



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 14, 2000

CHALLENGE Number 2000-0001

[REDACTED]
Local President
American Federation of Government Employees
Local 2484
Post Office Box 1425
Frederick, Maryland 21702-0425

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.

Date of Receipt. I received your "Challenge" on January 19, 2000.

Function Code H999, Other Health Services

Activity Challenged. You have challenged the inclusion of "Other Health Services," Function Code H999, on the list. This function is defined to include services such as HIV testing, administering physical examinations and performing evaluations of medical suitability, providing support to medical centers, hospitals, laboratories, alcohol abuse residential treatment, operation of pharmacies, pathology and blood bank functions, and numerous other health care 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 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. The purpose of the health services functions and activities listed above is to provide care to patients; none suggest an application of Governmental authority or making value judgments for the Government.

Another consideration is that these health services are commonly available in the private sector. Your "challenge" contends that these functions should be considered inherently Governmental because this work entails access to private, personnel-sensitive, or confidential information. Access to sensitive information, including information classified in the interests of national security, 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 Y510, Budget & Financial Program Management

Activity Challenged. You have challenged the inclusion of "Budget & Financial Program Management," Function Code Y510, on the list. This function is defined to include services such as program and budget administration, management analysis functions, managerial accounting services, 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 Y510 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, or to providing budget or accounting-related advice, opinions, and recommendations generally do not entail substantial discretion 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.

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.

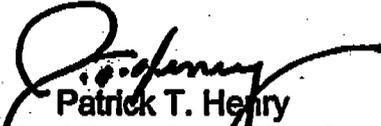
Your "challenge" also contends that these functions should be considered inherently Governmental to assure that program manager and program executive officer decisions are truly independent and not merely a ratification of contractual recommendations. While the program management support functions included 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.

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