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28 JUN 1993

MEMORANDUM FOR OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF
DEFENSE (CIVILIAN PERSONNEL POLICY)
ATTN: Paul Rossbach

SUBJECT: Outsourcing Firefighting Functions

This responds to your request for coordination on a proposed policy memorandum on the application of 10 U.S.C. § 2465¹ to certain DoD firefighter positions. Attached is a proposed revision of your draft policy memorandum. It is consistent with your intent, while remaining within the scope of the statutory provision in section 2465.

Section 2465 does not define the term "firefighting function" and there is little direct legislative history to explain its intended scope. The intended scope becomes critical in the context of the commercial activities program, Office of Management and Budget (OMB) Circular A-76, "Performance of Commercial Activities," and the Federal Activities Inventory Reform Act of 1998 (FAIR), Pub. L. 105-270. Under OMB Circular A-76 and the FAIR, commercial activities are subject to cost comparisons between the cost of contracting and the cost of in-house (i.e. government) performance to determine who will do the work. The Government is not to perform commercial work, such as fire fighting, if the private sector can do so more economically. However, contracting is not required when it is "contrary to law, Executive Orders, or any treaty or international agreement." OMB Circular A-76. Therefore, even though most fire fighting functions are commercial activities, available from the private sector, and would otherwise be subject to cost comparison for contracting out under OMB Circular A-76, because of the:

¹ Section 2465 states:

"(a) Except as provided in subsection (b), funds appropriated to the Department of Defense may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting or security-guard functions at any military installation or facility.

"(b) The prohibition in subsection (a) does not apply -

"(1) to a contract to be carried out at a location outside the United States (including its commonwealths, territories, and possessions) at which members of the armed forces would have to be used for the performance of a function described in subsection (a) at the expense of unit readiness;

"(2) to a contract to be carried out on a Government-owned but privately operated installation; or

"(3) to a contract (or the renewal of a contract) for the performance of a function under contract on September 24, 1983."



1 of 5 pages

prohibition in 10 U.S.C. § 2465, DoD may not contract for them. However, the proscription against contracting-out speaks in terms of the fire fighting function, not a General Schedule series, or fire fighter or fire prevention positions. Positions in the Fire Protection and Prevention Series (GS-0081) are covered by section 2465 only to the extent that the duties/ functions performed are part of the fire fighting function. To the extent that any firefighter positions perform duties/functions that do not fit within the scope of the statutory prohibition against contracting out fire fighting functions, they would be subject to the cost comparison and other requirements of OMB Circular A-76.

As noted above, the term "firefighting function" is not defined in the statute. However, it is possible to glean some information on the intent of the statute from information that DoD has reported to Congress and its committees on the effect of this statutory prohibition on DoD operations. For example, section 1232 of the National Defense Authorization Act for Fiscal Year 1986 (NDAA FY86), required the Secretary to submit to Congress a report:

"[C]ontaining -

"(A) an assessment of the special needs of the Department of Defense with respect to firefighting and base security, and

"(B) an assessment of how those needs are met by both Federal employees and contract personnel."

In response, the Department submitted a report² that defined [inherently] governmental functions related to fire fighting as limited to those involving:

"[F]ire prevention and protection of nuclear weapons in DoD custody and fire prevention and protection of chemical weapons in government owned and operated facilities[.]"

Alternatively, the following functions were described as applicable and responsive to the Congressional reporting requirement to address the impact of the contracting-out prohibition on DoD's special "firefighting" needs:

"Fire Prevention and Protection

"Fire prevention and protection under the Commercial Activities program includes activities that operate and maintain fire protection and preventative services, as well as routine maintenance and repair of fire equipment and the installation of fire prevention equipment. The sub-functions are:

"Fire Protection Engineering. Consultation services, project review, and review of fire protection equipment submittals to ensure that essential

² A similar report was submitted on March 1, 1984.

direction criteria are provided in planning, design, construction of new facilities, alterations, and rehabilitations.

"Fire Station Administration. Record keeping and reporting systems necessary for evaluation and basic fire protection operations. Personnel development and training programs necessary to improve and maintain performance levels.

"Fire Prevention. Inspection services for code enforcement and non-code enforcement fire and life safety related needs. Public fire safety education services aimed at improving fire and life safety. Plan review services related to proposed construction projects, and fire and life/safety consulting services.

"Fire Station Operations. Maintenance service systems to ensure proper maintenance and repair of the fire station facilities, apparatus, and equipment; supply services appropriate to the station needs and overall management of the station functions, including on-the-job training programs.

"Crash and Rescue. Fire control and suppression, before, during, and/or after operations involving all types of military and civilian aircraft that may be assigned/utilized at DoD airfields, with a designated minimum level of recurrent crash/fire/rescue training.

"Structural Fire Suppression. Fire suppression, rescue, and emergency first aid services provided to DoD personnel and facilities with annual recurrent training to maintain minimum skill levels.

"Fire & Crash/Rescue Equipment Major Maintenance. Comprehensive support service systems to ensure proposer preventative maintenance, periodic preventative maintenance inspections, and repairs to structural, crash/fire/rescue, and auxiliary fire apparatus and equipment.

"Other Fire Prevention and Protection. Emergency and technical services for controlling significant accidental releases of hazardous or otherwise troublesome materials which could threaten public safety."

This broad listing of firefighting functions was provided to address the reporting requirement in section 1232 of the NDAA for FY86. It included those functions that, at the time, were performed in-house, as well as those that were performed under contract.³

³ The prohibition against contracting-out was initially established in the NDAA for FY93. It applied prospectively and did not affect contracts already in place.

DoD Instruction 6055.6, "DoD Fire and Emergency Service Program" provides the current DoD interpretation of "firefighting function." It, too, is extremely broad. The Instruction identifies four broad functions as being included in the fire and emergency service program: fire prevention, fire incident investigation and reporting, emergency response, and fire suppression services. Each of these is discussed at length in enclosure 2 to DoD Instruction 6055.6. In addition, paragraph E2.15.1 of DoD Instruction 6055.6, recognizes the prohibition in 10 U.S.C. § 2465, stating that "funds shall not be obligated or expended for entering into a contract for the performance of fire fighting functions at any military installation or facility." (Paragraph E2.15.1 does recognize the limited exception provided in section 2905(b)(8) of the Base Closure and Realignment Act of 1990 (10 U.S.C. § 2687 (note)), to contract with local governments for fire protection services at military installations within 180 days of closure.)

Historically, DoD has treated the prohibition in section 2465 extremely broadly, both in its reports to Congress and internally. However, the fire fighting functions addressed above are defined in terms of functions, not the job series of the employees performing those functions, i.e. GS-0081, the Fire Protection and Prevention Series. Therefore, it is necessary to determine whether the duties identified in the GS-0081 series correspond to the functions identified in DoD Instruction 6055.6. As you know, the GS-0081 series includes positions that:

"[S]upervise or perform work to control and extinguish fires, rescue persons endangered by fire, and reduce or eliminate potential fire hazards, ... [as well as] positions that control hazardous materials incidents; train personnel in fire protection and prevention; operate fire communications equipment; develop and implement fire protection and prevention plans, procedures, and standards; and advise on improvements to structures for better fire prevention."

Typical duties for fire protection or prevention positions in this job series could include combating fires and rescuing personnel, driving and operating complex vehicles, training, reviewing new construction plans, inspecting and correcting deficiencies, studying prevention problems, and knowing applicable standards and recognizing and identifying hazards. Based on the Department's historical and current broad characterization of fire fighting functions for purposes of section 2465 and its predecessors, it is accurate to say that any position which performs the functions described under the four broad areas identified and described in DoD Instruction 6055.6 as fire and emergency services may be covered by the prohibition in section 2465. While not identical to the fire fighting functions in DoD Instruction 6055.6, the duties described in the GS-0081 classification standard can be equated. For example:

DoD Instruction 6055.6

GS-0081 Series

Fire prevention

Develop and implement fire protection and prevention plans
 Advise on improvements for structures for better fire prevention
 Study prevention problems

✓ Fire incident investigation and reporting

Participate in preliminary investigations into causes by inspecting damaged areas

✓ Emergency response

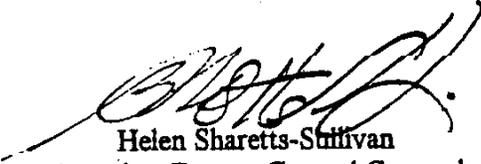
Rescue personnel
Drive and operate complex vehicles
Perform firefighting duties, including at airfields

✓ Fire suppression services

Perform fire suppression duties
Plan, program and budget (supervisory duties)

These examples illustrate the translation between the fire fighting functions described in DoD Instruction 6055.6 and the duties performed by personnel in the GS-0081 series. A similar analysis could be performed for the remaining sub-functions in DoD Instruction 6055.5 and the more detailed description of duties for the various levels of fire protection and fire prevention positions in the GS-0081 series. To the extent that these duties roughly equate to the functions in DoD Instruction 6055.6, it is reasonable to conclude that they are within the scope of the broad definition of "firefighting function" used by DoD to characterize the scope of the statutory exclusion in 10 U.S.C. § 2465.

Please contact me if you have questions or require additional information.


Helen Sharetts-Sullivan
Associate Deputy General Counsel

Attachment: a/s