

Project On Government Oversight

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April 2, 2010

To Nicole.Lurie@hhs.gov

Dr. Nicole Lurie
Assistant Secretary for Preparedness and Response
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Dr. Lurie:

I have received your letter of January 15 written in response to the October 30 letter to Secretary Sebelius from Danielle Brian and me. Unfortunately, your letter again avoids dealing with the issues we raised.

Our questions and your non-response response

In our letter of October 30 we again requested public disclosure of documents and information in several areas of the pandemic flu vaccine program. One of the areas is related to contracts as well as to contractors and their performance.

Under the heading “Disclosure needed: Government contracts for pandemic flu vaccine production” we wrote about two separate issues in need of greater transparency: the contracts for vaccine production and the evaluations of contractors’ performance. In our letter of October 30 to Secretary Sebelius we wrote:

Every one of these multimillion dollar contracts for vaccine production should be posted online – on the initiative of DHHS and without the need to file Freedom of Information Act requests. If a contract (redacted when necessary) is obtainable through a FOIA request, then that contract can and should be posted online without such a request. (USAID routinely posts many of its contracts online.) In addition, any evaluations of contractors’ ongoing performance should be posted online and updated periodically. . . .

and in our letter we asked Secretary Sebelius if she planned to act on the steps we urged:

Will the contracts be posted online? Will DHHS’s evaluations of manufacturers’ performance under their contracts be posted? If such disclosures are prohibited by law, will that prohibition be explained?

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Responding to these three questions, you wrote on Secretary Sebelius's behalf:

In regard to your request that HHS post vaccine manufacturing contracts online, the Federal Acquisition Regulations (FAR) 42.1503(b) does not allow for making the evaluation of proposals available on publicly available websites. By their nature, contracts contain confidential information which would be redacted, rendering the contracts uninformative. In keeping with these regulations, HHS contract officers share contractor past performance with other agencies through the National Institutes of Health Contractor Performance System and the Past Performance Information Retrieval System.

This short passage is a non-response response. It combines, confuses, and fails to distinguish *four* different kinds of documents:

- o Contract proposals submitted by manufacturers in response to an RFP (Request for Proposals). Our letter did not ask that these proposals be made public, and indeed we did not refer or allude to these documents in any way.
- o Evaluation of these proposals by the agency. This internal evaluation by agency officials is the customary and necessary precursor to the choice of a single manufacturer who will become the contractor. Our letter did not ask that these intra-agency evaluations be made public, and indeed we did not refer or allude to them in any way.
- o Final contract itself, namely, the agreement between the government and one manufacturer (the successful one chosen by the government). This is the document that we said should be posted online for examination by the public. We noted parenthetically that certain information might have to be redacted, which we still believe to be true, while your January 15 letter asserted that the redaction of confidential information would have the effect of "rendering the contracts uninformative," which we doubt is true for most DHHS contracts.
- o Evaluations of contractor performance. Your January 15 letter indicates correctly that these performance evaluations are shared with other government agencies, an issue we did not raise. Instead, you failed to comment on our request that these evaluations be posted online. Your letter implies that this is not possible, which we believe may not be correct. We discuss this point next.

It is uncertain whether the evaluations of contractors' performance can be released publicly, and therefore we asked, "If such disclosures are prohibited by law, will that prohibition be explained?" It has been *customary* under FAR 42.1503 to share these performance evaluations with other agencies in the federal government, but not to make the evaluations public. However, the Federal Acquisition Regulation (FAR) is a regulation, not a law. Thus the agencies have some flexibility in interpreting and implementing the FAR. Indeed, soon after he took office, Attorney General Eric Holder issued a memorandum announcing a new policy of increased transparency and public disclosure:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. [Holder memorandum, page 1.]

The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and

systematically post information online in advance of any public request. [Holder memorandum, page 3]

Moreover, the new policy advocated by Mr. Holder may prove to be far more permissive than past policies in dealing with the public release of evaluations of contractor performance. An article in *The Government Contractor* (April 15, 2009) notes that under Mr. Holder's new FOIA guidance,

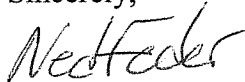
it will be more difficult for agencies to justify withholding such evaluations beyond the three-year period specified in the FAR. Furthermore, the new guidance leaves open the possibility that despite Exemption 5 [of FOIA], an agency may release certain past performance evaluations before the three-year period ends if it determines that release of such information does not pose a threat of competitive harm.

Thus the online posting of performance evaluations may prove possible – i.e., the public disclosure of these evaluations may be fully consistent with federal law. That is why we asked, “If such disclosures are prohibited by law, will that prohibition be explained?” Your letter ignored this direct question.

The short paragraph quoted above from your letter of January 15 contains not a single statement that answers the three questions we asked. The remainder of the letter is similarly unresponsive to the other questions we asked.

In our previous correspondence with you and Secretary Sebelius, the main problem we described is a lack of transparency in the government's program for vaccine production in a pandemic. We again note that this problem is important and unresolved.

Sincerely,



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cc: Kathleen Sebelius, Secretary, Department of Health and Human Services
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