



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



REPLY TO
ATTENTION OF

February 24, 2000

CHALLENGE Number 2000-0043

████████████████████
President
American Federation of Government Employees
Local 2004
P.O. Box 384
New Cumberland, Pennsylvania 17070

Dear ██████████

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

Standing. As head of a labor organization within the meaning of 5 U.S.C. 7103(a)(4), 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 28, 2000.

Support of Foreign Military Sales Functions

Activity Challenged. You have challenged the inclusion on the list of numerous functions involved in the support of the foreign military sales mission of the U.S. Army Security Assistance Command (USASAC) at New Cumberland, Pennsylvania performed under Function Codes R600, S731, W999, Y200, Y530 and Y999, 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 the above Function Codes pertaining to the support of the foreign military sales mission of USASAC are, for the most part, 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. The determinations of policy pertaining to the sale of military equipment, services and training to foreign Governments is inherently Governmental. The functions at New Cumberland in support of the foreign military sales mission of USASAC are not inherently Governmental. The collection and disbursement of foreign government funds is a ministerial function.

Your challenge contends that the foreign military sales support functions involve access to procurement-sensitive information in a manner that compromises the integrity of the competitive process. Access to procurement-sensitive information may in some circumstances be a consideration in deciding whether some work should continue to be performed by Government sources. However, it is not a basis for determining that a function is inherently Governmental in nature.

The Army FAIR Act list presumes that the determinations of policy pertaining to the sale of military equipment, services and training to foreign Governments would be the responsibility of senior personnel. Accordingly, the performance of these functions by most personnel who are assigned to positions at grades GS-13 and above within a management headquarters are presumed to be inherently Governmental. However, most of the work involved in performing these functions are performed by personnel at lower grades. This presumption is based in part on the degree to which the exercise of discretion within this function is substantially circumscribed by law, rule and regulation.

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 been made at the present time in the case of some 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