



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 28, 2000

CHALLENGE Number 2000-0105

[REDACTED]
President
American Federation of Government Employees
Local 1658
U.S. Army Tank-Automotive and Armaments Command
Building 230, Room 136W
Warren, Michigan 48397-5000

Dear [REDACTED]

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns five 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 31, 2000.

Maintenance, Logistics, Budget & Financial Program Management

Activity Challenged. You have challenged the inclusion of Maintenance, Logistics, Budget and Financial Program Management, included under Function Codes Y510 and Y540, 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 Code Y510 and Y540 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 discretion in applying Government authority or the making of value judgments in making decisions for the Government. This includes, e.g., the determination of budget policy, guidance, and strategy. On the other hand, services that relate to budget preparation, fact finding, efficiency studies, providing budget or accounting-related advice, opinions, and recommendations, as well as the entirety of the maintenance and logistics program

management function generally do not entail substantial discretion in applying Governmental authority or value judgments in making decisions for the Government.

Another consideration is that both budget and accounting services are commonly available in the private sector. Your "challenge" contends that these functions should be considered inherently Governmental because this work entails maintenance of Government control over property, compliance with law, and ensures decision-making in accordance with the public interest. The Army FAIR Act list presumes such considerations would be the responsibility of senior personnel. Accordingly, the performance of these functions by 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.

Research, Development, Testing and Evaluation (RDT&E) Functions

Activity Challenged. You have challenged the inclusion on the list of RDT&E Functions, Function Code R600, 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>. We understand that your challenge concerns this activity at organizational levels below management headquarters.

Decision. I have determined that the activities included under the above Function Codes pertaining to Function Code R600 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. The RDT&E function does not involve the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. The RDT&E function is performed in the private sector. There are Federally funded research and development centers and contractor-operated Department of Energy laboratories. Therefore, the RDT&E function is not inherently Governmental, and likewise, the management and support of RDT&E functions is not inherently Governmental.

Your challenge contends that these functions should be considered inherently Governmental because of potential conflicts of interest associated with private sector

performance of the RDT&E function. 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 Y650, Acquisition

Activity Challenged. You have challenged the inclusion of "Acquisition," Function Code Y650, on the list. This function is defined to include services such as program management support to project managers assigned to Army Acquisition Executive chartered Program Executive Officers, and 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>. This function does not include other acquisition-related functions included in the following codes: "Maintenance," J999; "RDT&E," R600; and "Contracting," Y600.

Decision. I have determined that the activities included under Function Code Y650 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 discretion in applying Government authority or the making of value judgments in making decisions for the Government. This includes, e.g., the approval of contractual documents, to include documents defining requirements and evaluation criteria as part of the oversight and direction of major and significant non-major defense acquisition programs. On the other hand, activities that relate to the provision of services in support of acquisition planning, program management support, and logistics planning and management generally do not entail substantial discretion or value judgments in making decisions for the Government.

Another consideration is that program management support services are commonly available in the private sector and routinely contracted at varying levels of support by program managers and program executive officers. Your "challenge" contends that program management support involves 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.

Your challenge also contends that these functions should be considered inherently Governmental to assure that program manager and program executive officer decisions

are truly independent and not merely a ratification of contractual recommendations. While the program management support functions included in Appendix B of the Office of Federal Procurement Policy Letter 92-1 are ordinarily not inherently Governmental, the level of contractual support in specific circumstances may approach being inherently Governmental because of the way in which the contractor performs the contract or the manner in which the Government administers the contract. The Army FAIR Act list presumes that current levels of contractual support have not approached a level that would risk the independent decision-making of a program manager. In addition, the Army FAIR Act list also presumes that the inherently Governmental portion of this function 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 program manager or program executive officer organizations 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.

Commander Support Staff and Personnel Functions

Activity Challenged. You have challenged the inclusion on the list of Function Code Y200, "Commanders and Support Staff," and Function Code Y530, "Personnel, Community Activities and Manpower Program Management," 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 Y200 and Y530 are, for the most part, not inherently Governmental. However, some activities listed under Function Code Y530 are improperly included in the Army's FAIR Act list and will be deleted from the 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. Functions included within Function Code Y200 and most of the military personnel, civilian personnel, community activities and manpower functions included within Function Code Y530 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 Army FAIR Act list presumes that substantial discretion in the civilian personnel, military personnel and manpower function is exercised by personnel who are assigned to grades GS-13 and above within a management headquarters (excluding field operating agencies). However, most of the work involved in performing these functions is 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. Another consideration is that all of these functions are performed in the private sector. As an exception to the above general presumptions, the corrected FAIR Act list will also presume that substantial discretion is exercised by personnel performing the labor relations function and assigned to grades GS-11 and higher within occupational series 233 to the extent such personnel bind the Army in labor negotiations or represent the Army in third party adversary proceedings.

Guard Services, Installation Services and Operations

Activity Challenged. You have challenged the inclusion on the list of work performed under the Function Codes S724, S731 and P100, 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 S724, S731 and P100 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. This includes law enforcement operations involving the direct conduct of criminal investigations. The FAIR Act list presumes that persons in positions classified to Occupational Series GS 1811 assigned to the CID Command under Function Code Y410, "Criminal Investigation," are the only activities involved in the *direct* conduct of criminal investigations within the Army. On the other hand, inherently Governmental functions do not normally include services that are primarily ministerial in nature, such as building security, prisoner detention, and non-military national security details.

In this connection, current statutory prohibitions on contracting guard services illustrate recognition by Congress that guard services are not inherently Governmental functions.

Installation services and operations 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. Another consideration is that installation services and operations functions are commonly available in the private sector, and currently included in on-going A-76 competitions.

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