association of State Highway and Transportation Unions (NASHTU) welcomes and appreciates the opportunity to respond to the proposed Policy Letter No. 10-XX addressing "Work Reserved for Performance by Federal Government Employees." NASHTU represents hundreds of thousands of state and locally employed transportation engineers and related public servants in 38 member unions and associations throughout the United States.

Attached are comments on the draft policy and the questions proposed in the accompanying memo. We would appreciate the opportunity to participate in a continuing dialogue on these issues as the final policy is developed. Please contact me at the NASHTU Office at 916/446-0584.

Sincerely,

Ted Toppin
NASHTU National Coordinator

American Federation of State, County, and Municipal Employees (AFSCME)
AFSCME, Council 40
AFSCME, District Council 48
Connecticut State Employees Association (CSEA)
International Federation of Professional and Technical Employees (IFPTE), Local 17
Association of Engineering Employees of Oregon (AEEEO)
Massachusetts Organization of State Engineers and Scientists (MOSES)
Minnesota Government Engineers Council (MGEC)
Professional Engineers in California Government (PECG)
Public & Healthcare Workers of the Communications Workers of America (CWA)

May 25, 2010

Daniel I. Gordon, Administrator
Office of Federal Procurement Policy

From: **National Association of State Highway and Transportation Unions
(NASHTU)**

Subject: **Comments on Proposed Policy Letter 10-XX, Work Reserved for
Performance by Federal Government Employees**

NASHTU is comprised of 38 unions and associations representing hundreds of thousands of state and locally employed transportation engineers, technical workers and related public servants throughout the United States. NASHTU appreciates and generally supports the draft policy letter issued on March 31, 2010. NASHTU makes the following specific recommendations, discussed in more detail below.

- **Construction inspection of federally funded surface transportation projects is an inherently governmental function.**
- **If outsourcing surface transportation engineering functions is more costly than using public employees, such outsourcing should be eliminated, except for specialty work or a temporary increase in workload for which public agency staff cannot be obtained in a timely manner.**
- **These OMB policy positions should also be applied to state and local agencies using federal surface transportation dollars.**

DISCUSSION

A bridge collapsed into the Mississippi River in Minneapolis, Minnesota, killing 13. A concrete ceiling panel collapsed in the Big Dig tunnel in Boston, killing one. The construction of the Red Line Subway under Los Angeles included walls only one-third of the design thickness, paper wads and wooden blocks instead of concrete and steel, and an impermeable membrane so perforated during construction that toxic liquids poured into the tunnel before construction was complete. The seismic retrofit project for the I-8/805 interchange in San Diego included 10,000 defective welds, more than 70% of the total.

All of these high profile project disasters had two things in common. They involved substantial payment and ultimate **waste of federal transportation funds** and they were all constructed by private contractors whose work was **inspected by private contractors**, not public servants. The two projects that resulted in deaths, the Minnesota Bridge collapse and the Big Dig ceiling collapse, also involved serious design defects by private contractors.

Construction inspection of federally funded surface transportation projects is an inherently governmental function.

In March 2009, in a series of statements and memos, **President Obama stated:** “Inherently governmental activity should be performed by government employees... The federal government must ensure that those functions that are inherently governmental in nature are not outsourced... We will stop outsourcing services that should be performed by the government... Far too often, the spending is plagued by massive cost overruns, outright fraud, and the absence of oversight and accountability. In some cases, contracts are awarded without competition; in others, **contractors actually oversee other contractors.**”

The proposed policy letter defines “inherently governmental function” as “a function that is so intimately related to the public interest as to require performance by Federal Government employees” (page 12). Key factors are “the exercise of discretion” which could “significantly affect the life, liberty, or property of private persons,” and making “independent judgments... to protect or benefit the public.”

Construction inspection and many other engineering functions require the use of independent judgment by a qualified (usually licensed) individual who is in responsible charge of the function. As the above examples of project disasters demonstrate, allowing private contractors to perform the inherently governmental function of construction inspection can and has resulted in death, fraud, and a massive waste of federal and other public funds.

The function of a construction inspector is to be at the job site when the work by the construction contractor is being performed; observe the performance of the construction operation; and, through observation, experience, and the use of materials tests and other techniques, determine if the contractor’s operations conform to the plans and specifications for the project. If not, it is the responsibility of the inspector to stop the operation, order removal of defective work or materials, and then allow the contractor to resume. **The inspector must be loyal to the public and the taxpayer, not the contractor, shareholders, or profit margins.**

This may have been best stated by David M. Walker, former Comptroller General of the United States (1998-2008). In a New York Times interview, Mr. Walker stated the following:

“There is something civil servants have that the private sector doesn’t, and that is the duty of loyalty to the greater good – the duty of loyalty to the collective best interest of all rather than the interest of a few. Companies have duties of loyalty to their shareholders, not to the country.”

A routine construction inspection example occurs during the construction of a bridge footing. The reinforced concrete foundation at the base of a bridge pier is ultimately completely covered by dirt and/or water. Was the excavation for the bridge footing of proper dimensions and correct depth? Is the excavation clean and on solid, competent ground? Does the amount, quality, and placement of the reinforcing steel bars conform to the design plans and specifications? Does the steel have enough concrete covering it to protect it from eventually rusting? When the concrete is poured, does it meet the specifications (too wet, too dry, not enough cement, meet the required strength, etc.) and is it properly vibrated to fill the entire space without leaving air voids?

One of the “inherently governmental functions” listed on page 21 (Appendix A, item 12(e)), includes “accepting or rejecting contractor products or services.” That is the essence of construction inspection. **Therefore, we urge OMB to specify that “accepting or rejecting contractor products and services” under item 12(e) includes construction inspection.**

If outsourcing surface transportation engineering functions is more costly than using public employees, such outsourcing should be eliminated, except for specialty work or a temporary increase in workload for which public agency staff cannot be obtained in a timely manner.

NASHTU supports the draft policy letter position to require cost comparison analyses prior to outsourcing.

Engineering contracts supported by federal funds are awarded without competitive bidding. This is a mandate for federal agencies and for the states and regional/local agencies. Under the Brooks Act, competitive bidding is not permitted when outsourcing design, construction inspection, and other engineering and related services.

President Obama has stated: “We will eliminate the no-bid contracts that have wasted billions... We will end unnecessary no-bid and cost-plus contracts.”

For decades, one basic problem in outsourcing engineering and related services is that state and local governments sometimes don't comply with the requirements of the federal Brooks Act that the cost of contracts be "fair and reasonable." In essence, they decide to outsource, pick a contractor through a no-bid process, then award the contract without stopping to realize that in many cases their own government employees can do the work at far less cost. Paying more tax dollars to outsource work that could be accomplished in house does not meet the "reasonable" cost provision of the Brooks Act.

In California, the contracts are a matter of public record. For highway engineering and related services at the state level, Caltrans pays an average of **\$232,000 per person year (PY) or full time equivalent (FTE) for a private contractor** to perform design, inspection, and related functions. This does not include the cost of advertising, awarding, and overseeing the contract.

By contrast, the "fully loaded" **cost of a Caltrans engineer**, including salary, benefits, and direct overhead, is **\$103,000**. These figures are included in State Budget documents, are a matter of public record, and are agreed upon by Caltrans, the Governor's Department of Finance, and the Legislative Budget Committees and their staff. There is no dispute on the numbers.

While they vary from year to year, the pattern is always the same. **Outsourcing engineering work in California costs more than twice as much as having public servants perform those identical functions.**

The excessive cost of outsourcing engineering work is not unique to California. Studies from around the nation have overwhelmingly concluded that it is more cost effective to perform the work using government employees.

New York: a KPMG study of the Department of Transportation found that consultants were more expensive and that the department could have saved \$274 million if it utilized in-house expertise to perform the work.

Texas: a Price Waterhouse Coopers study found that outsourcing transportation engineering work was 62% more expensive than using Texas Department of Transportation staff.

Louisiana: a Louisiana Department of Transportation study found that outsourcing was 23% more expensive than using state staff.

New Jersey: a Department of Transportation study found that performing bridge inspections in house would result in a 52% savings, performing construction inspections in house would reduce costs by 33% and performing design work in house would save 30%.

The policy letter addresses this issue in several locations. “Ensure the proper use of funds appropriated by Congress” (page 12). Using the public sector may be “more cost effective” (page 16). Use “the most cost effective” alternative (page 17). “Address the full costs of government and private sector performance” (page 19).

Perhaps the point is best stated on page 18; “To meet its fiduciary responsibility to the taxpayers, the agency... must ensure it is cost effective to contract for the services.”

Nationwide, hundreds of billions of federal, state, and local transportation tax dollars have been and are continuing to be wasted through the ongoing failure to adhere to the policy and principles to be established in the proposed OMB Policy.

These OMB policy positions should also be applied to state and local agencies using federal surface transportation dollars.

The proposed OMB contracting policies only cover direct federal contracting, not state and local agencies use of federal funds. In transportation, more federal dollars are wasted at the state and local level than through direct contracting by the federal government. To safeguard federal transportation funds, the cost comparison requirement prior to outsourcing should also be applied to those state and local agencies which utilize federal dollars. In addition, State and local agencies should not be allowed to outsource inherently governmental work such as construction inspection.

The GAO report, *Increased Reliance on Contractors Can Pose Oversight Challenges for Federal and State Officials*, highlights the need for the federal contracting reforms to be expanded to state and local agencies using federal funds. The report found that while **“state [DOT] employees are always ultimately responsible for final project acceptance, they are increasingly further removed from the day-to-day project oversight.”** The report also found that among the State DOTs studied, there was no **“formal process for systematically assessing costs and benefits before entering into contracts”** and that **“current trends may lead to the erosion of in-house expertise that could affect the State DOTs’ ability to adequately oversee the work of contractors and consultants.”**

The federal government has, for decades, required state and local agencies using federal funds to conform to the federal Brooks Act procedures for advertising and awarding contracts for engineering and related services. Similarly, state and local agencies should be required to adhere to the policies established by OMB for federal contracting. In conclusion, **there is no reason why federal agencies should guard against waste, fraud, abuse, and danger to the traveling public while state and local agencies are allowed to misuse federal dollars to violate those very same policies.** These policies should apply to all agencies using federal funds, not just federal agencies.

**RESPONSES TO SPECIFIC QUESTIONS
(BEGINNING ON PAGE 8 OF THE PROPOSED POLICY LETTER)**

1. Definitions.

The definition of “inherently governmental function” and “public interest” should include a reference to conflict of interest, as perhaps best stated by Comptroller General David M. Walker’s reference to “the duty of loyalty to the collective best interest of all rather than the interest of a few. Companies have duties of loyalty to their shareholders, not to the country.”

If the concept of a “critical function” includes maintaining institutional memory and ensuring that the agency has sufficient internal capability to effectively perform the work being outsourced as well as maintaining control of it, then that should be stated in the definition. For example, an agency can’t really maintain control of its mission of designing bridges if it doesn’t employ engineers who have experience in designing bridges.

2. Inherently governmental functions.

The “nature of the function” and the “discretion” tests are appropriate, but the latter should also include consideration of cost. For example, if a contractor’s performance doesn’t “effectively preempt” the federal officials’ decision-making process or discretion but would require taxpayer expense to change or “countervail” the contractor’s action, then contracting should fail the discretion test.

Also, actual or potential conflict of interest should be considered here as well. The conflict would not necessarily mean that the contractor's interests are contrary to that of the public, but that the contractor's focus on making a profit in order to stay in business could affect the contractor's performance. For example, a contract for which the contractor's profit was increased as a result of the additional expenditure of federal (or state or local) funds would be contrary to the public interest because those funds could be used more productively in another way or may not need to be spent at all.

The "serious risks" consideration should also be defined and applied. This should not just be because of the difficulty in ensuring sufficient control, but the risk from potential conflict of interest (profit motive vs. serving the public) and the serious risk of greatly increased cost due to one or more of a variety of factors should be considered.

3. Closely associated and critical functions.

A presumption in favor of closely associated functions being performed by federal employees would be appropriate, rather than a requirement or simply giving special consideration. The reference to expecting federal employees to perform a function if internal expertise is needed or is cost effective, assuming hiring federal employees is feasible, is appropriate. Cost effectiveness and the inherent public/private conflict of interest considerations are factors. Utilizing state or local public agency employees, if available, should be required before outsourcing to private contractors.

"Closely associated" and "critical" functions should be differentiated more clearly if they are not merged. For example, "maintain control of its mission and operations" is used to describe "functions closely associated" (page 13) and "critical function" (page 18).

4. Non-critical functions.

The criteria for critical function should not be limited to those involving maintaining control of mission and operations. They should also ensure that the agency maintains the ability, expertise, and institutional memory to perform the function. For example, an agency should not outsource design of a bridge if the agency does not have employees who are capable of designing a bridge because they would be unable to determine if the contractor is properly performing its function.

Categories of non-critical contracts would be inappropriate because whether a particular contract involves critical functions or not should be evaluated on its individual merits. For example, the policy on page 18 emphasizes the need for an agency to “meet its fiduciary responsibility to the taxpayers” and “ensure it is cost effective to contract for the services.” This should be evaluated on a contract per contract basis, rather than blanket categories which would allow outsourcing without further analysis.

5. Specific functions.

If it is “most difficult” to determine if a function should be performed by government employees, then the function should be performed by government employees, rather than risk outsourcing it. Regarding the specific items listed, it is hard to imagine how outsourcing would be appropriate for developing independent government cost estimates, preparing documentation in support of a contract award, price negotiation memoranda, price reasonableness determinations, and so forth. These seem so clearly to be inherently governmental functions that even suggesting that they should be outsourced is disturbing. If an agency can’t prepare documentation to support an award of a contract, that agency had best quickly develop that capability, rather than allowing contractors to determine if contracts should be awarded to contractors.

Allowing contractors to manage other contractors, developing contractor performance assessments, reviewing contract claims, and related functions, would also appear to be clearly inappropriate and inadvisable. Many of the other listed functions are outside of NASHTU’s area of expertise, but several appear to be inappropriate for contracting.

6. Human capital planning.

Particularly in state government, Governors and Legislatures have been reluctant to provide the level of staffing needed to properly perform government functions for purely political reasons, even if outsourcing requires more taxpayer dollars. This should not affect the policy of utilizing government employees where public interest, economics, a conflict of interest, or other factors dictate or favor use of public employees. Once this policy is finalized, one would expect the Administration to seek adequate staffing at the federal level to perform these functions, typically at far less cost.

The policy should not address, or even recognize, the potential that Congress might fail to authorize the staff needed to fully comply with the policy. Salary limits and “hard to fill” categories may be a reality, but can be addressed more effectively if there is a policy which reasonably requires those functions to be performed by government employees. It is not appropriate, at least in a policy statement, to authorize temporary or other contracting for federal employee work.

If government employees do not possess the skills needed to provide adequate oversight for a contractor, then that would be a closely associated function, assuming the definition is clarified to include having the skills to perform a function which is being contracted as a necessary ingredient in maintaining control of an agency's mission and operations.

Regarding the proper mix, if almost all of a function is being outsourced so that the agency no longer possesses the expertise or institutional memory to perform the work, then that would be an overreliance on outsourcing, although the percentage of outsourcing would vary depending on the function. There is no such thing as an underreliance on outsourcing. In many cases, all of the functions of an agency or a program within that agency may be performed by public employees for reasons listed throughout the policy document.

7. Scope of coverage.

NASHTU does not have comments on this question.

8. Form of coverage.

The OFPP Policy letter is an effective vehicle for this purpose. As a policy document, there does not appear to be a need for it to "effectively address the affected stakeholder communities."

9. Implementation.

The most effective practices for agencies to identify functions to be performed by public employees may vary from agency to agency. Representation of an agency by a contractor at a policy-making meeting should not be permitted, and attendance at such meetings should be permitted only with good cause.

To ensure that a contractor's status is clearly understood, contractors should in no way present or appear to present themselves as agency employees. This means, for example, that contractors should not operate agency vehicles, not have an agency name or logo on their business card, not use agency stationery, and not regularly work or present themselves to the public at an agency office or facility.

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10. Management responsibilities.

Agency managers should be provided a name and contact information for someone in the Office of Federal Procurement Policy to get answers to questions they might have about the policy or its implementation. There should also be a contact for members of the public and others to have questions answered or to report apparent violations of the policy.

11. Inventories of federal and contracted employees.

NASHTU does not have comments on this question.