



REPLY TO
ATTENTION OF

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

February 24, 2000

CHALLENGE Number 2000-0087

[REDACTED]
National President
American Federation of Government Employees
80 F Street, N.W.
Washington, D.C. 20001

Dear [REDACTED]

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns three activities. I will address each activity, in turn.

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.

Function Code S999, Hazardous Waste Handling

Activity Challenged. You have challenged the inclusion of "Hazardous Waste Handling," Function Code S999, on the list. These functions are defined to include environmental compliance services associated with construction and real estate administration, the hazardous waste activities included under "Natural Resources Services," Function Code S700, and numerous other services listed in the functional definitions for these codes 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 Code S999 and S700 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 discretion in applying Government authority or the making of value judgments in making decisions for the Government. The purpose of the hazardous waste disposal functions is to implement Federal, State, and local environmental laws. Complying with environmental laws is not a unique requirement imposed on the public sector only, but

applies equally to the private sector. Indeed, hazardous waste disposal is performed in the private sector. The exercise of discretion within this function is substantially circumscribed by law, rule and regulation, rendering these functions largely ministerial in nature. Your challenge contends that this function should be considered inherently Governmental because of potential conflicts of interest associated with private sector performance. Conflicts of interest concerns apply equally to Federal employees as well as contractors. Any alleged conflict of interest can be avoided through appropriate safeguards in the administration of the contracted work.

Function Code S731, Supply Operations

Activity Challenged. You have challenged the inclusion of "Supply Operations," Function Code S731, on the list. This function is defined to include services such as supply management, central issue facility operation, clothing initial issue points, retail supply, asset management, laundry and dry cleaning services, food services, logistics support and numerous other services listed 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 Code S731 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 discretion in applying Government authority or the making of value judgments in making decisions for the Government. Supply operations functions are currently performed in the private sector and are already heavily contracted or competed under A-76. The exercise of discretion within this function is substantially circumscribed by law, rule and regulation, rendering these functions largely ministerial in nature. Your challenge contends that this function should be considered inherently Governmental because of the need to maintain proper accountability and reduce the risk of pilferage associated with private sector performance. These concerns apply equally to Federal employees as well as contractors. The risk of pilferage can be substantially mitigated through appropriate safeguards in the administration of the contracted work.

Housing Administrative, Family Services and Hospital Care

Activity Challenged. You have challenged the inclusion on the list of "Housing Administrative Services," included within Function Code S999, "Other Installation Services," Function Code G904, "Family Services," and "Hospital Care" included within Function Code H999. * This function is defined to include the services listed 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, G904 and H999 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 discretion in applying Government authority or the making of value judgments in making decisions for the Government. Housing Administrative Services, Family Services and Hospital Care are currently performed in the private sector and are already heavily contracted. In addition, none of these functions entails the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. Your challenge contends that these functions should be considered inherently Governmental because of their importance to the quality of life of the soldier. We agree that quality of life related functions are important functions, but that is not a basis for determining such functions to be inherently Governmental.

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 a significant portion 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