



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 24, 2000

CHALLENGE Number 2000-0089

[REDACTED]
President
National Federation of Federal Employees
Local 2193
U.S. Army Topographic Engineering Center
Alexandria, Virginia 22315

Dear [REDACTED]

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns one activity.

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. Other issues raised in your challenge are not relevant to FAIR Act determinations.

Date of Receipt. I received your Challenge on January 28, 2000.

Research, Development, Testing and Evaluation (RDT&E) Functions

Activity Challenged. You have challenged the inclusion on the list of RDT&E Functions, Function Code R600, as defined 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>. We understand that your challenge concerns this activity at organizational levels below management headquarters and outside the scope of program manager or program executive organizations.

Decision. I have determined that the activities included under the above Function Codes pertaining to Function Code R600 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 substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. The RDT&E function does not involve the exercise of substantial discretion in applying Government authority or the

making of value judgments in making decisions for the Government. The RDT&E function is performed in the private sector. There are Federally funded research and development centers and contractor-operated Department of Energy laboratories. Therefore, the RDT&E function is not inherently Governmental, and likewise, the management and support of RDT&E functions is not inherently Governmental.

Your challenge argues that decisions made in the early phase of systems development have a dramatic impact on the cost and functionality of the resulting system. The FAIR Act list presumes that senior level decision makers make such decisions within the framework of a program manager or program executive officer structure, or a management headquarters, or equivalent, all of which are outside the scope of this challenge.

Your challenge contends that the RDT&E functions involve 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.

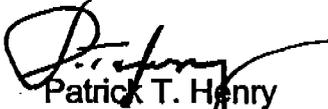
Your challenge contends that these functions should be considered inherently Governmental because of potential conflicts of interest associated with private sector performance of the RDT&E function. Conflicts of interest concerns apply equally to Federal employees as well as contractors. Any alleged conflict of interest can be avoided through appropriate safeguards in the administration of the contracted work.

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