

CHAPTER 2

IDENTIFYING, REVIEWING AND INVENTORYING COMMERCIAL ACTIVITIES

2-1. General. The three initial steps in the CA process are discussed in this chapter. These are (a) to identify which activities are CA and which are excluded Governmental functions, (b) to review CAs, determine if any are or could be excepted or exempted from cost comparison study, and establish study schedules, and (c) to prepare annual inventories.

2-2. Activity Categories. All activities performed by or for the USACE can be divided into either CAs or Governmental functions (see Appendix B, Appendix C, Figure 2-1 in Appendix D, and Glossary).

a. CA (that is, activities that could be performed by the private sector). This group can be further subdivided into activities that are subject to, or excepted or exempted from, the CA program, as follows:

(1) CA that are subject to cost comparison study.

(2) Excepted CA (listed in Appendix B), that is, CA that have, in accordance with paragraph 2-3a, been determined not to be subject to cost comparison study for one of the following reasons:

(a) Activities performed outside the United States and its territories and possessions.

(b) Products or services provided from other Federal agencies required by law to furnish them (mandatory sources).

(c) Products or services required by treaties or international agreements.

(d) Products or services where their acquisition in accordance with this regulation would be inconsistent with law. Architect and engineering (A-E) and surveying and mapping services must be procured using Brooks Act procedures. A methodology for reconciling Brooks Act and OMB Circular A-76 requirements will be published at a later date. General functional areas (GFAs) C120, C125, C127, and C128 in Appendix C are affected by this determination.

(e) Research and development (R&D) activities. However, R&D support activities are to be included in CA studies even if they are funded by R&D appropriations.

(f) Activities that are not separable from other excepted, excluded or exempted activities for performance by a contractor or an in-house work force.

(g) Activities that are not recurring, are related to support of specific projects, or have a total lifespan of less than two years. However, a series of one-year tasks expected to cover more than a two-year span is continuous activity and is governed by this regulation. A methodology for projecting the workload associated with such activities and comparing associated Government in-house costs to contractor bids/offers will be published at a later date.

(h) Expert and consulting services governed by AR 5-14.

(3) Exempted CA (listed in Appendix B), that is, CA that have, in accordance with paragraphs 2-5 and 2-6, been determined not to be subject to cost comparison study.

b. Governmental functions (listed in Appendix B), or activities that must be performed in-house due to their special nature. These activities are excluded from cost comparison study and include:

(1) Governmental activities associated with a CA (for example, management functions that would remain if a CA were contracted).

(2) Governmental activities which stand alone (for example, program development).

2-3. Determination of Excluded Activities.

a. The first step an FOA should take in determining whether a particular activity is subject to cost comparison study under this regulation is to compare the activity to the list in Appendix B of excluded Governmental functions.

b. If the activity is included in Appendix B, the FOA should document the study file and refer to the instructions in Appendix G for inventory of activities.

c. If the activity is not included in Appendix B and there is a question as to whether the activity is a Governmental function, the FOA may submit a request for declaration of the activity as a Governmental function to CDR USACE (CERM-MC) WASH DC 20314-1000 for advice and possible decision by the Commander or the Deputy Commander, USACE. The request should include the number of spaces proposed for exclusion, as well as the rationale for requesting that this determination be made. In addition, the FOA should refer to the instructions in Appendix G for inventory of activities.

d. If the activity is not included in Appendix B and the FOA does not decide to submit a request for determination of a Governmental function, the FOA should refer to paragraph 2-2a(2) to determine if the activity could be expected from cost comparison study for other reasons.

e. Questions concerning which activities have been excluded, excepted or exempted should be referred to the functional proponent so that the basic documents by which these approvals were obtained can be consulted.

2-4. Determination of Excepted Activities.

a. If the activity corresponds to the list of exception rationales in paragraph 2-2a(2), the FOA should submit documentation explaining the relationship of its activity to these types of exception possibilities to the functional proponent for HQUSACE staff review and decision by the Commander, Deputy Commander, or Chief Counsel. In addition, the FOA should refer to the instructions in Appendix G for inventory of activities.

b. If the activity is not listed in paragraph 2-2a(2) or if an exception request is denied, the FOA should next determine if an exemption request has been granted, in accordance with paragraph 2-5, or if an exemption request can be supported, in accordance with paragraph 2-6.

c. Questions concerning which activities have been excluded, excepted or exempted should be referred to the functional proponent so that basic documents by which these approvals were obtained can be consulted.

d. The inventory instructions in Appendix G should be followed.

2-5. Determination of Exempted Activities.

a. FOA should next compare the subject activity to the GFA codes listed in Appendix C.

b. If there is a match, the FOA should next determine if an approved exemption for the activity exists (see Appendix B). If there is an exemption already approved, the FOA should ensure that the inventory instructions in Appendix G are followed and that an in-depth review of the activity is accomplished within five years of the approval date.

c. If there is a match between the subject activity and Appendix C but no exemption request has been previously approved, the FOA should determine if a rationale for exemption exists (see paragraph 2-6).

d. Questions concerning which activities have been excluded, excepted or exempted should be referred to the functional proponent so that the basic documents by which these approvals were obtained can be consulted.

2-6. Exemption Rationales. Rationales justifying an exemption are national defense requirements, the lack of a satisfactory commercial source, the delay or disruption of an essential program, or special security considerations. Justification may address one or more of these reasons.

a. National defense requirements that may compel in-house performance are deployability, military training, and military overseas rotation base.

(1) Deployability.

(a) In-house performance may be required if the activity or its assigned personnel are designated deployable in approved contingency plans. Non-deploying activities that support mobilization, deployments, or other contingencies may also have to be retained in-house for national defense reasons. The ability of potential contractors to perform the functions overseas or in support of deployment, mobilization, or other contingency must be considered in the review. Requirements that cannot be met by either an in-house work force or a potential contractor do not justify in-house performance. An example of such a requirement is the rapid expansion of a work force in an isolated area in an area with a labor shortage. The inability to meet national defense requirements must be unique to contract performance.

(b) In-house performance may be required to maintain positions for military personnel who may be deployed as individuals or with modification table of organization and equipment (MTOE) units. Recommendations for in-house performance must cite the directive designating the deployable positions. Some of the positions in the activity may not be designated for deployable personnel. If so, the recommendation must explain why the non-deployable part of the activity cannot be separated for CA study. The FOA Commander may set aside from CA studies work that is required for the training of deployable MTOE units and not consider the work for performance by a table of distribution and allowances (TDA) activity or a contractor.

(2) Military training. Activities that train military personnel in certain combat-unique or combat-related skills may be retained in-house for national defense reasons. Descriptions of this type of training are provided under the U series of GFA codes in Appendix C. Normally, training that can be conducted by Government employees can also be conducted by contractor employees.

(3) Military Overseas Rotation Base. Rotation base positions provide soldiers with meaningful jobs in their particular skills between overseas tours. Activities may be performed in-house to maintain rotation base positions for military enlisted personnel. The Deputy Chief of Staff for Personnel in AR 570-4 publishes a list of each military occupational specialty for which a rotation base must be maintained in the continental United States and Hawaii.

b. The lack of availability of a satisfactory commercial source is a second justification for requesting an exemption for an activity from the CA Program. This must be proved through the submission of CPAS (see paragraph 3-10) and the search for commercial sources outlined in paragraph 3-18. USACE has agreed to abide by the Congressional announcement requirement set forth in Defense Authorization Acts. Therefore, advertising and other efforts to locate commercial sources will not begin until Congress has been notified that an activity is being studied for possible conversion to contract, unless the activity requires only HQUSACE approval. In that case, advertising and other efforts to locate commercial sources may begin after HQUSACE approval is received.

c. The third possible rationale for submitting an exemption request is that the use of a commercial source would cause an unacceptable delay or disruption of an essential program. Recommendations to perform an activity in-house on the basis of delay or disruption must explain the delay or disruption in terms of cost, time, performance measures, and effects on mission performance. Also, the disruption must be shown to be lasting and unacceptable. Transitory disruptions caused by conversions are not sufficient grounds, although an unacceptable delay in responding to short-term natural disaster situations could provide a sufficient reason for seeking an exemption from potential contracting. The function may have been performed by contract elsewhere or at a different time. If so, the recommendation must explain why circumstances are substantially different. Lastly, it must be shown that the in-house work force is able to provide the product or service.

d. The last rationale for exemption is special security considerations. A risk assessment of CAs that handle intelligence information (such as mail rooms or messenger services) will be conducted by the FOA Security and Law Enforcement Officer to determine if using commercial sources to accomplish the work of that activity poses a threat to national intelligence. This assessment will be included in the CPAS (see paragraph 3-10) for decision by the Director, Defense Intelligence Agency, or the Director, National Security Agency, in coordination with the HQUSACE staff before the CA is approved for study.

2-7. Exemption Request Documentation.

a. FOA will submit a Decision Summary (RCS CSCOA-111), Figure 2-3, through channels to CDR USACE (CERM-MC) WASH DC 20314-1000 to obtain ASA-level approval of an exemption request wherever in-house performance of a CA is sought for noncost reasons. The Decision Summary may be classified if in-house performance is justified by classified plans or mission assignments. A Decision Summary must be submitted under any of the following circumstances:

(1) An exemption request can be supported using any or all of the rationales of national defense, delay or disruption of an essential Government program, or lack of a satisfactory commercial source;

(2) In-house performance of a new requirement or continued in-house performance of an expanded activity is proposed for noncost reasons. If this action requires construction of a new facility or purchase of equipment, the Decision Summary must be submitted and approved before the construction or equipment purchase is entered into the Corps budget. (In-house performance of a new requirement or continued in-house performance of an expanded activity for cost reasons is covered in paragraph 3-11.)

(3) Transfer of work from contract to in-house performance is proposed for noncost reasons.

b. If a Decision Summary receives ASA-level approval, the FOA will, upon notification from CERM-MC, enter the pertinent information in the next annual update to the inventory. Exemptions are valid for five years from date of ASA-level approval. Therefore, the activity will be reviewed not later than the fifth fiscal year after exemption approval. The approved Decision Summary will be retained in the FOA records until the next review is completed.

c. That an activity involves a classified program, or is part of a basic mission, or could possibly be involved in a strike by contract employees, or is an urgent requirement does not provide adequate justification for in-house performance. It must be clearly shown that commercial sources are not able and the Government is able to provide the product or service when needed.

d. If no exemption rationale exists, then the FOA should prepare to study the CA as outlined in Chapter 3 and refer to Appendix G for instructions on inventorying the activity.

2-8. Requirement to Categorize Activities. FOA shall initially categorize each activity in accordance with paragraphs 2-3 through 2-5. FOA shall schedule studies of activities not excluded, excepted, or exempted. During each five-year period after the initial categorizing and studying, each activity will be reviewed, i.e., reexamined, to determine whether to study contracted or in-house activities. This review should be phased so that not more than five years passes between the time of CA is studied and the time it is reviewed for restudy. Note that all CAs are included in the annual CA inventory (see paragraph 2-9).

2-9. Efficiency Review (ER) Program. Excluded, excepted, and exempted activities will be subject to study under the Efficiency Review (ER) Program. Portions of CAs that may not be contracted out will be studied under the CA Program, included in the CPAS (see paragraph 3-10 and Figure 2-2) and the CA management study (see paragraph 3-36 and Figure 3-5), but not the PWS prepared for the CA (see paragraph 3-19) nor the solicitation (see paragraph 3-21) nor the Government's in-house cost estimate (see paragraph 3-39).

2-10. Commercial Activities Inventory Requirement.

a. The USACE Commercial Activities Inventory, maintained by the Director of Resource Management, is an annual listing of activities performed by or for the Corps. The primary information included is the FOA responsible for the study, the location of the activity, the functions performed, and the resources, both in-house and contractual, expended to accomplish the activity.

b. CAs not specifically described in each series shall be reported against the general 999 code for the series.

c. Instructions for preparation and submission of inventory data are in Appendix G.

d. Corps CA will not be subdivided below major GFA category level (see Appendix C) to create non-reportable sub-functions utilizing less than one whole workyear. In addition, when two or more sub-GFAs (e.g., S716A and S716B) will be included in a single CA study, they should be combined and reported under the major GFA (e.g., S716).

e. Records will be maintained at FOA to support all entries for activities in the inventory. Records will be identified, maintained, and disposed of according to AR 25-400-2, The Modern Army Recordkeeping System (MARKS), file number 5-20a. The following information will be documented, collected, and preserved for each activity included in the inventory:

(1) Source of data for each inventory submission and the methodology used to identify and record all resources to include dollars and manpower;

(2) Changes in workload, mission, and methods of performance;

(3) Manpower authorization documents and any changes to them;

(4) Results of CA studies, expansions and new requirements affecting the activity;

(5) Justification for and approval of requests for exemption, exceptions and exclusion from CA study.