The State Contract Series
For use in understanding the state employees' contract

Article 39 - Subcontracting

Article 39 of the collective bargaining agreement deals with subcontracting. Subcontracting means to assign work to people not employed by the State of Ohio. That is, the paycheck of those who are doing the subcontracting is signed by someone other than an official of the State of Ohio.

Under the state contract, bargaining unit work can be contracted out. While there is a clause that the State "intends" to utilize bargaining unit members to do work that they normally perform, for reasons of greater efficiency, economy or other related reasons the **employer can subcontract work.**

Fighting Subcontracting

A violation of Article 39 can occur even though bargaining unit employees are not displaced.

There are many ways to fight improper subcontracting. Many unions have chosen to fight the issue through publicity. The major thrust of these campaigns has been to show that in the long-run, using permanent employees is cheaper and provides for better, more stable service. Unions have also been able to show links between politicians advocating the subcontracting and the recipient of the award.

In order to make such arguments, research is necessary into the company that is receiving the subcontracting and its track record. Budget information should be requested to determine if the State is really saving money. Often times, subcontracting gives a short-term savings, but long term costs are not estimated or factored into the evaluation. Other factors such as quality and other customer expectations need to be evaluated., Issues of accountability and contract monitoring should also be evaluated.

Research should begin as soon as it appears that subcontracting is beginning to occur. Immediately try to verify the rumor and request documentation. If contracting out results in layoffs of bargaining unit members, then the Employer shall provide the Union with not less than 120 days notice of such action. This notice gives the Union some time to research and advance alternatives to contracting out.

Subcontracting can also be fought through the grievance procedure. In such a grievance, the management rationale for contracting out -- efficiency and economy -- has to be challenged. This was effectively done in arbitration case #489 when the State failed to prove that contracting out of "loop" detector repair was cheaper or more efficient. The Union was able to demonstrate that it cost the State $34,000 more to have a subcontractor do the work than if a state employees had done the work.

It is important to note that the best protections from contracting out are effective and efficient workplaces that make public services competitive with private vendors. If the employer decides to contract out, the union can enforce/evoke Article 39; and if a violation exists, we can arbitrate.

Arbitrators have said that management does have the right to subcontract subject to the standards of reasonableness and good faith. There are 10 basic factors that arbitrators look at to determine reasonableness and good faith on the part of Management when they make a decision to subcontract:

1. What is the past practice on contracting out? Has the State subcontracted this work in the past?

2. What is management's justification for subcontracting? Is there a sound business reason for subcontracting? Is it more efficient? Does it save money? Are there programmatic benefits which Management derives from this subcontracting?

3. What is the effect of the subcontracting on the union or bargaining unit? Is Management subcontracting to

discriminate against the union and to destroy the integrity of the bargaining unit?

4. What is the effect of subcontracting on union employees? Are union employees being discriminated against? Are they being displaced (laid off)? Are union members being deprived of jobs previously available to them? Do employees lose regular earnings? (Lost overtime is not normally considered if the contract does not contain overtime guarantees.)

5. What is the type of work involved in the subcontracting? Is the work normally done by the bargaining unit employees or is it the kind of work in the public sector which is frequently subcontracted? Is the work of a marginal or incidental nature to what bargaining unit employees do or is it an integral part of what they normally do?

6. Do bargaining unit employees possess the skills to perform the work which is to be subcontracted?

7. What is the availability to Management of equipment and facilities needed for the work? Are necessary equipment and facilities present and available? If not, then that may lead an arbitrator to believe that subcontracting is permissible and reasonable.

8. What is the regularity of the subcontracting? Is this work frequently subcontracted or is it just done on an occasional basis? If it is done on an occasional basis, why couldn't bargaining unit workers do it all the time? Conversely, if the work is done occasionally, then the arbitrator can also hold that there is not great harm to the Union.

9. What is the duration of the subcontracted work? Is the subcontracting temporary or permanent?

10. Are there any other unusual circumstances involved? Is there an emergency or time limit which Management must meet? Is there a strike going on which makes it impossible for bargaining unit workers to do the work?

The standards to determine whether an Article 39 violation exists have been clarified to some extent by arbitration #514A. First, the Union must show that contracted-out work would have been normally done by bargaining unit employees during the collective bargaining agreement period. The burden then shifts to the Employer who must show by preponderance of the evidence that the decision was rationally based on greater economy, greater efficiency or greater program benefits or other related factors. Once the Employer has shown a rational basis for the decision, the burden shifts to the union who must show that the decision was erroneous, done in bad faith or not in the public interest. The employer has a burden to show its decision to contract out is rational or made in good faith (#514, #514A).

What remedies are available?

In a contracting out case, the Union seeks to preserve its bargaining unit work and to make sure that no bargaining unit employees are laid off.

In terms of the union's preservation of bargaining unit work, an arbitrator only decides whether subcontracting is proper or improper. In some cases, arbitrators have awarded monetary damages to the Union for lost work -- either at straight time or a time and a half rate.

The proper measure of the remedy is what bargaining unit employees would have been paid rather than what the subcontractor was paid. The Union, in order to get money as a remedy, must demonstrate that there was a monetary loss. Another remedy that the arbitrator can give is a cease and desist order for Management to not subcontract or to cancel the subcontract. (Every time a new contract is let, there is a new event.)

If bargaining unit employees are displaced, then the employer must follow the additional standards and procedures of layoff as outlined in Article 18 of the contract. (For more information, please see the Fact Sheet #190 on layoffs.)

There is one additional provision in the case of subcontracting. In the event of subcontracting, the contract provides that employees can receive additional training to perform work in any vacancy s/he fills. The employer will provide training as long as the needed training can be successfully completed in a reasonable length of time. The training shall be provided during working hours at the employer's expense.

Privatization is a Political Decision

The size of government or who should perform services traditionally performed by

public employees is a political decision as well as one that is influenced by cost or quality. Legislative views about the value of public service is reflected in legislation that appropriates dollars for services or determines whether services are public, private or should not be provided at all. A majority of subcontracting decisions are rooted in political preference about who should perform public services. Know the views of your legislators. It is important that OCSEA educate legislators about the value of public services. Which legislator you vote for may be directly related to who performs the service and member employment security.

Notice

1. 120 Day Notice

If contracting out results in layoff, then the Employer shall provide advance written notice of not less than 120 days to the Union.

Upon request, the Employer shall meet with the Union to discuss the rationale and to give the Union the opportunity to discuss alternatives. The 120 day period sometimes can provide ample time for the union to collect the facts that resulted in the contracting out decision and then prepare alternative, efficient ways to have the work done using bargaining unit employees.

2. Notice through agency websites

The state's technology plan requires state agencies to provide public documents including requests for proposals (RFPs) and Invitations to Bid (ITBs) on their websites. Proposed and existing contracts for services will be available through the website. Find your agency's website to get advance notice of proposed contracting out and to obtain additional information on employer requirements. Such advance notice can help provide needed time to address the union concerns or to develop a strategy.

Contracting In

The Union has an opportunity to demonstrate that bargaining unit work that has been previously contracted out or proposed for contracting out can be done better, more effectively or more cheaply by bargaining unit employees. A union's contracting in proposal must compare the cost and other factors that were relevant to the agency's decision to contract out. The union then develops a practical plan about how, in the alternative, it is more efficient, economic and a better business service to use bargaining unit employees. Timelines, scope and quality of services can sometimes be as important as price. Article 39.02 calls to the employer's attention the right to collect the facts to make the analysis.

Under Article 39.03, the union and the state may select 3 agencies in which the parties will jointly examine agency contracting practices and develop strategies for alternatives to contract out.

IT Contracting Out

Article 8.05D is a separate Labor Management committee that will focus on identifying the causes that underlie agency decisions to contract out IT services. The committee will be reviewing factors relating to cost, quality, program requirements, workforce skills and other factors that influence contracting out. The committee will review IT personal service contracts and will review cost-benefit analyses and other approaches that can be used to increase the use of bargaining unit employees to meet state IT needs.

References

Article 18, 39
Arbitration 489, 514, 514A
Fact Sheet 190

OCSEA AFSCME LOCAL 11 AFL-CIO
Ohio Civil Service Employees Association