



DEFENSE SECURITY ASSISTANCE AGENCY

WASHINGTON, D.C. 20301

10 January 1985

In reply refer to:
Transmittal No. 3
DoD 5105.38-M

MEMORANDUM FOR RECIPIENTS OF DOD 5105.38-M, SECURITY ASSISTANCE
MANAGEMENT MANUAL (SAMM)

SUBJECT: SAMM Change 3 Transmittal

The attached revised material updates the initial publication.

Update the applicable portions of the SAMM in accordance with the
attached list of changes by inserting new pages.

This change is effective 10 Jan 1985.

A handwritten signature in black ink, appearing to read "Philip C. Gast", is positioned above the typed name.

PHILIP C. GAST
LIEUTENANT GENERAL, USAF
DIRECTOR

Attachments

- (1) List of Changes
- (2) List of Effective Pages
- (3) SAMM Update Pages

LIST OF CHANGES

Remove and insert the following portions of your current SAMM:

REMOVE

1-3 through 1-4
6-25 through 6-27
7-79 through 7-80
8-3 through 8-6
9-9 through 9-12

INSERT

1-3 through 1-4
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7-79 through 7-80
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9-9 through 9-12

LIST OF EFFECTIVE PAGES

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through each military department's publication distribution system. The respective points of contact are:

NAVY: Office of the Chief of Naval
Operations (CNO/OP-63)
ATTN: OP-631D3
U.S. Department of the Navy
Washington, DC 20350-2000

ARMY: Department of the Army
Deputy Chief of Staff for Logistics
Security Assistance Policy
Coordinating Office
ATTN: DALO-SSA
Rm 3D560, The Pentagon
Washington, DC 20310-0512

**

AIR FORCE: Publication Distribution Center
2800 Eastern Blvd.
Middle River
Baltimore, MD 21220-5000

Such distribution will be in accordance with addressee lists developed and provided by the DSAA Comptroller, Office of FMS Control Division, Washington DC, 20301. Requests for commercial purchases of the SAMM should be directed to the aforementioned DSAA office.

H. INTERPRETATION, RECOMMENDATIONS AND DEVIATIONS. Requests for clarification or interpretation of, or changes to, the provision of this Manual should be submitted through security assistance management channels to the DSAA (ATTN: SAMM Coordinator), Washington DC, 20301. Any guidance contained in this Manual that appears to be in conflict with other DoD issuances or governing statutes and regulations should be reported to the DSAA SAMM Coordinator. Deviations from the policies presented in this Manual may not be implemented without the explicit prior approval of the Director, DSAA, based upon justified requests from the components of the DoD.

I. EFFECTIVE DATE AND IMPLEMENTATION. The provisions of this Manual are effective upon date of transmittal.

SECTION II - RATIONALE AND SCOPE

A. PURPOSE. Section I addressed the basic structure and organization of the SAMM, its authorities, applicability and responsibilities. This section is designed to summarize the rationale and scope of the security assistance program.

B. RATIONALE FOR SECURITY ASSISTANCE PROGRAM.

1. Security assistance has historically played a prominent role in U.S. foreign and defense policy. The security assistance program is an essential complement to the overall U.S. defense effort. When we directly assist other

nations in meeting their defense requirements, we also make a contribution to our own security.

2. Security assistance represents a most visible aspect of our foreign policy in that its implementation results in tangible evidence of U.S. interests and presence. Such evidence is represented by the delivery of defense weapon systems to friendly foreign governments; by numbers of international military students in U.S. service schools; by U.S. personnel advising other governments in increasing their internal defense capabilities; and by providing guidance and assistance in establishing a practical infrastructure and economic base through which regional stability can be achieved and maintained.

C. SECURITY ASSISTANCE SCOPE.

1. Security assistance, defined in its simplest terms, concerns the transfer of military and economic assistance through sale, grant, lease, or loan to friendly foreign governments. Transfers are carried out under the principle that if they are essential to the security and economic well-being of such governments and international organizations, they are equally vital to the security and economic well-being of the United States.

2. Security assistance consists, inter alia, of the following major programs:

a. Programs administered by the DoD:

- Program;
- (1) The International Military Education and Training (IMET)
 - (2) Foreign Military Sales (FMS) Financing; and
 - (3) Foreign Military Sales (FMS).

b. Programs administered by the Department of State:

- (1) Economic Support Fund (ESF);
- (2) Peacekeeping Operations (PKO);
- (3) Commercial Export Sales licensed under the Arms Export Control Act (AECA).

3. Prior to 1981, defense articles and defense services were provided as grant aid through a separate program, the Military Assistance Program (MAP), which was administered under procedures entirely different from those used for FMS. Legislation effective in FY 1982, however, allows grant funds to be merged with other funds held for the foreign government's account (e.g., cash, FMS credits) in that country's FMS trust fund. This technique, which is used exclusively today, precludes distinguishing items as having been provided as grant aid. Special rules, procedures, and constraints for items provided as grant aid, essentially those set forth in the MASM, apply only to programs initiated under the old system. FMS rules and procedures apply to all others.

sales preference notifications will be coordinated with the DSAA Operations Directorate before dispatch. DSAA initiated correspondence utilizing these formats will be coordinated with the applicable DOD component, as required.

FORMAT 1 - Letter for current DOD producer

(COMPANY) has advised the DoD that it has the capability of providing the (ARTICLE OR SERVICE) which you have requested to purchase via FMS and prefers to market it on a direct commercial basis. The DOD has no preference as to whether this items is procured through FMS or on a direct commercial basis. We have confirmed that this company is capable of producing this item, and that it is currently in production for DOD requirements. If a commercial transaction is undertaken, the U.S. Government will not be a party to the contract; therefore, all aspects of contract performance must be between your Government and the company. Should you not desire to pursue a direct commercial purchase, please advise us of your rationale.

FORMAT 2 - Letter for current producer (other than for DOD)

(COMPANY) has advised the DoD that it has the capability of providing the (ARTICLE OR SERVICE) which you have requested to purchase via FMS and prefers to market it on a direct commercial basis. The DOD has no preference as to whether this items is procured through FMS or on a direct commercial basis. We are not aware of any current contract for this item between the U.S. DOD and this company, although we are aware of previous direct commercial sale for this item between other countries and this company. If a commercial transaction is undertaken, the U.S. Government will not be a party to the contract; therefore, all aspects of contract performance must be between your Government and the company. Should you not desire to pursue a direct commercial purchase, please advise us of your rationale.

FORMAT 3 - Letter for prior producer for DOD

(COMPANY) has advised the DoD that it has the capability of providing the (ARTICLE OR SERVICE) which you have requested to purchase via FMS and prefers to market it on a direct commercial basis. The DOD has no preference as to whether this items is procured through FMS or on a direct commercial basis. We are not aware of any current contract for this item between the U.S. DOD and this company, although we are aware of a previous contract between the U.S. DOD and this company for this item. If a commercial transaction is undertaken, the U.S. Government will not be a party to the contract; therefore, all aspects of contract performance must be between your Government and the company. Should you not desire to pursue a direct commercial purchase, please advise us of your rationale.

FORMAT 4 - Letter for producer not known by DOD

(COMPANY) has advised the DoD that it has the capability of providing the (ARTICLE OR SERVICE) which you have requested to purchase via FMS and prefers to market it on a direct commercial basis. The DOD has no preference as to whether this item is procured through FMS or on a direct commercial basis. We are not aware of any current contract for this item between the U.S. DOD and this Company. If a commercial transaction is undertaken, please note that the U.S. Government makes no representation regarding the commercial firm involved, or the item or service in question, regardless of the designation or nomenclature applied by the commercial firm, and regardless of the services the commercial firm states it can provide. Should you not desire to pursue a direct commercial purchase, please advise us of your rationale.

b. Previous Commercial History. The DOD component concerned may be aware of a previous commercial purchase or of a request by the foreign country or international organization for price and availability data from a U.S. commercial source. If so, appropriate reference to the prior purchase or current commercial negotiation should be inserted in the format set out in paragraph G.2.a., above. **

c. Coordination. All transactions or correspondence between the DOD component and foreign countries or international organizations or commercial contractors relating to direct sale preference must be coordinated with DSAA-OPS. **

H. NOTIFICATION OF SIGNIFICANT COMMERCIAL SALES ACTIVITY. In implementing these procedures each DoD component involved in processing purchase requests will, to the extent such activities are known, keep DSAA-OPS, the DoD component, and the SAOs or other appropriate in-country DoD representatives informed of significant commercial sales activities.

I. DOD P&A VERSUS A COMMERCIAL PROPOSAL.

1. General. Foreign governments may request LOAs after having solicited bids from U.S. contractors. LOAs should not be offered to a foreign government until:

a. The foreign government confirms that commercial negotiations have stopped and the country provides rationale for continuing with FMS.

b. DSAA and/or DoD components have established the U.S. contractor preferences regarding issuance of an LOA.

c. DSAA has determined, based on the combination of information received from the foreign government and U.S. contractor, whether to satisfy the requirement under FMS.

2. Withdrawal of LOAs. There are cases when a foreign government or international organization has requested and received LOAs and subsequently solicited bids from private industry for the same supplies and services. Such action by the foreign government does not automatically require DoD withdrawal

of the LOA. However, DoD components should query the foreign government as to its intentions and express a preference for withdrawing the LOA in light of the situation of commercial quotations. U.S. contractor requests for withdrawal of LOAs should be referred to DSAA-OPS for resolution.

3. Direct Sale Preference for Individual Commercial Proposals. In the event that a request for direct sale preference designation is received by the DSAA which does not qualify for inclusion in the listing of items eligible for direct sale preference consideration, but does identify negotiations with one or more foreign countries, consideration will be given to direct sale preference for the individual transaction in question. The U.S. commercial source must include sufficient supporting information to show that a specific request for a price quotation was received in writing from a foreign country. Such informal notifications will be listed as an appendix to the listing of direct sale preference items, but will not be considered as designating items eligible for direct sale preference consideration. These items will remain in the appendix for a period of one year. (See paragraph F.4., above.)

not include costs of government property or facilities for which rental or asset use charges will be assessed. "Special" nonrecurring RDT&E production costs are those incurred at the request of, or for the benefit of, the customer in developing a special feature or unique requirement. These "special" costs must be paid by the customer as incurred. The objective of applying these recoupment charges is to ensure that a purchasing customer pays a fair price for the value of DoD "sunk" investment costs. The pro rata recoupment charge is to be included in the FMS or direct commercial sales price of the product or technology unless reduced or waived as outlined in paragraph (8) below.

(3) DSAA Approval. Prior to applying pro rata nonrecurring cost recoupment charges to sales of items on the MDEL, components will insure that the proposed pro rata charge has been approved by the Director, DSAA. Approval will be requested only for MDE items, and for which there has not been an approved nonrecurring cost pro rata charge established since 5 January 1977.

(4) Format. Requests for approval of pro rata charges for each MDE item will be submitted on the format shown in Chapter 7, Section I, Figure 7-I-1. U.S. Government nonrecurring RDT&E and U.S. Government nonrecurring production costs will be shown separately. The total of these two entries, i.e., the total U.S. Government nonrecurring investment in the item, will be prorated against past and projected production quantities for U.S. Government, FMS, MAP, and direct commercial sales. Actual past and projected production quantities will be depicted and a country breakout for FMS/MAP and direct commercial sales projections will be shown. Five Year Defense Program (FYDP) forecasts will normally be used to indicate the U.S. military service production quantities; however, for those items for which Selected Acquisition Reports (SARs) are required, the latest SAR data will be cited, as applicable.

(5) Pro Rata Charges Determined Before 5 Jan 1977. If the pro rata charge was determined prior to 5 January 1977, it will be reviewed to identify any significant changes. Changes requiring approval by the DSAA will be submitted to Director, DSAA, in the format of paragraph (4), above.

(6) Direct Commercial Sales. As a matter of policy, the DoD requires that, in the case of direct commercial sales of defense items to foreign countries and international organizations, the U.S. contractor must collect and pay to the cognizant MILDEP the appropriate nonrecurring cost recoupment charge for the items being sold. MILDEPs will insure that they have in place an operative system for assessment, monitoring, collection, and reporting of these recoupments in order to insure that all appropriate payments are in fact made to the DoD. This system will provide for the following actions to be taken:

(a) Applicable Items. The development of complete lists of non-MDE and MDE items under the cognizance of the MILDEP which require assessment of a nonrecurring cost recoupment charge in accordance with DoDD 2140.2 and a reference to the contracts in which the recoupment clause applicable to the items is or was contained.

(b) Cross-Reference of Export License Requests. The cross-referencing of all export license requests processed by the MILDEP

against these lists to determine whether the commercial sale is required to have a nonrecurring cost recoupment charge assessment.

(c) Editing Munitions Control Export Licenses. The Munitions Control Export Licenses will be annotated to indicate the amount of nonrecurring cost recoupment charge which the contractor is required to reimburse to the U.S. Government, and indicate the office in the MILDEP to which the payment is to be made. It is emphasized that this process should in no way delay the expeditious handling of Munitions Control Export Licenses. In the event that appropriate nonrecurring cost recoupment charges have not been determined for a particular item, the munitions control license should be annotated only to show that a charge may be required, and that the contractor is directed to contact the designated MILDEP administrative or procurement contracting officer to ascertain the specific recoupment charge. Recommendations for approval of an export license request may not be conditioned upon an agreement by the license applicant to pay such a charge to the United States Government in a case in which the MILDEP knows that the applicant does not have a current contractual obligation with the United States Government to make such payments.

(7) Reporting. Collections received both from FMS and commercial sales transactions will be reported in the DSAA(Q)1112 report required by DoDD 2140.2. This report will be submitted quarterly by each DoD component, to DSAA Comptroller, within 45 days of the end of each quarter.

(8) Reductions and Waivers.

(a) The pro rata recoupment charges may be reduced or waived for particular sales that would, if made, significantly advance U.S. interests in standardization with NATO, NATO member countries, Australia, Japan, or New Zealand. As used hereafter, the word "waiver" includes reductions. Waivers will be considered only where it is demonstrated clearly that a particular sale will significantly advance U.S. interests in standardization. The burden of such demonstration rests with the purchasing foreign government or international organization. Waivers will be considered only on a case-by-case basis taking into account the unique circumstances of the particular transaction. Waivers must be specific by law, and blanket waivers are not provided by either the broad "Defense Cooperation Agreements" or other general memoranda of understanding. Full waivers solely on the basis of standardization may be granted to eligible countries for which Military Assistance Program (MAP) funding has been approved for the current fiscal year. *

(b) For all countries and organizations other than those specified in the preceding sentence, there will be a presumption against granting a waiver unless additional or unusual benefits can be demonstrated. Such benefits must be clearly identifiable and generally attributable to a unique military, foreign policy, or economic advantage of the sale. A description of such benefits will be included in documentation relating to the case. Seldom, if ever, will nonrecurring cost charges be waived for programs involving offshore production of major components, unless such programs are subject to the AECA, Section 27.

SECTION II - ACQUISITION FOR FMS

A. DOD REGULATIONS AND PROCEDURES.

1. Compliance with DoD Regulations. In keeping with the DoD policy, acquisition for FMS purchasers will be in accordance with U.S./DoD regulations and procedures. This affords the foreign purchaser the same benefits and protection that apply to DoD procurement and is one of the principal reasons why foreign governments and international organizations prefer to procure through FMS channels.

2. Federal Acquisition Regulation (FAR). The DoD is authorized to enter into contracts for the purpose of resale to foreign governments or international organizations. The FAR shall apply to all purchases and contracts made by the DoD for acquisitions in support of FMS. Some of the most pertinent sections of the FAR and the DOD FAR supplement relative to FMS are listed below:

	<u>FAR</u>	<u>DOD FAR SUPP</u>
a. Agents Fees and Commissions	3.400 thru 3.404	25.7305
b. Contractor Options - FMS		Subpart 17.2
c. Contractor Risk for FMS (Weighted Guidelines)	--	15.905-1(b)(7)(E)
d. Costs of Doing Business with a Foreign Government	--	25.7304(c)
e. FMS Rental and Asset Use Charges	45.405	45.405(f)
f. FMS Selling Costs and Allocations to Contracts	31.205-38(b)	31.205-38
g. Foreign Acquisitions	Part 25	Part 25
h. Recovery of NonRecurring Costs	--	25.7306, Subpart 35.71
i. Sole Source Designation	15.210	25.7307

3. Acquisition Notification of FMS Requirements. In accordance with Section 25.7303(b) of the DOD FAR Supplement, when the acquisition for FMS is expected to involve a contract in excess of \$10,000 which cannot be placed on the basis of price competition (for example when the FMS purchaser requests a specific sole source), prices, delivery data and other relevant information shall be requested from the prospective source and the request shall indicate that the information is for the purpose of a potential sale under FMS and shall identify the prospective FMS purchaser(s).

B. FMS CUSTOMER REQUESTS FOR SPECIFIC SOURCE.

1. DOD Policy. DOD policy provides that procurements made for FMS will comply with U.S. Government acquisition regulations and procedures. When procurement is required to meet an FMS requirement for defense articles and/or services, to the maximum extent possible, the competitive procurement process will be utilized. Authority for sole source procurement can be considered when the purchasing country makes a specific written request and provides sufficient rationale for obviating the benefits of the competitive process.

2. Sole Source Designation. With regard to the source selection process, the FMS purchaser may request that a defense article or defense service be obtained from a particular source. In such cases, FAR 15.210(b)(18) (effective 1 April 85 FAR 6.302-4 applies) provides authority for the U.S. Government to contract on a sole source basis. Sole source designation for procurements under FMS LOAs must be submitted for approval by DSAA prior to exercising the FAR authority.

a. Foreign Purchaser Request. Foreign purchaser sole source requests may be honored (see DOD FAR Supplement 25.7307) only when the sole source designation is based on the objective needs of the FMS purchaser as stated by the purchaser and DSAA approval is obtained. Accordingly, a letter requesting a specific item(s) and/or service(s) from a specifically identified firm or other supplier must be addressed either by the chief of the defense equipment procurement bureau or comparable official of the purchasing government to the chief of the U.S. Security Assistance Organization (SAO) in country, or by the defense attache or comparable official of the purchasing government in the United States to the Director, DSAA Operations. The letter must provide the basis and justification for a sole source request. To the maximum extent possible submission through the SAO is encouraged. The request shall not be honored in any case of patently arbitrary, capricious or discriminating exclusion of other sources. The number or frequency of sole source requests should be kept to the absolute minimum; however, there may be situations where the programmatic reasons sole source procurement is necessary and justifiable. Situations where sole source procurement may be justifiable could include but are not limited to the following situations.

(1) When one of numerous suppliers can deliver faster and the situation is urgent enough to forego the benefits of the competitive process.

(2) When the procurement of a non-standard item which is out of the DOD buying pattern has been approved because of a country request and a specific source has been identified by the country, i.e., obsolete items no longer supportable by the DOD. This could occur in countries with predominantly MAP merger funded programs since MAP merger funds can be utilized only for FMS programs; therefore, such a purchasing country may not have the capability of buying on a direct basis.

(3) When the country has established a history of procurement for articles or services from a particular prime source and to change would adversely affect an ongoing program. For example, this would include an ongoing maintenance program wherein a particular prime contractor is providing technical assistance or other services under established agreements.

(6) DSAA may approve financing for advance payments ** (downpayments) of a part of the contract value for contracts requiring the manufacture of items. Any such payments in excess of 30% will require information provided by the seller that explains and justifies the need for an advance payment greater than 30 percent. DSAA may require as security a reverse letter of credit from the contractor. Any proceeds accruing from such reverse letters of credit will be provided by DSAA to the country for use in further procurements from U.S. sources. Progress payments stipulated in the contract and requested by the purchaser should be based on work in progress, on deliveries made by the seller, and on the level of any advanced payment. For purchases of off-the-shelf items, DSAA will approve financing of full payment upon receipt of assurances from the purchaser that shipments will occur within 7 days of the payment. It is assumed that the purchaser will obtain this data direct from the contractor.

(7) Only contracts or purchase orders with U.S. firms having * current or prior contracts with the Department of Defense (DOD) will be approved without receipt of additional information. However, it is recognized that U.S. contractors who do not have contracts with DOD sometimes may be most qualified to provide articles or services unique to country needs. Approval of such contracts may be granted by DSAA based on information provided by the purchaser to DSAA containing the following:

(a) A detailed explanation of what will be provided by the prospective contractor that is not available from contractors having prior or current contracts with the DOD.

(b) A description of the current business activities and past performance of the contractor relating to the prospective purchase which indicates the contractor's ability to meet the terms of the contract.

(c) Requests to finance contracts with firms that do not regularly sell to the DOD must be signed by the Minister or Deputy Minister of Defense (or a defense official designated in writing by these individuals) if the contracts or invoices are normally signed and processed through in-country channels, or by the Ambassador, the Senior Defense Attache, or Chief of Purchasing Mission, if the contracts are normally signed and processed through embassy/attache channels.

(8) When the prospective purchase is from a contractor that does not regularly sell to the U.S. Government, the purchaser should set a commencement date for the contract that allows at least 90 days for U.S. Government representatives to conduct a survey of the contractor. Such a review may be required in certain circumstances by DSAA as a condition for FMS credit financing of the contract.

(9) No payments will be made to freight forwarders with FMS credit funds for transportation services. Certified bills of lading may be approved for direct payments to U.S. carriers upon request.

(10) FMS credit funds will not be approved for funding of direct commercial letters of credit which assure payment to the supplier upon presentation by the supplier of invoices and/or delivery documents.

b. Documents and Statements. Requests for payment of FMS loan funds to U.S. commercial suppliers must be accompanied by certain documents/statements as set forth in the Annexes and Attachments to each FMS loan agreement. These supporting documents must be provided to the DSAA by the

borrower, and not by the commercial supplier. These include but are not limited to the following:

(1) Invoice. An invoice, which has been prepared in accordance with the relevant provisions of the purchase agreement between the borrower and the commercial supplier, covering the materiel and services for which payment is to be received from the subject loan. The invoice should, as a minimum (a) list items for which payment is requested or identify the work in progress for which payment is requested; (b) reflect the amount and date payment is due; (c) indicate by separate entry the amount included in the invoice for ocean or air transportation and related costs to ports outside the United States; and (d) state the name of the carrier(s) of the materiel from the U.S. port of embarkation.

(2) Bill of Lading. A copy of each ocean or air bill(s)-of-lading (a rated "onboard" bill-of-lading) to substantiate transportation charges shown on the invoice. If an invoice has no cost entry for transportation from a United States port of embarkation, the supplier will include a certification with the invoice as follows:

The (Commercial Supplier) acknowledges that United States Government funds are being used by the (Borrower) to finance the materiel included in this invoice, and certifies that no charges of any nature are included for transportation from a United States port of embarkation.

(Signed)
(Commercial Supplier)

(3) Audit/U.S. Source Product Certification. A certificate must accompany each invoice, or a one-time certificate applicable to the entire DSAA approved contract between the borrower and the commercial supplier must be submitted to the DSAA through the borrower, granting DSAA access to the commercial supplier's records and certifying that the items financed are of U.S. origin. The required certificate must be as follows:

The (Commercial Supplier) agrees that authorized representatives of the Government of the United States shall have access to and the right to examine any directly related books, documents, papers, or records which involve transactions relating to this sale for a period of three years immediately following the receipt of final payment therefore, and also confirms that the materiel for which payment is requested are United States source end products.

(Signed)
(Commercial Supplier)

(4) Commissions/Fees. Before the DSAA will approve the use of FMS loan funds to finance a purchase directly from a commercial supplier, the borrower must obtain from the supplier and provide to the DSAA a statement which certifies the amount (if any) of sales commissions and/or contingent fees contained in the contract price. As set forth in paragraph B below, the DSAA will not approve for FMS credit financing any direct commercial purchase which contains sales commissions and/or contingent fees exceeding \$50,000. The form and content of the required certification is as follows:

must be in writing from the borrowing country and must be submitted to the Department of State (or to the DSAA) for interdepartmental coordination and processing of the amendment document by the FFB. Amendments to the FFB loans require signatures by authorized representatives of the borrowing country, the FFB and the DSAA.

3. Requests for Disbursement of Loan Funds. All requests for disbursement of FMS loan funds must be submitted to the DSAA by the borrowing country in the letter format set forth in the applicable FMS loan agreement. Each request for payment of FMS loan funds to the Security Assistance Accounting Center (SAAC) for amounts due on FMS cases must indicate the FMS case designator(s) and the dollar amount(s) to be disbursed for each case. Procedures for requesting disbursements to commercial suppliers are discussed in paragraph I.1. of this section.

4. Methods of Disbursement. All disbursements from FFB loans are accomplished by electronic wire transfer. The FFB does not process disbursements by issuance of checks. Disbursements from direct loans are accomplished by issuance of checks through the USAF Disbursing Office at Bolling, AFB.

5. Limitation on FFB Disbursements. Not more than one FFB disbursement shall be requested by the borrower in any single month, except that an advance of \$500,000 or more may be requested at any time.

6. Restriction on Use of FMS Loan Funds for Costs of Transporting FMS Credit-Financed Cargoes.

a. When ocean transportation is used, all items purchased with FMS loan funds must be transported by U.S. flag vessels. (NOTE: FMS loan agreement documents contain provisions for certain waivers which, if approved, permit shipment of up to 50% of FMS loan financed cargo on vessels of the borrowing country, and in certain instances such cargo may be transported on vessels of a third country. Such waivers are discussed later in Section IV of this chapter. In no instance may FMS loan funds be used to pay cost of transportation provided by a vessel of non-U.S. registry.)

b. FMS loan funds may be used to pay air transportation costs only if U.S. flag aircraft are used.

I. DIRECT COMMERCIAL PURCHASES

1. Policies and Procedures. FMS credit financing may be used, when approved by DSAA on a case-by-case basis, for the purchase of defense articles and services, and for direct commercial contracts with U.S. contractors. Generally, if a government-to-government transaction under FMS would be approved for FMS credit financing, a similar direct commercial contract would be approved. In order to insure that FMS credit funds are properly utilized, a careful review of credit financed direct commercial contracts is necessary. The purchasing country must make a formal request to the DSAA, accompanied by a copy of the proposed contract. Upon approval of FMS credit financing, the DSAA notifies both the purchaser and the supplier of its approval action. A sample of the letters to each is at Tables 9-III-4 and 9-III-5, respectively. Prior to disbursement of FMS funds, the supplier is required to provide certifications as specified in Table 9-III-5.

a. FMS Credit Guidelines. Currently there are specific policies ** and procedures in existence in the Federal Acquisition Regulation and the Security Assistance Management Manual which apply to government-to-government FMS credit financed programs. The following FMS credit guidelines establish similar policies and procedures for the use of FMS credits for direct commercial contracts between U.S. industry and foreign countries.

(1) Purchases must be from U.S. incorporated firms licensed to do business in the U.S.

(2) The items purchased must be manufactured in the U.S. and ** be composed mainly of U.S. made items, components, and services. In the event that the purchase of a U.S. end item consists of both U.S. and non-U.S. components and services, only the value of the U.S. components and services will normally be financed. Foreign content which is an integral part of end products manufactured in the U.S. may be eligible for FMS credit financing under certain limited circumstances. Such financing will be considered when the DOD has procured or is procuring (under provisions of the FAR) the same items from the same foreign sources under existing multi- or bi-lateral agreements, Defense Industrial Cooperation agreements, or because the item(s) is not available from U.S. sources. Contracts should specify any non-U.S. origin items, components, or services.

(3) The total value of each contract or purchase order must be * for \$100,000 or more. Purchases of less than \$100,000 will not be approved for FMS credit financing.

(4) Credit financing is discouraged for purchases containing offset provisions as a condition for securing the purchase. Offset provisions are agreements by the seller to make investments or procurements in a country other than the U.S., either concurrent with or subsequent to the purchase for which financing is being requested. No FMS credit funds will be authorized or disbursed to pay for mandatory direct offsets. Mandatory direct offsets are * procurements of a foreign made component required by the foreign government as * a condition of sale, for incorporation or installation in a U.S. produced end item being sold. While FMS credit funds will not be authorized for foreign * produced content, resulting from mandatory direct offset, such funding can be * authorized for the U.S. content.

(5) If the items or services are available from production in the U.S., purchases must be made from the prime manufacturer, assembler or a U.S.-based distributor licensed by the manufacturer who has had a longstanding relationship with the manufacturer and who has been provided with general domestic and/or international sales regions. Funding with FMS credit financing will not be authorized for a procurement agent, broker, import-export firm or other intermediary including a corporation which has been established or licensed for the express purpose of making a particular sale. A request for exception would be considered if sufficient justification is provided by the purchaser as to why the purchase is sought from a firm other than the manufacturer. A list of suppliers and subcontractors for the proposed contract, showing names, addresses and the materiel and services to be procured by the intermediary must be provided as part of the justification. In such cases it is assumed that the purchaser will be aware of the extent of additional cost or markup by the intermediary and such data can be provided upon request.

C. SALES COMMISSIONS AND AGENTS FEES.

1. Determination of a Bona Fide Agent. FAR sets forth the criteria to be used by the contracting officer or head of the procuring activity (HPA) in determining whether an agent(s) is bona fide. When an agent(s) has been determined to be bona fide, based on FAR, the following procedures will be followed with regard to the inclusion of sales commissions and fees in FMS cases:

a. Prior Notification to Purchasing Government. Unless the purchasing country or international organization has indicated to the contrary, all sales commissions and fees anticipated to be included in FMS cases shall be made known to the purchaser prior to or in conjunction with the submission of the LOA to the purchaser. Such advice will include: (a) the name and address of the agent(s); (b) the estimated amount of the proposed fee, and the percentage of the sale price; and (c) a statement indicating one of the following, whichever is applicable: (1) appropriate officials of the U.S. Department of Defense consider the fee to be fair and reasonable; (2) in the event that only a portion of the proposed fee is considered to be fair and reasonable, a statement to this effect together with the rationale therefor; or (3) the U.S. Government cannot determine the reasonableness of the proposed fee. This statement will normally be included as a "Note" to the LOA. Such a Note may also include the contractor's explanation and/or justification for the proposed fee, together with any other data requested by the purchasing country or international organization. The Note will also include a statement that acceptance of the LOA by the purchaser, with inclusion of the Note, will constitute the purchaser's approval of the sales commissions and fees involved.

b. Ex-Post Facto Notification to Purchasing Country or International Organization. When it is not possible to determine prior to presentation of the LOA whether the price quoted for the articles or services includes sales commissions and fees, the purchasing country or international organization will be notified as soon as possible if, in the course of subsequent contract negotiations, it appears that a charge for sales commissions and fees will be claimed by the contractor. This notification will include the information in paragraph a. above, along with a statement that, unless contrary advice is received from the purchasing country or international organization within 30 days of the date of the notification, the Department of Defense will determine whether to accept such a charge as a valid cost in the contract. No sales commissions and fees will be accepted by the contracting officer prior to expiration of the 30 day period.

c. Coordination with the DSAA.

(1) All LOAs which specify that a sales commission or fee is included in the case will be coordinated with DSAA Operations, regardless of the dollar value of the case, prior to an LOA dispatch to the requesting country or international organization. LOAs which carry the notation that no

sales commissions and fees are included in the case do not require coordination with the DSAA except as may be required by other policies and procedures which may be in effect.

(2) All correspondence with a foreign country or international organization on the subject of agents fees relative to P&A, P&R, or a LOA will be coordinated with DSAA Operations prior to dispatch.

(3) All ex-post facto notifications of an agent fee to a foreign country or international organization will be coordinated with DSAA Operations prior to dispatch.

(4) The submission to DSAA Operations of all LOAs or ex-post facto notifications for coordination shall be in writing, shall contain a certification that the agent is bona fide in accordance with the criteria set forth in FAR, and shall provide the rationale for reasonableness or an explanation if the reasonableness of the fee cannot be determined.

2. FMS Agents Fee Ceiling. Allowable costs for sales commissions and fees applicable to contracts for FMS shall not exceed \$50,000 per contract (including all modifications and subcontracts thereto), per country. Although commissions and fees may be less than \$50,000 per contract, all such commissions and fees must be justified and supported based on the criteria cited in the FAR.

3. Disallowance of Agents Fees.

a. No fee shall be accepted by the contracting officer if such fees are disapproved by the purchasing country or international organization.

b. If, in making the determination required by FAR, the contracting officer or head of the procuring activity (HPA) determines that an agent is not bona fide for reasons other than reasonableness of fee, no LOA will be tendered pending withdrawal by the prospective contractor of the fee for such agent from his proposal.

4. Exceptions to Notification Procedures.

a. The procedure contained in paragraph c.1. above will not be followed in the case of Australia, Egypt, Greece, Iran, Israel, Japan, Jordan, Korea (Republic of), Kuwait, Pakistan, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, and the Venezuelan Air Force. At the request of these governments all LOAs issued to these countries will include the following statement:

"All U.S. Government contracts resulting from this Offer and Acceptance shall contain one of the following provisions, unless the sales commission and fee have been identified and payment thereof approved in writing by the Government of (____) before contract award:"

(1) For firm fixed-price contracts or fixed-price contracts with economic price adjustment:

(4) When the designated source has won the foreign purchaser's own source selection competition and the purchaser advises of its desires. Specific evidence as to the competitive process should be included in the justification.

(5) When the country has established a history of procurement for articles or services from a particular prime source and needs to continue procurement from that source to continue standardization of equipment with consequent benefits of logistics support.

b. SAO Responsibilities. As indicated above, the involvement of the SAO in country is encouraged. If after review of a specific country request the SAO determines that a sole source procurement is justified, the original of the sole source request must be forwarded to DSAA Operations for approval. Advance copies, in message format, must be quoted in their entirety, including the date and the signature block when they are forwarded to DSAA Operations for approval. The SAO recommendations and certification must be included. The original request, if approved, will be provided to the implementing agency by DSAA Operations for retention in the contract file.

c. Subcontractor Sole Source Designation. The FMS purchaser may also request that a sole source subcontract be placed with a particular U.S. firm. The DOD Contracting Officer will honor such a request for subcontractor placement on the same basis as indicated above for prime sources. It should be noted that the designation of subcontractors carries a risk which should be brought to the attention of the FMS purchaser. Clearly, the sole source designation for a component constitutes a warranty by the U.S. Government to the prime contractor that the designated item will be suitable for its intended purposes. In the event that problems in the performance or integration of the component are subsequently experienced and are attributable to its characteristics, the specification may be held to be defective in that respect and any increased costs incurred by the prime contractor in correcting or attempting to correct the problem may be recovered by the prime contractor. Since by law such additional costs must be borne by the FMS purchaser, the purchaser should be advised of this potential expense at the time the sole source designation is requested.

d. Out-of-Channels Requests. Requests for sole source procurement received outside of channels outlined in subparagraph 2a above must be forwarded to the Director, DSAA, Operations for approval. The original of the request must be forwarded. When a sole source request is forwarded to DSAA, in message format, the entire text of the country request, including the date and the signature block, must be quoted.

3. Timing of Sole Source Requests. To avoid the additional delay and workload involved in revision of an LOA, request for sole source placement should be made when the request for preparation of the LOA for the defense articles or defense services is transmitted to the U.S. Government. However, if a request can be honored without excessive delay or undue disruption of the procurement/acquisition processes, it may be made and accepted anytime prior to formal acceptance of the LOA by the FMS purchaser.

a. LOA Presentation. The applicable LOA must specifically identify the country sole source designation. The following note will be utilized in the LOA:

Note _____ : Sole-Source Procurement paragraph A1 of Annex A (General Conditions) of the Letter of Offer and Acceptance states in part: "Unless the purchaser has requested that a sole source contractor be designated, and this Letter of Offer and Acceptance reflects acceptance of such designation by the DOD, the Purchaser understands that selection of the contractor source to fill this requirement is solely the responsibility of the Government of the United States (hereafter referred to as USG)." By letter dated _____ the purchaser has requested (Name of specific firm or other private source) be designated as (prime contractor) or (sub-contractor) for (Line/Item(s) _____ of) this Letter of Offer and Acceptance. This note is evidence that DOD has accepted such request of the purchaser and that such designation is required at the written direction of the Purchaser.

b. LOA Amendment. The designation of sole source procurement for an LOA which has already been accepted by the Purchaser would be an exception to policy outlined above. However, if the situation does occur the addition of the note in subparagraph 3 above is required. The note must be added by a DD Form 1513-1, Amendment.

4. FMS Purchaser Involvement. The purchasing activities of defense components and prime contractors shall implement FMS requirements using normal procurement and contract management procedures as set forth in the FAR, other directives and pertinent contractual provisions. Representatives of the FMS purchaser shall not be permitted to review bidders' mailing lists or slates of proposed architect engineer firms, nor shall they be permitted to direct the deletion of names of firms from such lists or slates. They may, however, suggest that certain firms be included. The defense components should fully control the procurement and contracting process and contractual provisions. Representatives of the FMS purchaser will not normally participate in contract negotiations. The defense components shall not accept directions from the FMS purchaser as to source selection decisions or contract terms (other than the special contract provisions and warranties referred to in Condition A.2. of the LOA), nor shall the FMS purchaser be permitted to interfere with a prime contractor's placement of his subcontracts. However, to the extent permitted above, defense components may honor an FMS purchaser's request for the designation of a particular prime or subcontract source for defense articles or defense services. Requests by the FMS customer for rejection of any bid or proposal shall not be honored unless such rejection is justified on the basis of reasons which would be sufficient in the case of a procurement made by the DOD to meet its own needs.

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