



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

March 26, 2003

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(ACQUISITION, LOGISTICS, AND TECHNOLOGY)
DEPUTY UNDER SECRETARY OF THE ARMY
(OPERATIONS RESEARCH)
DEPUTY CHIEF OF STAFF, G-4
DEPUTY CHIEF OF STAFF, G-8

SUBJECT: Army Acquisition, Logistics, and Technology Functions Exemption

Reference:

- a. Memorandum, OASA (ALT), December 3, 2002, subject: Exemptions from the Federal Activities Inventory Reform (FAIR) Act.
- b. Memorandum, OASA (ALT), January 15, 2003, subject: Revised Exemptions from the Federal Activities Inventory Reform (FAIR) Act.
- c. Exemption 2000-0002, Test and Evaluation Function.
- d. Exemption 2000-0003, Medical Research and Development Function.
- e. Exemption 2001-0001, Research and Development Function.
- f. Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA)) memorandum, subject: Clarification of Standards of Review – Third Wave Exemption Requests, dated November 1, 2002.

Function. This decision addresses exemption requests for the following five acquisition, logistics and technology (AL&T) functions: Test and Evaluation, Systems Acquisition, Procurement and Contracting, Science and Technology/Research and Development, and Logistics (i.e., Supply, Transportation, and Maintenance). In addition, it addresses a separate exemption request for Acquisition Workforce Career Development, which encompasses all of the preceding functions. It also addresses AL&T-related exemption requests from the following organizations: U.S. Army Materiel Command (AMC), U.S. Army Forces Command (FORSCOM), Installation Management Agency (IMA), Logistics Integration Agency (LIA), U.S. Army Medical Command (MEDCOM), Military Traffic Management Command (MTMC), U.S. Army Europe & 7th Army (USAREUR), and U.S. Army Pacific (USARPAC).

Decision. The exemption requests for the five AL&T functions listed above are approved as set forth herein. This decision is based upon my determination that certain of these functions are inherently Governmental in nature and/or that an exemption is required in order to avoid disruption to core missions of the Army.

Considerable portions of the AL&T functions are resident in organizations undergoing redesign as part of The Army Transformation. Since the redesign will significantly affect the assignment of AL&T functions within these organizations, decisions for AMC, FORSCOM, IMA, LIA, MTMC, USAREUR, and USARPAC exemption requests will be deferred until March 2004. MTMC's request also will be addressed in the Joint context since it is a Tri-Service organization. Although MEDCOM is not currently undergoing redesign, its exemption request is also being deferred to allow time for additional analysis.

Enclosure 1, developed by the Deputy Chief of Staff (DCS), G-1 in coordination with the Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA (ALT)) based upon the guidance in this memorandum, lists the specific exemptions that are approved for recoding the AL&T workforce in conjunction with the 2003 Headquarters, Department of the Army FAIR Inventory submission.

The separate exemption request for Acquisition Workforce Career Development is also approved. Pursuant to the Defense Acquisition Workforce Improvement Act (DAWIA), Public Law 101-510, 10 U.S. Code, Sections 1701-1764, the Secretary of the Army has delegated to the ASA (ALT)/Army Acquisition Executive (AAE) responsibility for managing the accession, training, education and career development of military and civilian personnel in the Army's acquisition workforce. This statutorily mandated management responsibility, particularly 10 U.S. Code, Section 1722, includes the identification of education, training, experience, and assignments necessary for progression to senior acquisition positions, and an exemption is needed to enable the ASA (ALT) to effectively discharge this responsibility. Enclosure 1 does not encompass this exemption request; it will be included in the Military and Civilian Career Progression Exemption reviews currently being undertaken by the DCS, G-1.

Requestors Positions on Issues. The ASA (ALT) concurs with the disposition of the AL&T exemption requests as set forth in this memorandum and Enclosure 1.

Standard of Review. As set forth in reference f., 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 be considered in evaluating impacts upon a core mission: force management risk; operational risk; future challenges risk; and institutional risk. In addition, an exemption request should address whether the preparation and execution of an implementation plan may result in — the contracting of inherently Governmental functions, inappropriate contracting for personal services, conflicts of interest or the appearance of such conflicts. Application of these criteria may vary based on each course of action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to another agency; divestiture, and privatization). Exemption requests and decisions therefore, must assess the potentially adverse impact of each course of action.

Risk to Core Competency. The AL&T functions of Test and Evaluation, Systems Acquisition, Procurement and Contracting, Science and Technology/Research and Development, and Logistics directly relate to the Army core competency of Sustained Land Dominance, one of the six core competencies recognized in Army Field Manual 1 and the Army Plan. As detailed in the exemption requests, the divestiture, transfer, or competitive sourcing of these functions would disrupt the performance of this core competency and present unacceptable force management, operational, future challenges, and institutional risk.

Statutory Requirements Relevant to Divestiture. Title 10, U.S. Code, Section 3013 assigns the Secretary of the Army responsibility for, among other things, the functions of: supplying; equipping (including research and development); servicing; maintaining; the construction, outfitting, and repair of military equipment; the construction, maintenance, and repair of buildings, structures, and utilities, and the acquisition of certain real property and interests therein. Title 10, U.S. Code, Section 3014 vests a single office within the Office of the Secretary of the Army and the Army Staff with responsibility for, among other things, the acquisition function. Title 10, U.S. Code, Section 1704 assigns the AAE certain responsibilities with respect to the acquisition workforce. Title 10, U.S. Code, Section 2464 requires that the Department of Defense (DoD) maintain a core logistics capability that is Government-owned and Government-operated. In addition, 41 U.S. Code, Section 414 and Executive Order 12931 require the appointment of a senior procurement executive to oversee the agency procurement system. These authorities encompass the five AL&T functions under consideration in this exemption decision, and they effectively preclude the divestiture or transfer of these functions.

In addition, 50 U.S. Code, Section 1521 designates the Army as executive agent of the DoD for the Chemical Demilitarization Program. Also, 50 U.S. Code, Section 1522 designates the Army as DoD's executive agent to coordinate and integrate research, development, test and evaluation and acquisition requirements of the military

departments for chemical and biological warfare defense programs. Accordingly, these functions could not be divested or transferred without statutory authorization.

Inherently Governmental Relevant to Outsourcing Issue. As defined in the FAIR Act, an inherently Governmental function means a function that is so intimately related to the public interest that performance by Federal Government employees is required. It includes activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the government, including judgments relating to monetary transactions and entitlements. An inherently Governmental function involves, among other things, the interpretation and execution of laws of the United States so as to bind the United States to take, or not to take some action by contract, policy, regulation, authorization, order, or otherwise.

Based upon prior FAIR Act determinations within the Army that applied the above standard, it is well-established that the following Systems Acquisition and Procurement and Contracting functions are considered to be inherently Governmental: (1) senior officials in Army Program Executive Offices/Program Management Offices who exercise discretionary decision making authority with regard to major weapons and information technology systems and (2) all personnel assigned within occupation series GS 1102 at Army contracting offices directly involved in the awarding, administering, and terminating of contracts. These determinations, however, exclude the performance of the following contract support and oversight services that are not ordinarily classified as inherently Governmental functions under Office of Federal Procurement Policy Letter 92-1: services relating to the evaluation of another contractor's performance; services in support of acquisition planning; contractor's providing assistance in contract management; providing technical evaluation of contract proposals; providing assistance in development of statements of work; or participating as technical advisors to a source selection board or participating as nonvoting members of a source selection board.

Past FAIR Act exemptions have been granted for the Test and Evaluation and Science and Technology/ Research and Development functions, based upon risk to national security. Neither of these functions, however, is considered to be inherently Governmental in nature based upon the FAIR Act definition.

Statutory Requirements Relevant to Competitive Sourcing. As summarized above, 10 U.S. Code, Sections 3013 and 3014 assign the Army Secretariat responsibility for certain enumerated AL&T functions. In addition, 10 U.S. Code, Section 1704 assigns the AAE certain responsibilities with respect to the acquisition workforce, Code, Section 1704 assigns the AAE certain responsibilities with respect

to the acquisition workforce, and 41 U.S. Code, Section 414 and Executive Order 12931 require the appointment of a senior procurement executive to oversee the agency procurement system. While these statutes do not specifically address the use of competitive sourcing in the execution of AL&T functions, they would preclude contracting out the entire functional areas or activities performed at the Secretariat level.

Several provisions in Chapter 146 of 10 U.S. Code constrain the Army's ability to contract out certain functions: Title 10, U.S. Code, Section 2464 requires that DoD maintain a core logistics capability that is government-owned and government-operated, and 10 U.S. Code, Section 2466 imposes a percentage limitation upon the amount of depot-level maintenance and repair workload that may be performed by contract. Title 10, U.S. Code, Section 2465 establishes a general prohibition on contracts for fire-fighting and security guard functions, as modified by Section 332 of the National Defense Authorization Act for Fiscal Year 2003, Public Law 107-314.

In addition, Section 802 of Public Law 96-107, 10 U.S. Code, Section 114, *note*, prohibits the use of Office of Management and Budget (OMB) Circular A-76 procedures in connection with the obligation or expenditure of research, development, test, or evaluation funds, except for the operation or support of installations or equipment used for research and development (including maintenance support of laboratories, operation and maintenance of test ranges, and maintenance of test aircraft and ships. OMB Circular A-76 incorporates this statutory restriction, stating that the "Circular and its Supplement shall not . . . [a]pply to the conduct of research and development. However, several in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this circular and its supplement. These restrictions expressly preclude the use of OMB Circular A-76 procedures for the test and evaluation and science and technology/ research and development functions. These restrictions, however, do not foreclose alternatives to the A-76 process, and it has been concluded that such alternatives merit further consideration.

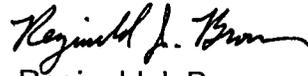
The AL&T functions are otherwise subject to the notification and analysis/cost-comparison process specified in 10 U.S. Code, Sections 2461 and 8014 of the annual DoD appropriations acts, subject to established exceptions for small functions and certain preferential procurement programs.

Personal Services. The potential for inappropriate personal services contracts exists where an inherently Governmental decision-maker provides oversight to a contractor employee in circumstances where effective work requires the level of supervision associated with an employer-employee, rather than an independent contractor, relationship. For purposes of the AL&T exemption requests, the personal services issue is relevant to administrative support services provided directly to general officers and members of the Senior Executive Service in view of the required confidential nature of the working relationship.

Conflicts of Interest. While an increased use of contractor services creates a potential for inappropriate organizational conflicts of interest, established processes exist in the Federal Acquisition Regulation for assessing and resolving such conflicts to ensure that the Government receives objective analysis and recommendations and that other contractor's procurement sensitive information and trade secrets are protected. While Army managers must be very sensitive to conflicts of interest in connection with individual actions, I conclude that this issue does not present overarching concerns that would preclude the preparation or execution of implementation plans.

Military Conversions. Generally, the DAWIA statute and implementing regulations specifically provide for both civilian and military career development to progress to the most senior acquisition positions. Title 10, U.S. Code, Section 1722(b)(2)(A) requires that there will be military fill only positions that will be available to members of the Armed Forces based on specific criteria developed by the Secretary of Defense (see also DOD Instruction 5000.58, Section 4.13) that such military fill only "is required for that position by law, is essential for performance of the duties of the position, or is necessary for another compelling reason." All of the Components, including Army, are required to provide such list to the Director, Acquisition Education, Training, and Career Development for the Under Secretary of Defense (AL&T) approval. A further consideration relevant to a discussion of military conversion to civilian is that 10 U.S. Code, Section 1722(d) also requires that selections to the senior acquisition positions be based on the selection of "the best qualified individual for that position, consistent with other applicable law." Additionally, 10 U.S. Code, Section 1722(f) requires the Secretary of Defense to establish a policy "assigning military personnel to acquisition positions that provides for a balance between (a) the need for personnel to serve in career broadening positions and (b) the need for requiring service in each such position for a sufficient time to provide the stability necessary to effectively carry out the duties of the position and to allow for the establishment of responsibility

and accountability for actions taken in the position." Any analysis to consider military conversions must be in concert with the above statutory framework.



Reginald J. Brown
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosure

CODING RULES for Acquisition, Logistics, and Technology (ASA(LT)/G4)

- Code P -- Pending Restructuring
1. Exemption for commands undergoing restructuring
 - a. Army Materiel Command
 - b. Military Traffic Management Command
 2. Logistics undergoing transformation in Major Commands
 - a. US Army Europe
 - b. Forces Command
 - c. US Army Pacific
 - d. LIA
 3. Test and Evaluation Function
 - a. Expand current ATEC exemption (2000-0002) to include the following positions at ATEC
 1. Series 00318, GS-8/NK III and above
 2. All in series 300, 400, 500, 800, 1300, 1500, 1600, 1910, 2000
0028, 2181, 0180, GS-11/NH II and above
 3. Series 0201, 0205, GS-14/NH IV and above
 4. Series 1101, all grades
 5. FA49 and FA90, all ranks
 6. Military in MDEP RL02 & RL03 in admin MOS
 4. Systems Acquisition Function
 - a. Acquisition Support Command (W27PAA including derivatives) and ASA(L&T) (W1B0AA)
 1. Series 0340, 0343, 0560, 0800, GS-15 and above
 2. Series 0340, 0343, 0560, 0800, GS-9/NH II to GS-14
 3. FA51, O6 and above
 4. FA51, O3-O5
- Code M – DoD Management Decision
Code R – Subject to Review
- Code E – Civilian Authority Direction and Control
Code M – DoD Management Decision
Code E - Civilian Authority Direction and Control
Code M – DoD Management Decision

- b. SAALT, AMC, ASC, LIA, MEDCOM, SMDC, TRADOC, USAREUR in R&D APE's
 - 1. Series 0301, 0334, 0340, 0343, 0346, all 0400, 0560, all 0800, 1515, 1670, all 2000, GS-15 and above
Code E - Civilian Authority Direction and Control
 - 2. Series 0301, 0334, 0340, 0343, 0346, all 0400, 0560, all 0800, 1515, 1670, all 2000, GS-9/NH II to GS-14
Code M – DoD Management Decision
 - 3. FA 40, FA49, FA51 O6 and above
Code E - Civilian Authority Direction and Control
 - 4. FA 40, FA49, FA51, O3-O5
Code M – DoD Management Decision
- 5. Procurement and Contracting Function
 - a. Series 1102, AOC 51C/Z all grades
Code E - Civilian Authority Direction and Control
 - b. Series 1101
Code M – DoD Management Decision
 - c. All in series 0800 in Contracting Offices, all grades
Code M – DoD Management Decision
 - d. Series 0343, 0560 in Contracting Offices, GS-9 and above
Code M - Protected by law, statute, treaty or agreement
- 6. Science and Technology/Research and Development Function (positions in R&D APEs)
 - a. Expand current AMC exemption (2001-0001) to include
 - 1. All in series 0180, 1910, 0400, 0800, 1300, 1500, GS-11/NH III-IV and above
Code M – DoD Management Decision
 - 2. MACOMs ASC, SMDC, TRADOC, COE: same criteria as 4-a-1
Code M – DoD Management Decision
 - 3. ARI: Series 0180, all 1500, GS-11/NH III-IV and above
Code M – DoD Management Decision

b. Expand current MEDCOM exemption (2000-0003) to include

1. All in series 0180, 1910, 4805, 5048, 0400, 0800, 1300, 1500, GS-11/NH III-IV and above
2. 231 Military positions (P6)
3. Remaining Military

Code P -- Pending Restructure
Code R -- Reviewable
Code P -- Pending Restructure

7. Logistics (Supply, Transportation and Maintenance) Functions

Analysis is ongoing for this exemption. Positions will be identified by Occupational Series, Grade, and function (determined by APE or MDEP). Though some variation is present, the following rule will apply generally for each given supply, transportation or maintenance function:

- a. Military O6 or higher AND civilian GS-15 and higher
- b. Military E6-O5 and civilian GS-11/14

Code E -- Civilian Direction and Control
Code M -- DoD Management Decision