



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

March 27, 2003

Re: CHALLENGE Number 2003-0002

Mr. Michael Arendt
U.S. Army Corps of Engineers
Lock and Dam Operator
Howell Heflin Lock and Dam
RR1 Box 122
Gainesville, Alabama 35464-9801

Dear Mr. Arendt:

This responds to your challenge to the Army's 2001 Federal Activities Inventory Reform (FAIR) inventory. Your "challenge" concerns two activities, Function Codes Q520 and Q540.

Function Code Q520, Operation and Maintenance of Locks and Bridges
Function Code Q540, Operation and Maintenance of Dams

Date of Receipt. February 10, 2003.

Standing. As an employee within the meaning of 5 United States Code 2105, performing the functions included in Function Code Q520, Operation and Maintenance of Locks and Bridges and Function Code Q540, Operation and Maintenance of Dams, you are an "interested party" who is qualified to submit challenges of inclusion or exclusion to the Army list.

Activity Challenged. You have challenged the inclusion of "Operation and Maintenance of Locks and Bridges," Function Code Q520, and "Operation and Maintenance of Dams, Function Code Q540, on the list.

Decision. I have determined that the activities included under Function Codes Q520 and Q540 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. Activities within the spectrum of duties of operators of

locks, dams and bridges, involve decisions regarding the volume, velocity and timing of water releases, directing lock traffic and controlling river levels during floods and drought. The interested party makes the point that these activities significantly affect the life liberty and property of private persons. However, these decisions by operators of locks, dams, and bridges involve technical functions rather than the making of value judgments in interpreting and executing the laws of the United States. There are private actors or non-Federal Governmental entities that exercise similar technical judgments and decisions having broad and significant public impacts. The mere fact that an activity has an impact on the public or on the life, liberty and property of private persons is not a sufficient basis for an inherently Governmental characterization.

The interested party contends that because lock and dam operators prepare incident reports and update databases, this should justify an inherently Governmental characterization. The preparation of incident reports and maintenance of databases are not activities typically characterized as inherently Governmental because these functions do not involve making value judgments in interpreting and executing the laws of the United States.

The interested party also argues that maintenance of locks, dams and bridges should be exempt from private sector performance by reason of risk to national security. Not every potential terrorist target can or should be brought under Federal Government control. Pursuant to this logic, nuclear power plants should be nationalized. At any rate, the nature and likelihood of a terrorist threat does not change the functions of lock and dam operators to inherently Governmental ones.

The interested party also contends that this function should be exempt from private sector performance because Lock and Dam Operators have direct oversight of navigational headwaters. It should be noted that the FAIR Statute allows characterization of a function as inherently Governmental only when it involves interpretation and execution of the laws of the United States so as to significantly affect the life, liberty, or property of private persons. Merely carrying out public safety type functions that do not necessitate making substantial and subjective value judgments does not justify an inherently Governmental determination.

The interested party makes the point that the facilities maintained by lock and dam operators must remain open 24-hours per day, seven days per week. The mere fact that a function must be staffed around the clock does not make it inherently Governmental.

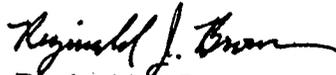
Finally, the interested party claims that because lock and dam operators work without direct supervision, they should be considered inherently Governmental. As settled in prior Army FAIR Act Appeal Number 2000-0099, an inherently Governmental

characterization does not turn on supervisory status. Moreover, lock and dam operators are not empowered to make value judgments or exercise government discretion. Rather, operators are confined to sets of procedures that already have been developed and approved.

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 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.



Reginald J. Brown
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: 703-614-5975