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OFFICE OF THE ASSISTANT SECRETARY
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MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(FINANCIAL MANAGEMENT AND COMPTROLLER)

SUBJECT: Request for Exemption of Selected Financial Management Functions

Reference memorandum, Assistant Secretary of the Army (Financial Management & Comptroller) (ASA (FMC)), subject: Request for Exemption of Selected Financial Management Functions, October 28, 2002.

Function. This request includes military and civilian employees in the infrastructure and operating force performing financial management, cost and economic analysis, operations research and systems analysis, plus acquisition-related functions that you have included in financial management. For the purposes of this decision, I will exclude operations research and systems analysis and acquisition related functions, as these will be decided in a separate decision. In addition, military and civilian career progression issues are being decided in a separate decision covering all career fields and functional areas.

Decision. Financial Management performs both an operational and institutional mission. The operational Army Financial Management is a core competency of the Army as evidenced by inclusion in the Army Field Manual 1, page 24, under the category Conduct Sustainment Operations, a subcategory of Sustained Land Dominance. The Institutional Financial Management is specifically mandated by Title 10, U.S. Code, Section 3022. As Army Field Manual 1 states, "Without the institutional Army, the operational Army cannot function. Without the operational Army, the institutional Army has no purpose."

Financial Management cannot be divested, privatized, or transferred to another agency as the ASA (FMC) is personally responsible for it under the provisions of 10 U.S. Code, Section 3022. In addition, disbursement functions must be performed by an employee of the executive agency, as delegated from the head of the executive agency, pursuant to 31 U.S. Code, Section 3321. However, the Secretary of the Army may change the scope of that delegation by consolidating disbursing functions. Although under Title 10, U.S. Code, Section 3063, the Finance Corps is a basic branch, the performance of this function in the infrastructure and operating forces should be examined in the force development process for additional military to civilian conversion opportunities, in light of the impact of financial systems modernization. The functional proponent has not substantiated for the purposes of this determination that the financial management function, within the infrastructure, requires military unique knowledge and skills to perform. Disbursing officials must be military only where Uniform Code of

Military Justice (UCMJ) authority is needed in order to compel performance in certain operational situations away from home station. For the most part, civilians may perform financial management functions. The Assistant Secretary of the Army, Financial Management and Comptroller "executes" the laws of the United States so as to exert "ultimate control" over the management of appropriated funds, and therefore is inherently Governmental. There remains an issue as to how far "ultimate control" extends lower than the ASA (FMC), insofar as most of the relevant substantiation provided so far describes the ASA (FMC) responsibilities. Advisory and clerical support provided to any inherently Governmental official within a management headquarters is exempted, as necessary, to avoid personal service arrangements. The limitations and scope of this decision are discussed in detail below.

At enclosure are instructions on how to implement this decision in the Inventory of Commercial and Inherently Governmental Activities (including the Federal Activities Inventory Reform Act Inventory), to be developed by DCS, G-1 in coordination with our responsible staff officers.

Requestor's Position on Issues. The request seems to claim that most of the financial management function must be performed by civilian government officials and military. In addition, the request seems to claim that the current mix of military and civilian performance is required.

Standard of review. The senior HQDA functional official for a function must describe and substantiate specifically how preparation and implementation of a Third Wave implementation plan for each course of action poses substantial and specific risks to a core war-fighting mission of the Army (i.e., a core competency) or violates a statutory requirement affecting a function. The following are risk factors to evaluate this request: force management risk; operational risk; future challenges; and institutional risk. How these risk criteria are applied may vary based on each course of action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to another agency; divestiture). Therefore, exemption requests and decisions must assess the potentially adverse impact of each course of action.

Core Competency Relevant to Risk Issue. The financial management function is included in one of the six recognized core competencies of the Army, as provided for in Army Field Manual 1 and The Army Plan: Conduct Sustainment Operations, a subcategory of Sustained Land Dominance.

Statutory Requirements Relevant to Risk Issue. Most of the financial management functions may not be divested since the ASA (FMC) is personally responsible for them under the provisions of 10 U.S. Code, Section 3022. In addition, disbursement functions must be performed by an employee of the executive agency, as delegated from the head of the executive agency, pursuant to 31 U.S. Code, Section 3321.

Inherently Governmental Determination Relevant to Outsourcing Issue. 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 while making decisions for the Government including judgments relating to monetary transactions and entitlements including collection, control, or disbursement of appropriated and other Federal funds. An inherently Governmental function involves the "interpretation" and "execution" of the laws of the United States so as to exert "ultimate control" of the management or disbursement of appropriated and other Federal funds. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government employees. This concept does not include providing advice to Federal Government officials.

The Assistant Secretary of the Army, Financial Management and Comptroller "executes" the laws of the United States so as to exert "ultimate control" over the management of appropriated funds, and therefore is inherently Governmental. (The General Counsel interprets the laws executed by the ASA (FMC)). There remains an issue as to how far "ultimate control" extends lower than the ASA (FMC), insofar as most of the relevant substantiation provided so far describes the ASA (FMC) responsibilities. Prior Army FAIR Act challenge and appeal determinations which I am bound to follow pursuant to the Secretary of the Army's delegation of authority to me, define discretionary decision making as requiring "substantial", as distinct from ministerial decisions. Section 7 of the Office of Federal Procurement Policy Letter 92-1, which is a basis for interested parties to mount challenges and appeals under the FAIR Act, states: "While inherently Governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. Rather, the use of discretion must have the effect of committing the federal Government to a course of action when two or more alternative courses of action exist." This language from the OFPP 92-1 helps to define the meaning of "ultimate control" over the management of funds.

Your request seems to suggest that all persons connected with monetary transactions are inherently Governmental. Although 31 U.S. Code, Section 3321(c) provides that disbursing officials must be "personnel of the agency", this statute does not define the scope of what is or is not inherently Governmental. Accordingly, the impact of this statute will be separately discussed in the following sub-section.

Also included in your exemption request are Directors of Resource Management, Financial and Program Managers and Budget Officers. The proponent states that some of these functions fall into the Y510 function code, "Budget and Financial Program Management." The Y510 function code was previously the subject of a FAIR Act challenge, and it was determined that most of the activities included under that function code are not inherently Governmental in nature. Determination of budget policy, guidance and strategy does involve the exercise of discretion in applying government authority or the making of value judgments in making decisions for the government. However, budget preparation services, fact finding, efficiency studies and providing budget or accounting-related advice, opinions and recommendations generally do not involve inherently Governmental functions (exercising substantial discretion and value judgments in making decisions for the Government).

Your request also includes a list of several financial management functions that are being performed pursuant to 10 U.S. Code, Section 3022. While Section 3022 requires that the ASA (FMC) manage the financial management activities of the Department, this only establishes that this function may not be divested, transferred, or privatized. Within the broad category of financial management, there are tasks that are not inherently governmental and thus may be outsourced to contractors. The individual functions for which exemptions are requested are discussed below, together with my determination.

- "Approve guidance to those preparing government resource (dollars and manpower) program plans, budgets or spending plans for a program or an organization/installation/garrison." Pursuant to Appendix BOFPP Policy Letter 92-1, paragraphs services that "involve or relate to budget preparation" or "relate to analyses. . . and strategy options to be used by agency personnel in developing policy" are not considered to be inherently Governmental functions. This contrasts with Appendix A, which states that "the determination of Federal program priorities or budget requests," and "the determination of budget policy, guidance, and strategy" are inherently Governmental functions.
- "Decide which programs should receive funds and work years when and in what amounts based on funds received and commitments made or planned by government agents." According to Appendix A to OFPP Policy Letter 92-1, paragraph 16 (as found in Appendix 5 of the Revised Supplemental Handbook to OMB Circular No. A-76), the determination of budget policy, guidance and strategy are inherently Governmental functions.
- "Ensure government funds are used for authorized purposes and that the distributions, commitments, obligations and expenditures do not exceed

amounts authorized and available." "They also commit the Government to contractual liabilities (including other government agencies via MIPRs and other letters of authorization)." According to OFPP Policy Letter 92-1, paragraphs 5 (a) and (e), binding the government to "take ... some action by contract" and "disbursement of appropriated or other government funds" are inherently Governmental functions.

- "Interpret whether Government fiscal policy permits use of an appropriation to fund a program or activity and, using substantial judgment, formulate command/activity policy to minimize potential government funding violations." Pursuant to Appendix B to OFPP Policy Letter 92-1, paragraph 18, advising Government officials on interpretation of regulations and statutes is not an inherently Governmental function. Therefore by analogy, advice regarding interpretation of policy would not be an inherently Governmental function. However, according to Appendix A to OFPP Policy Letter 92-1, paragraph 5, determination of agency policy is an inherently Governmental function, so formulating policy to minimize Government funding violations should be performed by Government employees.

An argument has been raised that a memorandum from the DEPSECDEF on 28 Jun 1990, subject: Control of Planning, Programming, and Budgeting system Documents to Preserve Candor in Deliberative Process prohibits the involvement of contractors in the PPBS process. Army General Counsel has confirmed with the DoD General Counsel that this memo has no application to sourcing decisions. The memo deals with safeguarding of budget information.

Statutes Relevant to Sourcing Decision. Pursuant to 31 U.S. Code, Section 3321(c), disbursing officials must be "personnel of the agency." Section 3321 provides that the scope of the disbursing function is determined pursuant to a delegation from the "head" of the "executive agency." For these purposes, the Secretary of Defense is deemed to be the "head" of the executive agency. The head of the executive agency for purposes of disbursement is the Secretary of Defense and the primary disbursing activity is Defense Finance and Accounting Service (DFAS), rather than the Services. Accordingly, the disbursing function may not be performed by a contractor, however this does not mean that any person whose activities touch upon disbursements are somehow covered by the statute. The question of inherently Governmental depends on whether it can be said that the official in question exerts "ultimate control" over the disbursement of funds as defined in the FAIR statute.

Accordingly, not every employee in the financial management area is performing a disbursement function. The law (31 U.S. Code, Section 3325) specifically defines

disbursement functions to include the disbursement of money only as provided by a voucher certified by the head of the executive agency or by an officer or employee of the executive agency having written authorization from the head of the agency to certify vouchers. In addition, the disbursing function is defined in Section 3325 as including the examination of a voucher to decide if it is in proper form, certified and approved, and computed correctly on the facts certified. Although both a disbursing officer and a certifying official perform inherently Governmental functions, through reorganization the numbers of these employees may be adjusted downward, as discussed below.

Additionally, it may not be necessary for disbursement to be done on site, enabling the consolidation of the disbursement function at a remote location based upon change in the delegation from the head of the executive agency. No demonstration has been provided as to how reorganizations are relevant to funding apportionment or Anti-Deficiency violations.

Personal Services. Where supervision by an official making inherently Governmental decision within the management headquarters is required for effective performance of an activity in support of that decision maker, and other measures can not mitigate that effect, there is a basis for exempting that activity to avoid an inappropriate personal services contract. I am not applying this exemption further than the management headquarters until there is a full inventory of disbursing and certifying officials outside of the management headquarters, and a separate, facts and circumstances assessment of whether the risks of personal services arrangements can be mitigated. (In the case of DFAS, support to disbursing officials has been largely contracted.)

Conflicts of Interest. Development of cost analysis policy and oversight of the cost analysis function is exempt. However, the requirement in Title 10, U.S. Code, Section 2434, for "independent" cost estimates involving major systems acquisitions does not mandate an organic cost analysis, operations research, or systems analysis organization internal to the Army. That same independent assessment could be performed by a contractor lacking a stake in the system's acquisition.

Military conversions. The force development process and Total Army Analysis are the appropriate venues for applying the following guidance for reviewing military conversions.

Two of the authorities cited in your request, 31 U.S. Code, Section 3321 and OMB Circular No. A-76, do not provide support for your argument that the functions performed by Army Finance operating forces units must be staffed by military personnel in all cases. You state that these military personnel function in a combat service

support role. The mere fact that finance units are deployed with larger military formations does not necessarily mandate that these jobs may only be performed by uniformed personnel. To the extent that these personnel carry out their disbursement duties in sustainment areas rather than in the actual area of engagement, these finance functions can be carried out by civilians. Indeed, non-military personnel are currently doing many jobs in areas close to the battlefield, as referenced in the preceding subsection. Although disbursing officials are required to be government employees pursuant to 31 U.S. Code, Section 3321, this does not mandate use of military disbursing officers in every case.

The DoD Inventory of Commercial and Inherently Governmental Activities Guide to Inventory Submission (Inventory Guide), Enclosure 6, page 6-3 provides guidance regarding manpower mix criteria. "[Manpower] that perform duties and responsibilities that are integral to military command and control of combat and crisis situations" shall be designated as Military Operations (Code A). See Enclosure 6, page 6-3, paragraph 1. Components that perform combat and service support functions shall be designated Code A only if there is such a high likelihood of hostile fire or collateral damage that: 1) military authority, discipline, and training are needed to maintain control and, if necessary, reconstitute the unit, and 2) use of civilians or contract support constitutes an inappropriate or unacceptable risk.

Enclosure 8 of the Guide contains guidance for risk assessment. Applying the guidelines on p.8, paragraph 1-1, use of non-military personnel in combat support roles must be assessed in terms of risk to "the support mission and the missions dependent on that support." Combat mission failure or loss of life are severe risks, while "loss of support elements that augment or enhance operations in theatre during a conflict often have minor impact on combat operations." When a disbursing official is deployed forward of a division, where refusal to obey a commander's orders would create a risk of loss of life or mission failure, UCMJ authority will be needed in order to compel performance, so the disbursing official must be military. Otherwise, civilian employees may perform this function, with contract support in performance of non-disbursement functions. (Although UCMJ jurisdiction applies to civilians accompanying the operating forces, which could include contractors, that jurisdiction only applies during a "declared war," and most military operations augmented by civilians are operations other than war.)

Additionally, due to increased use of technology in the future, the footprint of the Financial Management function on the battlefield is expected to be diminished. This should be factored into implementation plans.

Insofar as the financial management function is not a core competency of

war-fighting, the basis for arguing for military performance in the infrastructure is weak. The central issue (according to the Inventory Guide, Enclosure 6, page 6-9) is whether adequate performance of the function in the infrastructure requires military unique knowledge and experience that can only be derived from *recent* first-hand involvement in military activities – i.e., through commanding military forces or conducting or participating in military operations or exercises. This knowledge and experience must be more substantial than familiarity with doctrine, tactics, operations, or regulations; capabilities that can be developed by civilians; or, advice military retirees can provide based on their knowledge and experiences.



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Enclosures

CODING RULES for Financial Management

1. Financial Management Military in the Operating Force
 - a. All personnel SRC14 (Finance Corps) units

Code M – DoD Management Decision
2. Financial Management personnel in Management Headquarters, includes personnel in:
 - HQDA Principle Offices (Secretariat and ARSTAFF) except Cost and Economic Analysis function – formerly a separate unit, but integrated into the OASA(FM&C) in FY2004
 - MACOM Headquarters
 - US Army Finance Command
 - US Army Per Diem Travel and Transportation Allowance Committee

(W0NRAA)
(W10TAA)

 - a. The ASA(FM&C)
 - b. General Officers
 - c. Civilian SES/GS15 and military O6's
 - d. All other civilians in AMHA units (above)
 - e. All other military in AMHA units (above)

Code E – Civilian Decision and Control
Code F – Unique, Knowledge and Skills
Code E – Civilian Decision and Control
Code L – Protected by law, statute, treaty or agreement
Code P – Pending restructuring
3. Cost and Economic Analysis function in Management Headquarters (formerly CEAC, now imbedded in OASA(FM&C))
Positions to be identified by ASA(FM&C) within FY04 OASA(FM&C) organization
 - a. Civilian SES's, GS15's and military O6's
 - b. All other personnel

Code L – Protected by law, statute, treaty or agreement
Code X – Candidates for alternatives to A-76
4. Other Financial Management personnel outside Management Headquarters (above)
 - a. Disbursing and Certifying personnel
(individual billets to be identified by ASA(FM&C))
 - b. Officers in Branch 44 (Finance Corps) or FA45 (Comptroller)
 - c. Civilians in 500-series billets (except GS-511's)

Code P – Pending restructuring
Code P – Pending restructuring
Code R – Subject to Review