



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
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WASHINGTON, DC 20310-0111  
March 26, 2003

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY  
(ACQUISITION, LOGISTICS, AND TECHNOLOGY)

SUBJECT: Foreign Military Sales Exemption

Reference memorandum, Office of the Assistant Secretary of the Army, Acquisition, Logistics and Technology (SAAL-ZR), 15 January 2003, subject: Revised Exemptions from the Federal Activities Inventory Reform (FAIR) Act, Enclosure 2.

**Function.** This decision pertains to the Foreign Military Sales (FMS) and Security Assistance (SA) Programs, which provide defense articles, military training and other defense related services by grant, credit, cash, sale, lease or loan. This function includes Foreign Military Sales, Peacekeeping Operations, Presidential Draw-downs, Co-production Programs, Transfer of U.S. Technology, and the International Military Education and Training Program.

**Decision.** The Foreign Military Sales and Security Assistance Programs are a core competency of the Army, performed pursuant to the Military Assistance and Sales Act and the Arms Export Control Act. As such, these functions may not be divested or transferred to another agency. The Military Assistance and Sales Act limits the number of experts, consultants and retired officers than can be hired to perform the security assistance function. The country program manager aspects of the Foreign Military Sales and Security Assistance functions are inherently Governmental. Case managers and support staff in support of a country program manager are exempted, as necessary, on grounds of avoiding personal services contracts. There is a basis for at least a nominal number of military to perform the security assistance function to retain credibility with foreign governments.

At the 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 the Deputy Chief of Staff, G-1 in coordination with our responsible staff officers.

**Requestor's Position on Issues.** The SAAL-ZR states that all functions associated with these programs should be exempt from outsourcing.

**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 the 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 FMS and SA programs directly support readiness of the Army regarding one of the six recognized core competencies of the Army, as provided for in Army Field Manual 1 and the Army Plan: Shape the Security Environment (Deter Forward). The FMS and SA functions directly support shaping the security environment by conducting cooperative activities with allies and friendly nations. Therefore, the risk criteria pertaining to the impact of an implementation plan or sourcing decision as it affects the Army's war-fighting competencies is directly relevant to FMS and SA programs. Moreover, as a core competency, the function is not appropriate for divestiture or transfer to any other executive agency.

**Statutory Requirement Relevant to Divestiture Issue.** This function is created by the Military Assistance and Sales Act, Title 22, U.S. Code, Section 2301, et seq. to implement the Arms Export Control Act, Title 22, U.S. Code, Section 2751, et seq., and due to the nature of the function, divestiture would not be appropriate.

**Inherently Governmental 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 in making decisions for the Government. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government employees. Pursuant to the Office of Procurement Policy (OFPP) Letter 92-1, paragraph 5 (a) binding the Government by contract or other means is an inherently Governmental function and since the FMS and SA programs provide defense articles, training and other defense related services by grant, credit, sale, lease or loan, this constitutes an inherently Governmental function. Additionally, these programs involve the execution of the laws of the United States, so as to "determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action"...or "contract management..." See OFPP Policy Letter 92-1, paragraph 5 (b). The FMS and SA programs involve advancing the interests of the United States via a combination of military liaison and diplomatic means. Indeed, the intention of Congress in enacting the Military Assistance and Sales

Act was to "promote the peace of the world and the foreign policy, security, and general welfare of the United States by providing military assistance to friendly countries." The higher-level management functions are those that involve actions that are inherently Governmental. Therefore, this inherently Governmental determination would not pertain to those positions graded lower than a GS-11 dealing with Foreign Military Sales Case Management and Support functions which did not involve the exercise of substantial discretion which were covered in Fair Act Challenge Decision 2000-0043.

**Statutes Relevant to Sourcing Decision.** The Military Assistance and Sales Act at 22 United States Code, Section 2386 contemplates limited hiring of experts consultants and retired officers to perform the military sales and assistance functions described in the Act, not to exceed a total of twenty-five per year. Presumably, these contract personnel would be performing the actual assistance to foreign governments to be provided under the Act and not the inherently Governmental contract negotiation military and diplomatic liaison functions associated with these programs.

**Personal Services.** Where supervision by an official making inherently Governmental decisions in a management headquarters is required for effective performance of an activity in support of that decision maker, there is a basis for exempting that activity, whether advisory or clerical support, to avoid an inappropriate personal services contract.

**Conflicts of Interest.** No conflict of interest issues rise out of this decision due to the fact that all decision makers are Army officers or DA civilians.

**Military Conversions.** There are a small number of military positions currently involved in the security assistance function. The Department of Defense Inventory of Commercial and Inherently Governmental Activities Guide to Inventory Submission (Inventory Guidance), Enclosure 6, page 6-10 recognizes that a minimal number of military positions may be necessary for credible provision of security assistance to foreign nations.



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(Manpower and Reserve Affairs)

Enclosure

## **CODING RULES for Foreign Military Sales and Security Assistance**

1. In USASAC (W1VWAA), OPM-SANG (W3ZLAA), TRADOC (TBD)
  - a. All GS-1102's
  - b. Military O6's and higher, civilian GS-15's and higher
  - c. Military O3/O4/O5's, civilian GS-11/14

Code E – Civilian Direction and Control  
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Code L – Protected by law, statute, treaty of agreement
2. In AMC (other than USASAC or OPM-SANG) or HQDA (excluding AMHA)
  - a. Military O6's and higher, civilian GS-15's and higher
  - b. Civilians in GS-301-13/14
  - c. Civilians in GS-318-08 or higher

Code E – Civilian Direction and Control  
Code L - Protected by law, statute, treaty of agreement  
Code M – DoD Management Decision