



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 2000-0042

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

Dear [REDACTED]

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

Research, Development and Engineering Functions and their Support

Activity Challenged. You have challenged the inclusion on the list of numerous functions involved in the support of Research, Development and Engineering functions performed under Function Code GO11, H999, J999, P100, S700, S710, S725, S726, S730, S731, S740, T999, W999, Y200, Y510, Y540, Y650, Y999, Z991, Z992, Z993 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 the above Function Codes pertaining to the support of Research, Development and Engineering functions 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 Research, Development and Engineering function is performed in the private sector. There are federally funded research and development centers and contractor-operated Department of Energy laboratories. Therefore, the Research, Development and Engineering function is not inherently Governmental, and likewise, the management and support of Research, Development and Engineering functions is not inherently Governmental.

Your challenge contends that the Research, Development and Engineering 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.

Function Code Y600, Contracting

Activity Challenged. You have challenged the inclusion on the list of work performed under the Function Code Y600, "Contracting." This work includes work performed by occupational series GS 1102, Contracting, and other activities 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 Y600 are, for the most part inherently Governmental. However, some activities listed under Function Code Y600 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. The purpose of the functions and activities listed above is to contract for supplies and services for the installation and assigned customers. The corrected FAIR Act list presumes that all personnel assigned within occupational series GS 1102 within Army contracting offices directly involved in the awarding, administering, and terminating of contracts are performing inherently Governmental functions. All other work performed within Army contracting offices is presumed to be not inherently Governmental.

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>.

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.

The Army FAIR Act list 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.

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