



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON DC 20310-0111



February 28, 2000

REPLY TO
ATTENTION OF

CHALLENGE Number 2000-0104

Dear

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns one activity.

Standing. As an employee within the meaning of 5 U.S.C. 2105 performing Directorate of Public Works functions included under Function Codes S999, "Other Installation Services," Function Code Y520, "Public Works and Real Property Maintenance Program Management," and Z999, "Other Maintenance, Repair, Alteration, and Minor Construction of real Property," you are an "interested party" who is qualified to submit challenges of inclusion or exclusion to the Army list. Other issues raised in your challenge are not relevant to FAIR Act determinations.

Date of Receipt. I received your Challenge on January 31, 2000.

Directorate of Public Works Functions

Activity Challenged. You have challenged the inclusion on the list of Directorate of Public Works Functions performed under the Function Codes S999, Y520 and Z999. This work includes architect and engineering services, real property inventory management functions, master planning functions for the installation, contracting officer representative functions, and other Directorate of Public Works functions included within Function Codes S999, Y520 and Z999, as defined in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Codes S999, Y520 and Z999 pertaining to Directorate of Public Works functions are not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value



judgments in making decisions for the Government. Directorate of Public Works functions do not require the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. The additional duty of Contracting Officer Representative (COR) is that of an agent of the Contracting Officer with substantially circumscribed authority precluding a COR from awarding, modifying or terminating a contract. All of these functions are so ministerial in nature or severely circumscribed by law, rule and regulation as to render all of these functions not inherently Governmental. Another consideration is that Directorate of Public Works functions are performed in the private sector, and have been contracted under A-76.

Significance. The significance of a non-inherently Governmental designation for an activity is discussed at the Army web site hyperlinked to the DOD FAIRNET at <http://www.asamra.army.pentagon.mil/fair>. In some cases there may be legal impediments to contracting activities designated as non-inherently Governmental, as reflected in statutes, international agreements, and restrictions on contracting for personal services. In other cases, the Army may consider it imprudent to contract activities designated as non-inherently Governmental based on risk assessment and national security considerations, or enlightened human resources management. Such a determination has not been made at the present time in the case of the activities included within this challenge.

Scope. The Army's functions are defined by its unique roles and missions. Therefore, the Army's FAIR Act decisions may not be extended to other agencies with different missions based solely on function code titles. The Army FAIR Act Inventory included civilian positions performing functions within the Army infrastructure and within Civil Works. The FAIR Act Inventory excluded all contractor positions and all military positions, as well as all personnel performing functions in the following mission areas within the Army: Major Theater of War, Smaller Scale Contingency, Base Engagement Force, Strategic Reserve, Domestic Support, or Homeland Defense.

Appeal Rights. You have the right to appeal my decision since it is adverse to your Challenge. The specific procedures for submitting an appeal are set forth at the enclosure to this decision.



Patrick T. Henry
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosure

Appeal Rights

Appeals must be in writing and transmitted by United States mail, express mail delivery or other similar service, or facsimile transmission, or may be delivered in person only if the person making the delivery is authorized access to the Pentagon. (To assist in processing, appellants may mark "FAIR Appeal" on the envelope.) Appeals must be submitted to the office listed below within 10 working days of the date on which the challenger received the decision denying or rejecting the challenge:

Department of the Army
Office of the Assistant Secretary
Manpower and Reserve Affairs
ATTN: SAMR-FMMR-FAIR
111 Army Pentagon
Washington, D.C. 20310-0111
Fax: 703-614-6833