



UNDER SECRETARY OF THE ARMY
WASHINGTON

22 MAR 2000



CHALLENGE Number 2000-0042

[REDACTED]
Acting President
American Federation of Government Employees Local 225
Building 456
Picatinny Arsenal, New Jersey 07806-5000

Dear [REDACTED]

This responds to your appeal of the February 24, 2000, decision of the Assistant Secretary of the Army (Manpower and Reserve Affairs), denying your challenge to the 1999 FAIR Act inventory. I received your appeal on March 10, 2000.

Research, Development and Engineering Functions and their Support

Activity Challenged. You are appealing the decision that the FAIR Act inventory properly includes on the list the work performed by the Research, Development and Engineering Support functions at Picatinny Arsenal.

Decision. I have reviewed the Assistant Secretary's decision, which is incorporated herein by reference, in light of your appeal. Based upon this review, I have determined that the selected activities at Picatinny Arsenal are not inherently Governmental. Therefore, I am affirming the challenge decision that they are properly included in the Army's FAIR Act list.

Rationale. Both your challenge and your appeal letters requested removal of positions from the Army's commercial activities inventory. However, the FAIR Act requires consideration of the nature of functions, not individual jobs or positions. Thus, work is performed at Picatinny Arsenal to accomplish certain purposes or functions (broadly defined). The Assistant Secretary's decision was based on these functions as they are listed in the Army's FAIR Act inventory. His decision was not based on individual jobs or positions at Picatinny. For this reason, his decision advised you that the Army considered it imprudent to contract some of the activities designated as non-inherently Governmental and listed in your challenge letter. An example is Acquisition, Function Code Y650, as performed by senior personnel within Program Manager and Program Executive Officer offices.

Your appeal suggests that the research, development and engineering support functions at Picatinny Arsenal are inherently Governmental because these functions afford contractors access to sensitive information related to national security at Picatinny Arsenal, and that contracting these functions would result in contractors



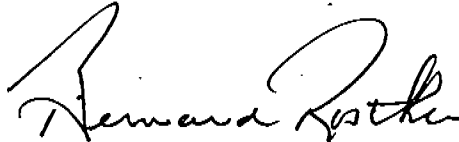
providing inspection services. Your appeal references these considerations as falling within Appendix B to the Office of Federal Procurement Policy Letter 92-1. However, Appendix B provides examples of activities that are not considered to be inherently Governmental, but which may approach being inherently Governmental because of the way in which the contractor performs the contract or the manner in which the Government administers contractor performance. Your appeal provides no basis for overcoming the presumption in Appendix B that these functions are ordinarily not inherently Governmental. In particular, many of the functions enumerated in your challenge and appeal do not fall within Appendix B at all. Moreover, the same kinds of safeguards that would have to be applied to safeguard the sensitive and classified research, development and engineering information at Picatinny Arsenal in the case of contractors apply equally to Federal Government employees.

Your appeal further suggests that the consideration that research, development and engineering functions are performed in the private sector is irrelevant because they are performed by the Government at Picatinny Arsenal. However, the OFPP 92-1 explicitly recognizes potential private sector performance of a function as carrying some weight in the determination as to whether a function currently performed by Government employees is inherently Governmental. Moreover the whole point of the FAIR Act is to inventory functions now performed by Government employees that could be considered for performance by non-Government employees.

Many important core missions of the Army are not inherently Governmental and have, therefore, been included on the FAIR list as non-inherently Governmental functions exempted from private sector performance. Determining what is or is not inherently Governmental, the focus of the FAIR Act, is a different issue from determining what is appropriate for private sector performance.

Your citation of OMB Circular A-76 Revised Supplemental Handbook, Part I, Section C (1) pertains to exemptions from cost comparisons on national security grounds in the case of "commercial", that is, non-inherently Governmental functions. That exemption from cost comparison is distinct from the Department's exemption of these functions from private sector performance altogether on National Security grounds. Indeed, the authority for the Department's national security exemption from private sector performance is grounded on the independent authority provided to the Department of Defense under Title 10, United States Code, in addition to section 8.b of the OMB circular, and section 2(d) of the FAIR Act. OMB has interpreted section 2(d) as affirming that "not all commercial activities performed by Federal employees should be performed by the private sector, though all such activities should be inventoried under the provisions of the FAIR Act and Circular A-76. The decision as to which commercial functions represent core capabilities, and thus should be retained in-house, remains with the agency head." That decision on exempting a core capability is not within the purview of the FAIR challenge and appeal process, which is ill-suited to the policy-based deliberations, extended internal coordination and analyses most appropriate for such a decision.

Please note that the Army's FAIR Act determinations are only one step in pursuing a larger objective. The larger objective is to ensure that Army functions and activities are performed in a manner that is both cost-effective and in the best interests of the taxpayers. In this connection, the Army FAIR Act inventory will be reviewed in conjunction with Army's larger, ongoing review of all functions for possible reengineering, privatization, consolidation or other reinvention efforts. As the Assistant Secretary indicated, these reviews may lead to decisions to keep performance of some activities in-house based on risk assessment, national security considerations, or enlightened human resources management.

A handwritten signature in cursive script, reading "Bernard Rostker". The signature is written in dark ink and is centered on the page.

Bernard Rostker