DEFENSE SECURITY ASSISTANCE AGENCY
WASHINGTON, D. C. 20301

1 October 1976

In reply refer to:
Transmittal No. 12
DOD 5105.38-M

MEMORANDUM FOR RECIPIENTS OF DOD 5105.38-M, MILITARY ASSISTANCE AND SALES MANUAL - PART I, II, AND III

SUBJECT: MASM I, II, and III Transmittal

Attached is MASM Transmittal No. 12 which updates the procedures to 1 October 1976.

Highlights of this transmittal include chapters on FMS - Policies, Guidelines and Restrictions; General Procedures; FMS - Commercial Availability; and Procedures for Processing FMS Letters of Offer Which Must be Reported to Congress.

Update the portions of your current MASM in accordance with the List of Changes. Specific changes are indicated by a broken line in the margin of the chapter.

This transmittal supersedes the following correspondence/messages:

DSAA Memorandum I-4525/76, 17 May 76. Subject: Revision of Chapter C, Part III (MASM), General Procedures.
DSAA Memorandum I-5118/76, 22 May 76. Subject: Revision of Chapter C, Part III (MASM), General Procedures.
DSAA Memorandum I-5535/76, 27 May 76. Subject: Revision of Chapter C, Part III (MASM), General Procedures.
DSAA Memorandum I-7296/76, 13 Jul 76. Subject: Revision of Chapter H, Part III (MASM), FMS - Commercial Availability.
DSAA Memorandum I-6175/76, 14 Jul 76. Subject: Revision of Chapter C, Part III (MASM), General Procedures.
DSAA Memorandum I-8339/76, 9 Aug 76. Subject: Revision of Chapter C and Appendix B, Part III (MASM), General Procedures and Processing of FMS Letters of Offer Which Must be Reported to Congress.

H. M. FISH
Lieutenant General, USAF
Director,
Defense Security Assistance Agency

Attachments
(1) List of Changes
(2) MASM Update Materiel

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

# LIST OF CHANGES

Remove and insert the following portions of your current MASM:

| *Remove* | *Insert* |
|---|---|
| List of Effective Pages | List of Effective Pages |
| Table of Contents - | Table of Contents - |
| pages xv - xviii | pages xv - xviii |
| Part III - | Part III - |
| B-3 - B-4 | B-3 - B-4 |
| Chapter C | Chapter C |
| H-1 - H-2 | H-1 - H-2 |
| Appendix B | Appendix B |

In addition to the above, post the following pen and ink changes:

Part II -

(1) Chapter C - page C-6 - para 5.d.(1)(a)2.a. - last line of para - change "the major item generic code." to read "the major item and substitute Generic A9C for the major item generic code."

(2) Chapter K - page K-3 - para 3.d.(2)(b) - change "," to "." and delete "or" from sentence.

(3) Appendix A - page A-20 - para 25 - Category S - 3rd line of para - change "in" to "is".

# LIST OF EFFECTIVE PAGES

| *Chapters* | *Page Numbers* | *Date of Latest Revision* |
|---|---|---|
| Table of Contents | xi through xviii | 1 October 1976 |
| **PART I** | | |
| Glossary of Terms and Abbreviations | 1 through 12 | 15 August 1976 |
| DoD Directives and Instructions | 1 through 8 | 1 May 1976 |
| A | A-1 and A-2 | 24 August 1973 |
| B | B-1 and B-2 | 1 May 1976 |
| C | C-1 through C-3 | 15 August 1976 |
| D | D-1 through D-11 | 1 April 1976 |
| E | E-1 and E-2 | 1 July 1974 |
| F | F-1 through F-3 | 1 July 1974 |
| G | G-1 and G-2 | 1 December 1975 |
| **PART II** | | |
| A | A-1 through A-4 | 1 December 1975 |
| B | B-1 through B-3 | Deleted |
| C | C-1 through C-21 | 1 October 1976 |
| D | D-1 through D-15 | 1 July 1974 |
| E | E-1 through E-48 | 15 August 1976 |
| F | F-1 through F-31 | 1 March 1976 |
| G | G-1 through G-24 | 24 August 1973 |
| H | H-1 through H-4 | 1 April 1976 |
| J | J-1 through J-23 | 1 December 1975 |
| K | K-1 through K-5 | 1 October 1976 |
| L | L-1 through L-27 | 1 August 1975 |
| Appendix A | App A-1 through App A-24 | 1 October 1976 |
| **PART III** | | |
| A | A-1 through A-8 | 15 August 1976 |
| B | B-1 through B-4 | 1 October 1976 |
| C | C-1 through C-17 | 1 October 1976 |
| D | D-1 through D-20 | 15 August 1976 |
| E | E-1 through E-10 | 1 July 1974 |
| F | F-1 through F-10 | 15 August 1976 |
| G | G-1 through G-13 | 15 August 1976 |
| H | H-1 through H-4 | 1 October 1976 |
| J | J-1 through H-3 | Deleted |
| K | K-1 through K-17 | 15 August 1976 |
| L | L-1 through L-23 | 1 December 1975 |
| Appendix A | App A-1 through App A-19 | 15 August 1976 |
| Appendix B | App B-1 through App B-5 | 1 October 1976 |

Chapter | Page Number

(4) The President must determine the eligibility of the prospective purchaser on the basis that sales will strengthen U.S. security and promote world peace (Sec. 3(a)(1)).

(5) The purchaser must agree not to transfer purchased items without prior U.S. consent; and the President must report to the Congress before such consent is given (Sec. 3(a)(2)).

(6) Sales, credits, and guaranties shall be cut off for 1 year to any country which seizes or takes into custody or fines U.S. fishing vessels for engaging in fishing more than twelve miles from the coast of that country, unless the President waives the cut off as important to U.S. security or receiving reasonable assurances from the country involved that future violations will not occur and promptly so reports to the Congress (Sec. 3(b)).

(7) Sales may be made only for purposes of internal security, legitimate self defense, civic action, or regional or collective arrangements consistent with the United Nations (U.N.) Charter, or requested by the U.N. (Sec. 4).

(8) No FMS credits or guaranties shall be extended to less developed countries—except Greece, Turkey, Iran, Israel, Republic of China, Philippines, and Korea—to buy sophisticated weapons, such as missiles and jet aircraft for military purposes, unless the President determines that such financing is important to the U.S. national security (Sec. 4).

(9) Sales will be made for the FMS credits repaid only with U.S. dollars (Secs. 21, 22 and 23).

(10) FMS credits must be repaid within ten years after the delivery of the defense articles or the rendering of the defense services (Sec. 23).

(11) Financing of sales of defense articles and defense services by any individual, corporation, partnership or other judicial entity doing business in the United States (excluding U.S. Government agencies other than the Federal Financing Bank) may be guaranteed by the USG. Fees shall be charged for such guarantees. An amount equal to 10% of the principal amount of the contractual liability under guaranty shall be set aside as a reserve from funds appropriated under the Act (Sec. 24).

(12) Export-Import Bank financing of sales to economically less developed countries is prohibited (Sec. 32).

(13) A ceiling on grant aid and credit sales combined (excluding training) shall not exceed $40,000,000 in each fiscal year for African countries. The President may waive this provision when he determines it to be important to the security of the United States (Sec. 33).

(14) FMS credit and guaranty standards and criteria, e.g., interest rates, shall be established by the President in accordance with the foreign, national, security, and financial policies of the U.S. (Sec. 34).

(15) Further sales, credits, and guaranties shall be terminated to any economically less developed country which diverts economic aid, or its own resources to unnecessary military expenditures to a degree which materially interferes with its development (Sec. 35).

(16) The munitions licensing requirement controls the export requirement which controls the export and import of arms, ammunition, and implements of war, including technical data relating thereto remains in effect (Sec. 414, Mutual Security Act of 1954, as amended).

(17) Cash received from FMS and from repayments of FMS credits shall not be used for financing new credits or guaranties (Sec. 37).

(18) Arms control consequences must be taken into consideration when evaluating any FMS sale (Sec. 42(a)(3)).

(19) FMS funds may be used for procurement outside the U.S. only if the President determines that such procurement will not result in adverse effects upon the U.S. economy or the industrial mobilization base (Sec. 42(c)).

(20) Provisions of Atomic Energy Act and 10 USC 7307 (requiring separate legislation for major ship loans and sales) are unaffected by the FMSA (Sec. 44).

(21) Consistent with its resources and the situation prevailing in-country, the MAAG is responsible for supervising and reporting on the utilization by the foreign country of defense articles and services acquired through FMS.

(22) Any foreign country which hereafter uses defense articles or defense services furnished under the FMSA, in substantial violation of any provision of that Act or any agreement entered into under that Act, shall be immediately ineligible for further cash sales, credits or guarantees until such time as the President determines that such violation will not recur, and that, if such violation involved the transfer of sophisticated weapons without the consent of the President, such weapons have been returned to the country concerned (Sec. 3c and 3d).

(23) Sale of defense articles, defense services or training to foreign organizations or units, including foreign police forces, will not be made unless such organizations or units are a part of the national defense forces under the direction and control of the Ministry of Defense. Any requests for exceptions to this policy should be referred to DSAA for decision. Also, prior approval of DSAA is required for the sale of defense articles, defense services or training to foreign organizations or units that are under the direction and control of the Ministry of Defense if they are engaged in on-going civilian police functions.

**b. Significant Reports to the Congress**

(1) Quarterly reports of all new Letters of Offer to sell any defense articles or defense services under the Act, if such offer has not been accepted or cancelled (Sec. 36(a)).

(2) Quarterly cumulative reports of all offers to sell that have been accepted during the fiscal year in which the report is submitted (Sec. 36(a)).

(3) Quarterly cumulative reports of the dollar amounts of sales under direct credits and guaranty agreements made before the submission of each quarterly report and during the fiscal year in which such report is submitted (Sec. 36(a)).

(4) Projections of the cumulative dollar amounts of sales under direct credits and guaranty agreements to be made in the quarter of the fiscal year immediately following the quarter for which the report is submitted (Sec. 36(a)).

(5) Prior notification of the impact on employment and production in the United States of a proposed co-production or licensed production abroad under direct credit or guaranty (Sec. 42(b)).

(6) Notification of any proposed issuances of Letters of Offer in the amount of $25,000,000 or more or for the sale of major defense equipment in the amount of $7,000,000 or more. Further, the Arms Export Control Act provides that the Letter of Offer shall not be issued if Congress, within 30 calendar days of receipt of such notification, adopts a concurrent resolution stating in effect that it objects to such proposed sale, unless the President in his notification to Congress states that an emergency exists which requires such sale in the national security interests of the United States (Sec. 36(b)). See Chapter C, paragraph 15 for processing LOAs in the amount for major defense equipment.

# CHAPTER C

# GENERAL PROCEDURES

## 1. Introduction

This Chapter describes the general context and character of Foreign Military Sales (FMS) and covers the processes and practices with which the U.S. Government decides to sell military equipment to a foreign government—or decides not to.

## 2. Buyer-Seller Relationships

An essential characteristic of Military Export Sales, whether they be commercial or through government channels, is that two governments must agree before a transaction is concluded. Neither government can direct the transaction; either government can shape it only by withholding its approval. Sales are negotiated. Both the buyer and the seller must be satisfied.

This essential characteristic predominates in shaping the conduct and style of Foreign Military Sales. Some of the rules governing FMS are hard and fast. For example, the U.S. Government is required by law to sell only for dollars. Most of the "rules" must be pragmatically applied. Since a sale must be negotiated, rules take the shape of preferences and sales procedures take on the shape of general practice, with the consequence that exceptions to the rule are more easily cited than the rule itself.

## 3. Purpose for Sale of U.S. Military Equipment Abroad

All nations generally prefer to buy at home. All nations express that preference by a willingness to pay a premium or make a sacrifice in terms of price, and/or quality for the privilege of buying at home. But because some goods are simply not available at home, or because the premium of sacrifice is too large, all nations make some of their purchases abroad.

For civil goods, trade patterns reflect the wide diversity of procurement decisions made by private citizens. Military trade patterns reflect the policies and preferences of governments—because the acquisition and use of military equipment is uniquely a governmental function.

In a narrow sense, the U.S. Government sells military equipment abroad because such sale is authorized and encouraged by law—in modern times, since the Mutual Defense Act of 1949. In a broader sense, the U.S. Government sells military equipment abroad for all the basic reasons expressed in Chapter B as well as the following:

a. because the United States, with only 6 percent of the world's population but one-third of its gross national product, is the world's most technological advanced nation;

b. because the United States has maintained a foreign policy and style since World War II of aspiring to promote a world free of dangers and burdens of armament with the use of force subordinated to the rule of law;

c. because the United States has long believed that its national security is inseparable from and dependent upon free world security;

d. because the Unted States has, since World War II, joined with its free world friends and allies in concluding that such security must rest on a strong and well-equipped defense capability;

e. because the Marshall Plan and successor assistance efforts, under which the United States has granted Military Assistance totaling over $37 billion since World War II, combined with the self help efforts of recipient countries, have restored the economies of most free world countries; and

f. because, finally, economically capable nations are now able to pay for the military equipment that they wish to obtain from the United States.

In brief, with many military requirements still unmet and with many modernization requirements accumulating, all the foreign policy, security and military motivations that gave rise to U.S. military grant assistance now motivate the transfers of military equipment on terms of sale.

## 4. General Criteria Regarding Sale of Military Equipment

In general the U.S. Government is willing to sell equipment to such countries at such times as it approves such sales on a case-by-case basis.

a. It is easier to approve the sale of less, rather than more sophisticated equipment; easier to approve the sale of less, rather than more, expensive equipment; easier to approve the sale of equipment adopted by the U.S. forces and promising to the buyer, thereby, the benefits of logistics standardization.

b. The willingness of the U.S. Government to sell military equipment varies country by country in accordance with the military requirement, ability to maintain and use, compatability with existing inventory, and impact on the preconceptions and the actions of the buyer's neighbors.

c. The willingness of the U.S. Government to sell military equipment varies with time and situation; thus changes in terms of foreign policy, diplomacy, economy, finances and security, reflecting the changing world-wide situation can cause reversals in such willingness from time to time.

This is not to say that there are no sources of guidance with regard to the question of the U.S. Government's willingness to sell. The National Disclosure Policy Manual (NDP–1) records the levels of classification which the U.S. Government is willing in general to release to cited countries. Requests for exceptions to policy established by this document are handled by the National Disclosure Policy Board which is chaired by the Department of Defense.

The legislative restraints on Foreign Military Sales are reviewed in Chapter B. These reflect the guidelines and constraints that must be followed prior to the approval of Military Export Sales.

## 5. Channels Used in the Sale of Military Equipment

"Military Export Sales" divide themselves into "Foreign Military Sales" and "Commercial Sales." Foreign Military Sales are government-to-government transactions; for these sales, the Department of Defense purchases equipment from United States firms, takes title to the equipment (or has title to equipment to be sold from U.S. stocks), and sells the equipment to the foreign buyer. For Commercial Sales, the U.S. firm sells directly to the foreign buyer.

Foreign Military Sales do not require the Defense Department to obtain an export license from the State Department if the items are physically exported by DOD; the purchaser requires a license if the items are delivered to the purchaser in the United States. For Commercial Sales, an export license from the State Department is required for the export of all military equipment (i.e., all materiel listed in the munitions list).

Section 38(b)(3) of the Arms Export Control Act states that: "No license may be issued under this Act for the export of any

major defense equipment sold under a contract in the amount of $25,000,000 or more to any foreign country which is not a member of the North Atlantic Treaty Organization unless such major defense equipment was sold under this act." For detailed procedures on commercial sales, see Chapter H.

The Defense Department preference, therefore, is to use commercial channels as much as possible. Nevertheless, some two-thirds to three-fourths of all U.S. military exports actually pass through government-to-government channels for one or more of the following reasons:

a. This GFE likewise cannot be sold directly to U.S. prime contractors for incorporation in weapons systems for sale to foreign buyers.

b. For some special situations, the U.S. Government wishes to exercise the control that is more easily achieved with the FMS channel.

c. Classified equipment, which must in any event be delivered through government channels, is often easier to sell through the government channel.

d. Sales made under supply support arrangements and similar logistics sales arrangements are handled through the FMS channel as the only practicable way of permitting the armed forces of friends and allies to "buy into" the procedure as do using U.S. units.

Direct contact between MAAGs and Military Departments is authorized to provide information to host countries concerning technical advice, data on item configuration and availability, cost factors, and other essential technical and supply data.

## 6. Basic FMS Sales Procedures

Eligible countries and international organizations authorized to procure military equipment and services from the United States are listed in Chapter A. Special approval requirements are prescribed for major capital end-items, maintenance support items, and where emergency procedures or special instructions apply, as shown in Chapter A, Table A-2.

Following are the prescribed procedures and administrative channels for implementating FMS requests:

### a. Normal Sales Channels

(1) Category A countries—*For major end-item or maintenance support items: At the discretion of the requesting country, FMS requests will be submitted either through the country's representatives in the United States, such as the Purchasing Missions, Embassies, or Military Attaches in Washington, or through United States Country Team located in the foreign country, such as the U.S. Embassy, Military Assistance Advisory Group, U.S. Military Mission, or U.S. Defense Attache's Office. Such requests for cash sales will be submitted directly to the appropriate U.S. Military Department concerned with the FMS request.

In all cases where a regional ceiling on FMS has been imposed by statute, information copies of all FMS requests shall be provided in the Department of State.

Category B. Countries: The preferred channel for FMS requests is through the purchasing country's representatives in the U.S., e.g., purchasing mission or military attache, via the Embassy of the country, to the State Department. Requests received by the U.S. mission in country should be sent

* Some countries are listed as Category A for maintenance support and Category B for major end-items.

Special Conditions: Sale of electronic warfare (EW) equipment to NATO countries will, for the most part, follow normal FMS channels. However, special coordination and review by USEUCOM will be required to assure that the equipment to be purchased by one NATO country is compatible with the overall NATO EW concept.

to the DSAA for forwarding to the Department of State.

(2) Military Departments will submit all Letters of Offer for major end-items and for those items or services of a critical or special nature to the Defense Security Assistance Agency (Attn: Director of Operations) for approval prior to submission to the requesting country. Such Letters of Offer include but are not limited to:

(a) all letters of offer to African countries and Iran;

(b) all letters of offer for $1 million or more, and all amendments which increase the value of a case to $1 million or more, for Bahrain, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, the United Arab Republic and the Yemen Arab Republic;

(c) all letters of offer for sale of major weapon systems;

(d) all letters of offer for sale of end-items when the value of the proposed sale exceeds $5 million. Special instructions for letters of offer for sale of end-items in the amount of $25 million or more are contained in Section 15 of this chapter;

(e) all letters of offer for items containing a non-recurring surcharge as an element of cost of the items are prescribed in DOD Directive 2140.2;

(f) all letters of offer for items or services which are not standard in the DOD inventory and for which Research, Development, Test and Evaluation are included as an element to be procured;

(g) all letters of offer involving the sale of Technical Data Packages or similar data which would result in the establishment of a foreign production capability for an item; and,

(h) all letters of offer including agent's fees.

#### b. Out of Channel Requests

When a Military Department receives a request for defense articles or services in a manner not specifically authorized as outlined above, or specified in Chapter A, Table A–2, the request should be forwarded to the DSAA. The DSAA will, in turn, seek State Department approval. With such approval, the DSAA will return the request to the appropriate Military Department for implementation and will advise the originator of this action as well as the proper channel for similiar future requests.

### 7. Furnishing Information on Price, Availability and Condition of Military Equipment to Foreign Governments

#### a. Importance of Accurate Estimates

The terms and conditions of the DD Form 1513 stipulate that any price and availability data shown on the DD Form 1513 are estimates rather than fixed prices or firm commitments. This point continually must be stressed to foreign governments. Nevertheless unexpected and substantial price increases, delivery delays, or the receipt of equipment in poor condition can lead to a foreign government's disappointment or even disillusionment with the FMS system. It is essential that all DOD elements concerned strive for accuracy in the development of price and availability data; the process must include the identification of contingencies which might cause the "best estimate" of price and availability to fluctuate beyond acceptable bounds. The nature of any such contingency or qualification as to the accuracy of estimates normally should be brought to the attention of the FMS purchaser during the offer and acceptance process, unless this would result in disclosure of classified information, U.S. force planning information, or data which otherwise is sensitive to United States interests.

#### b. Discussions with Foreign Governments

Economic, production and budget uncertainties all contribute to Military Department and DSA difficulties in making accurate price and availability estimates. The large volume of price and availability estimates which are processed also increase the likelihood of error. It is imperative that the utmost discretion be exercised by members of

the country team or other US officials in discussions with foreign government officials of price, availability and equipment condition. Discussions of specifics related to FMS cash or credit sales should be based on current program data. Only specific data provided by the Military Departments, DSA or the Defense Security Assistance Agency (DSAA) should be used. In all discussions, it should be clearly noted that price quotations are estimates only and are subject to change. Final prices charged to purchasers under Foreign Military Sales contracts are governed by United States legal requirements. Purchasers must recognize that prices contained in Letters of Offer are in reality estimates, and by law the United States must finally be reimbursed for the actual costs to the U.S. government of the equipment and services provided.

**c. Importance of Accurate Statements of Condition of Equipment.**

The condition of used equipment suggested for consideration should be ascertained, and any commitments made must be explicit in order to preclude misunderstandings. If data on equipment condition is not available in adequate detail, the DOD components concerned should obtain and provide specifics before commitments are made.

**d. Two Basic Categories of Estimates: "P&B" and "P&A"**

Estimates of price and availability information can be grouped into two basic categories. (1) "P&B" estimates which are for planning and/or budgeting purposes only (that is, not at that time meant to trigger the preparation of a DOD Form 1413); and (2) "P&A" estimates which are intended for use in the processing of a DD Form 1513 (Letter of Offer and Acceptance). In order to minimize uncertainty, reduce overall average response time and lighten workload, requests for price and availability estimates shall be treated according to the type they represent.

**e. Processing Requests for P&B Estimates**

(1) Requests for "Planning and/or Budgetary" purposes shall be known as "P&B" requests; responses to such requests shall be known as "P&B" estimates. These estimates should be sufficiently accurate to serve the planning purposes of the particular case, but normally will not be developed as fully or coordinated as widely as "P&A" estimates (see below). Accordingly the workload and response time associated with responding to P&B requests may be less than that associated with P&A requests.

(2) Generally, P&B estimates are developed on the basis of available information, using standard Military Department configurations and program data, unless more specific country data are provided. Standard Military Department factors may be applied to basic system estimates to derive support data. Normally contractor participation in developing "P&B" data is not desired. P&B estimates are specifically not considered to be valid for purposes of DD Form 1513 preparation.

(3) Requests for P&B normally should be sent directly to the cognizant DOD component with an information copy to DSAA, and will be processed by the element of the cognizant Military Department which has designated responsibility for offering FMS DD Form 1513s to a foreign customer. Requests for P&B which are received from countries listed in Category B (see Chapter A) for the item in question shall be coordinated with DSAA prior to processing. Those requests which are referred to OSD shall be expeditiously transmitted to the responsible DOD component. The DOD component concerned will take action to provide the P&B data to the requestor. An information copy of P&B estimates for both Category A and B countries will be provided DSAA.

(4) Responses to P&B requests will state that the data is for planning/budgetary purposes only and is not valid for Letter of Offer (DD Form 1513) purposes. Any potential additional costs which have not been included in the estimates, such as accessorial and transportation changes, spare parts and support equipment and training will be clearly identified. Emphasis shall be placed on timeliness and such estimates should be

transmitted to the requestor not later than 30 days after receipt by the Military Department. If this date cannot be met, an interim reply will be sent.

**f. Processing Requests for P&A Estimates**

Requests which are intended to lead directly to the processing of a DD Form 1513 shall be known as P&A requests; estimates prepared in response to such requests shall be known as P&A estimates. These estimates will be as accurate as possible, and will represent the best estimate of the DOD Component concerned, within the limits of timeliness and practicality. If the last contract price of an item is not known to be valid, it will be revalidated before providing a "P&A" estimate. Such estimates shall be provided within 60 days after receipt of the request by the DOD component concerned. If these dates cannot be met, the DOD component will send an interim reply to the requestor. In the event the estimate is being provided separately from a LOA, it will require DSAA coordination under the same guidelines as apply for the submission of actual Category A and B countries, will be provided DSAA.

Should the Military Department receive a request for P&A estimates from a Category B country, that request should be promptly referred to DSAA. Requests from Category A countries for P&A estimates should be sent directly to the cognizant Military Department with an information copy to DSAA.

**g. Need for Clarity and Completeness in Requesting Estimates**

In all cases requests for P&B or P&A estimates should be as clear and complete as possible, so that they are understood and can be properly estimated by the DOD components concerned. USG officials who initially accept such requests for transmittal to the DOD components concerned should review them to ensure that (1) they are sufficiently specific to be understood and provide a firm basis for preparing estimates, and (2) requests state specifically whether they are for P&A or P&B data. When requests for estimates are received that do not specify whether they are for P&A or P&B data, the recipient initially receiving the request shall notify the requestor of this requirement and hold action on the request until the information is received. Training requirements included in the requests will be definitized and those requests which do not include training requirements will contain a statement to this effect. Other factors which should be included (as appropriate) are type or model designation, any special extra capabilities or features, concurrent and follow-on spares and components, ancillary support equipment, ancillary construction, number of locations, types of maintenance, special maintenance and technical services anticipated, any training facilities and training aids, and the approximate timeframe for proposed delivery. If a request is incomplete, it may be returned to the requestor for the additional information required. Also the requestor should be advised at the time estimates are provided of additional costs which are included in an LOA but may not be included in a P&B estimate, such as PCH&T costs, quality assurance and government provided engineering services, insurance if requested by the customer, medical and billeting costs for students, credit charges, contingencies, and the administrative surcharge.

When appropriate to ensure that complete information is provided, as in the case of a major weapons system, the responsible DOD Component will provide the requestor with a checklist of planning information. In sum, care should be taken to ensure that requests for estimates are clear and complete, and that there is a mutual understanding concerning the elements which make up or are associated with the item requests. In turn, the estimates provided should also be clear and complete, and the components thereof fully described so that there is no misunderstanding between the parties.

## 8. Pricing of FMS Transactions

Defense policy outlined in DOD Instruction 2140.1, 17 June 1975, calls for uniform DOD application of pricing and cost criteria

for sales of Defense articles and services to eligible foreign governments and international organizations. In general terms, this means that DOD pricing and procedures will provide for the charging of all DOD direct and indirect costs, including those referred to as an "administrative charge" for the use of the DOD logistics system.

To assure that all such costs are covered in the DOD pricing, quotations on defense articles and services will be estimated and final adjustments will take place after delivery of the items or rendering of the services. DD 1513, Letter of Offer and Acceptance, provides for such estimated prices.

#### a. Items From Defense Stocks

Pricing of defense items from stock inventories will be handled according to DOD Instruction 2140.1. For example, standard prices will govern when nonexcess materiel is to be sold. This includes all items in the United States military supply system, except such major items as complete ships, aircraft and missiles, space vehicles, and plant and production equipment.

Standard prices will include the current market or procurement cost of the item at the time the price is established or re-established. As a general rule, standard prices for items currently procured are revised once a year and revised when significant changes occur. Reductions in inventory standard prices may be made for sale of nonexcess materiel:

(1) when material is in long supply, or

(2) when there is a determination by the inventory manager that there is an actual difference in utility or desirability of an item due to age, condition or model. Sales of excess materiel will be priced as prescribed in DOD Instruction 2140.1.

#### b. Items From New Procurement

Prices of defense articles and services procured for eligible foreign governments or international organizations pursuant to Section 22 of the FMS Act will be cited to recover full DOD contract costs (including the cost of government materiel). In addition, the purchaser shall be required to obligate itself to pay any damages or costs that may accrue from the purchaser's cancellation of the contract. Authorized surcharges specified in Section 9 below will be added to the contract cost and included in the billing.

In general, defense articles shall be priced on the same basis as the cost principles used in pricing defense contracts for items of DOD use. However, recognition shall be given to reasonable and allocable contractor costs which are justified in connection with a particular sale (see ASPR 6–703.3).

The cost of deviations from United States configuration and special technical data desired by a foreign government will be included as a charge to the foreign government additional to the average unit standard price or other U.S. normal charges.

## 9. Authorized Surcharges

Prices of defense articles and services sold to eligible foreign governments and international organizations will include the following charges:

#### a. Accessorial Costs

These represent certain expenses incident to issues, sales, and transfers of materiel which are not included in the standard price or contract cost of materiel, such as:

(1) Packing, handling and crating costs (known as PCH&T costs when transportation is included). These are costs incurred for labor, materials, or services in preparing the materiel for shipment from the storage or distribution points.

(2) Transportation costs. Inland and ocean transportation costs, representing shipments by land, sea, and air, inland and coastwise waterways, vessel or air, and including parcel post via surface or air.

(3) Port loading and unloading costs. These are costs for labor, materials or services at ports of embarkation or debarkation.

(4) Prepositioning costs. Supply distribution costs incurred at locations outside

the United States in anticipation of support to other authorized customers. These costs are applicable when shipments are made from overseas storage and distribution points, except that no positioning costs shall be assessed on "long supply" stocks.

#### b. Administrative Charges

An administrative charge for the use of the DOD logistics system shall be added to prices of contractual services and nonexcess materiel sold to eligible foreign governments and international organizations, for the purpose of recovering the DOD costs. Such a charge will be made in lieu of separate computations of charges for the costs of general management and administrative expenses pertaining to supply and procurement and services and other DOD costs (except Seat of Government costs).

The rate charge for administrative costs will be prescribed in DOD Instruction 2140.1, 17 June 1975. Supply support arrangements will include an administrative charge of 5 percent added to the basic sales prices of contractual services and materiel to be provided. Foreign Military Sales other than supply support arrangements will include an administrative charge of 2 percent added to the cost price of contractual services, new procurements, or materiel from stock to be provided.

Rates for accessorial and administrative costs will be subject to review at least every two years. Requests for exceptions to the pricing policies perscribed herein, in the case of unresolved disputes, or deviations from any price or service charge when it can be shown that such deviations is in the best interests of the United States Government shall be submitted through the Director, DSAA, to be forwarded to the Assistant Secretary of Defense (Comptroller) for resolution or approval. Such requests will contain the basis or justification and supporting data for the exception.

#### c. Nonrecurring Cost Recovery

Defense policy, DOD Directive 2140.2, 17 January 1974, calls for the inclusion of DOD nonrecurring costs associated with the research, development and production of major defense equipment offered for sale to foreign governments and international organizations. The calculated equitable share of such costs to be borne by the foreign buyer shall be included in the sales price unless waived as described below.

Waivers, in whole or in part, can only be made in accordance with the conditions set forth in DOD Directive 2140.2, Section VI. Requests for such waivers will be submitted to the Director, DSAA.

#### d. Asset Use Charge and Rental Charge for Government-owned Tooling

Sales of defense articles which involve the use of government-owned facilities, shall be priced to include a 4 percent asset use charge in accordance with DOD Directive 2140.1, Section X. Sales of defense articles which involve the use of government-owned tooling shall be priced to include a rental charge for the use of the government-owned tooling and equipment in accordance with the provisions of ASPR 13-403. Waivers of these charges can be made only in accordance with the provisions of DOD Directive 2140.1, Section X, for the asset use charge, and ASPR 13–406 for the rental of government-owned tooling and equipment.

### 10. Diversion of DOD Materiel

Defense policy calls for a determination to be made that sale of a defense item will not degrade U.S. defense efforts by taking needed equipment from U.S. stocks or by disrupting deliveries of critical items from production for U.S. forces, unless security or foreign policy requirements are such that sale of the item is in the overall U.S. national interest.

The Secretary of Defense on 20 September 1972 prescribed policies for allocating Defense materiel between U.S. forces and international security requirements to meet competing demands in a period of declining materiel acquisition programs. These include:

(1) To the maximum extent possible, allocations of materiel shall be made within the normal priorities structure—the Uniform Military Materiel Issue and Priority Systems (UMMIPS).

(2) Presidentially-directed, or Secretary of Defense-initiated materiel allocations shall be accorded sufficient priority through diversion of assets from other programs to assure accomplishment of the directed allocation within the time period specified.

(3) High priority international requirements (such as FMS requests) may be met by diverting or withdrawing equipment from U.S. active or reserve forces providing the operational readiness posture of these forces is not significantly lowered and payback can be accomplished in a reasonable period of time. Such determination may be made by the Military Departments.

(4) Materiel being procured or stocked specifically for FMS may be diverted to meet higher priority foreign requirements or urgent needs of U.S. Forces with the prior concurrence of the Director, DSAA, who will, as appropriate, obtain policy guidance from the ASD (ISA).

(5) All requests or recommendations for diversions of FMS equipment will be referred to the Director, DSAA. In those instances where agreement cannot be reached with DSAA concerning the use of foreign program assets, or diversion of defense materiel, the matter will be referred to the ASD (I&L) for review of available options and recommended courses of action and for decision by the Secretary of Defense.

## 11. Insurance

Purchasers will self-insure FMS shipments or obtain commercial insurance without any right of subrogation of any claim against the United States. In extraordinary situations, and upon specific request by the purchaser and receipt of written authorization from the purchaser for the designated departmental procurement activity to act as the agent of the purchaser to obtain pricing quotes and, if necessary, procure the insurance required, insurance may be obtained by the military department concerned and billed as a separate line item on DD Form 1513. For FMS cases already implemented, authorized insurance coverage can be added by amendment. Whenever a Military Department does provide these services to a purchasing country or organization, it should point out that this is an exceptional arrangement, and should encourage and assist that purchaser to make its own arrangements for insurance for subsequent cases, as feasible.

## 12. U.S. Response to Requests for "Offset" Procurement

The Defense Department prefers that sales be negotiated without "offset" procurement arrangements wherever possible and that the need for including an "offset" agreement be considered only on a case-by-case basis. Ift it is decided in any given case that such an agreement should be considered, the principles set forth below should govern.

"Offset" procurement is the term used to cover the offering, on a selective and case-by-case basis to foreign governments, of opportunities to respond to selected DOD procurement requirements. Experience to date with offset arrangements indicates that foreign countries find it difficult to compete effectively for enough U.S. business to achieve the offset procurement targets which are provided under the agreements. DOD has not had the need for a complete weapon system large enough or sophisticated enough to be procured from a foreign country to make such offset procurements sizable and attractive.

There are practical logistical problems involved in considering the procurement of major items or any quantity of sub-systems or components from a foreign source. Most important of these is the need for the U.S. to maintain a viable mobilization base within the U.S., which reduces or effectively eliminates a large quantity of items to be offered for foreign bidding. There also is the undesirability of considering foreign sources as mobilization base producers (other than Canada) for major items, assemblies, and critical components. We also have the problem of assuring proper quality of the defense items.

The administrative process for selecting items for competition has been lengthy and involved, as has been the procedure in waiving the bid differentials as the "Buy American" and the 50 percent gold flow rule. Unsuccessful U.S. producers in such competition also create many political and other pressures in opposition to any waiver of "Buy American" and "gold flow" differentials, especially in times of a declining DOD budget. This is understandable, inasmuch as such companies are not themselves realizing any direct benefits from the sale to a foreign country.

Nonetheless, if it is decided that such offset arrangements should be considered, due to the magnitude of total sales involved or for other specifically justified reasons, the following basic guidelines will be applied:

(1) There must be, as a minimum, a plan for a realistic implementation of the offset agreement.

(2) DOD will urge the contractor to accept all or a major portion of the offset obligation.

(3) The initiative for offset procurement arrangements should be taken by the buying government.

#### a. DOD Participation in Offset Procurement

In the current highly competitive international market, and in view of the fact that offset procurement arrangements are being used rather widely in the free world sale of military equipment, there is justification for some flexibility in our present practice of discouraging offset procurement arrangements. DOD willingness to be flexible is affected by the levels current and projected net defense expenditures in the potential buying country. DOD participation in such offset procurement should be governed by the following principles, in order of applications:

(1) If an offset is necessary, DOD will, first, consider that it is the responsibility of the U.S. company or companies and their subcontractors involved in producing the equipment who would thereby benefit from the sale to undertake offset procurement from the buying country.

(2) If the DOD is convinced that the company or companies and their subcontractors involved in selling the equipment to the foreign country are not able to provide sufficient procurement to fulfill the offset, then DOD participation will be considered. It will first be limited to any government-furnished-equipment (GFE) provided to the U.S. contractors or subcontractors involved in the sale. The Buy American Act and gold-flow differentials will not be applied in evaluation of foreign bids.

(3) If it is not possible to restrict the DOD participation to foreign competition for GFE items involved in the item being sold, an effect will be made to restrict the release of invitations to bid to equipment in the same general industrial category as the item being sold. An alternative is to place some portion with firms that otherwise have received benefits of other Foreign Military Sales.

(4) The next preference is to enter into arrangements on selected items using non-appropriated funds. This, however, has limited potential because of the comparatively small amount of non-appropriated funds available.

(5) The least preferred method of filling the offset procurement arrangement is to permit foreign competition for items not directly related to the equipment being sold.

Except in special circumstances, fulfillment of reciprocal procurement obligations will be subject to two basic conditions:

(1) that the foreign source fully satisfies DOD requirements for performance, quality and delivery; and

(2) that procurement from the foreign source would cost no more than would procurement of comparable U.S. items eligible for contract award. To ensure that DOD reciprocal procurement obligations are effectively and expeditiously handled, arrangements with foreign governments should reflect a general plan for implementation.

Furthermore, DOD reserves unto itself the unilateral right to select items suitable for offset procurement which will be opened for foreign source competition. For such items

that are selected, DOD will assure the foreign source competitors that a waiver of the Buy American Act and the gold-flow differentials will be granted to the foreign source competitor if the procurement conditions noted above have been properly met. Offset proposals and serious queries relating thereto should be referred to the DSAA Directorate of Operations.

#### b. Interdependent Research and Development

Another area to be considered in possible offset arrangements is in conjunction with Interdependent R&C projects. The Defense Department has been pursuing with its major allies a policy of interdependent R&C aimed at improving mutual planning and acquisition of our respective national R&C programs, in order to decrease possible duplication and to increase effectiveness of the programs. A number of major factors and considerations encourage interdependent R&C programs.

(1) The position of the U.S. Government that our allies must share a large portion of the free world defense burden.

(2) The declining R&C budgets of the U.S., which puts a premium on achieving a greater R&C return per R&C dollar spent. By reducing duplication in R&C programs among our allies, greater use of the technical resources of the free world can be realized. U.S. R&C dollars thereby saved are available for other critical R&C areas.

(3) Significant advances in the technical capability of our allies. Transfer of some of this advanced technology and operational capability to the U.S. can be accomplished on a faster schedule and with less expense than through our own duplicated development.

The Defense Department intends to utilize allied developments only in those instances where it is clearly advantageous for the U.S. to do so. Production of these items, however, will be accomplished in the U.S. except where special circumstances justify overseas production. For example, when immediate hardware availability is required for operational reasons, when the production buy is too small to be economical for new production line start-up, or if reciprocal procurement obligations (offset arrangements) make it attrictive to delay transition from off-the-shelf procurement to domestic production. Even in these circumstances, offshore procurement should be terminated as soon as such reasons are no longer controlling.

## 13. Release of Technical Data

#### a. Approval to Release Technical Data

All requests for Technical Data Packages (TPDs) must be approved by the Director, DSAA. Accordingly, all requests received by the Military Departments will be referred to DSAA for review. TDPs will normally not be released unless it has been determined to be in the U.S. interest to do so and alternative means of meeting the requirement are considered to be less desirable.

Requests for TDPs normally fall in one of two categories: a request for data for use in maintaining or operating an items of U.S. equipment, or a request for data for use in producing an item of U.S. equipment either for the purchaser's own use or for sale to third countries. Referrals of requests to DSAA should include the appropriate information relevant to the intended end use of the TDP as outlined in paragraphs 13b and 13c below. A formal statement in writing from the purchaser as to the intended end-use of the TDP must be obtained in every case.

TDPs furnished to foreign governments under the FMS program will be provided on a reimbursable basis only, by means of a formal LOA (DD Foarm 1513) which will cover, as a minimum, the full costs for preparation, reproduction and handling of the TDP in accordance with the pricing policies set forth in paragraph XIV A of DOD Directive 2140.1. In addition, if the TDP is intended to be used for production purposes, a charge for royalty fees in accordance with DOD Directive 2140.1, Section XVI will be included as a separate line item on the LOA unless waived by the Director, DSAA under provisions of paragraph 13c below.

**b. Sale of TDPs for Maintenance and Operational Purposes**

In the event that a TPD is requested for purposes of maintenance or operation of an item of U.S. equipment, the Military Department having cognizance over the item in question will provide to the Director, DSAA, the following:

(1) a copy of all pertinent correspondence with the purchasing government;

(2) a statement as to whether the requirement would be met by means of pertinent DOD instructions, maintenance or technical manuals, or other similar publications;

(3) in-country inventory of major end-items requiring maintenance support from the requested TDP;

(4) information as to classification of the TDP and as to proprietary rights involved, if any; and,

(5) the Military Department's recommendation concerning the request.

In the event that release of the TDP is approved, care will be exercised to insure that:

(1) The TDP bears clear identifying markings stating any restriction, such as classification or proprietary rights, which apply.

(2) The LOA and any other transmittal correspondence clearly states that the TDP is released for the purpose stated by the requesting government, and may not be used for production purposes without the prior consent of the U.S. Government.

**c. Sale of TDPs for Production Purposes**

In the event that a TDP is requested for purposes of producing an item of U.S. defense equipment, either for use of the purchasing government's own forces, or for sale to third countries, the Military Department having cognizance over the item in question will provide to the Director, DSAA, in addition to the information outlined in paragraphs 13b(1), (4) and (5) above, the following data:

(1) quantity to be produced;

(2) intended end disposition of item to be produced, to include names of third country purchasers if item is for third country sale;

(3) current status of U.S. production and stock on hand of item(s) involved;

(4) U.S. and foreign production history of item for last 5 years;

(5) future U.S. production plans;

(6) current U.S. source(s) of supply for item;

(7) current cost to U.S. Government of the item, and whether it is produced in-house or under government contract;

(8) security classification of item to be produced;

(9) other countries authorized to produce the item;

(10) impact that sale may have on U.S. Foreign Military Sales, and on other programs or projects; and,

(11) whether intended recipients of production have previously obtained the item to be produced, and quantities obtained, actual or estimated.

Normally, in all cases where the purchasing country intends to use the TDP for production purposes, a royalty fee will be assessed. This assessment will be done in accordance with the following rules unless the Director, DSAA, determines that special circumstances require a departure therefrom in a specific case:

(1) Where the foreign applicant intends to produce the article for "in-country" consumption only, a royalty fee of 5 percent of the latest or current U.S. unit sale price for each unit produced will be charged.

(2) Where the DOD has specifically approved "in-country" production for third country sale, a royalty fee of 8 percent of the latest or current U.S. unit sale price for each unit produced for third country sale will be charged.

(3) The charge for "in-country" consumption only may be waived when the foreign applicant is a current recipient of grants under the MAP materiel program.

(4) Where the item to be produced is obsolete and no longer being manufactured for United States Military Departments and/or is not available in the Military Departments inventories, the 5 percent royalty fee

for "in-country" consumption or the royalty fee of 8 percent where the DOD has specifically approved "in-country" production for third country sale may be reduced. The authorized sale price will be determined by DSAA in collaboration with ODDR&E based on cost of the most similar U.S. items in production.

(5) Where the pricing of the TDP is subject to an international agreement to which the DOD is a party or is otherwise bound, the sale will be determined consistent with the terms of that agreement.

(6) Where the item(s) to be produced is in long supply in a U.S. military department inventory, or if the item is being produced in the United States, requests for foreign production of the item(s) will normally be denied.

(7) In the case of TDPs related solely to processes, machinery or other items to be used in production, rather than to an end-item itself, and sold separately from a TDP for an end-item, the royalty fee will be based on the production of the end-item using the related TDP. In such cases, the authorized production under the TDP and other terms and conditions will be specified as in the case of TDPs for manufacture of end-items. However, if TDPs for processes, machinery or other items related to production are sold in conjunction with or subsequent to the sale of a TDP for manufacture of a related end-item, only one royalty will be charged based on production of the end-item.

(8) The Military Department shall include on the face of the Letter of Offer and Acceptance (DD Form 1513) which sets out the royalty fee the following notes:

(a) "The above stated royalty fee applies to the above quantity only. Any production in excess of the above quantity will be subject to a recalculation of royalty fee and the issuance of a new or amended Letter of Offer and Acceptance.

(b) Where the TDP is to be used to manufacture items for in-country use only add: "The items to be manufactured for in-country use only will not be sold or transferred to a third country without the written consent of the U.S. Government and the execution of a new or amended Letter of Offer for an additional royalty fee."

(c) Where the TDP is to be used to manufacture items for third country sale add: "The items to be manufactured for third-country sale will not be sold or transferred to third countries other than . . . (here insert country name/names) . . . without the written consent of the U.S. Government."

(9) In all cases, care will be taken to insure that the TDP bears clear identifying markings stating any restrictions, such as classifications, which may apply.

(10) For reporting purposes, the royalty fee line on the LOA will be reported as code R9D in the 1100 system.

## 14. Principles Regarding Coproduction Projects

Defense policy, expressed in DOD Directive 2000.9, dated 23 January 1974, states that initiation of coproduction project agreements will be encouraged and supported by all elements of DOD under the following circumstances:

**a.** When they advance the ability of participating countries to improve their military readiness through expansion of their technical and military support capability, while promoting U.S.-allied standardization of military materiel and equipment thus generating uniform logistics support and multi-national operational capabilities.

**b.** When they directly benefit the U.S. through increased capability to support the deployment of U.S. forces, strengthen international military operations in times of emergency or hostilities, encourage the unitization of common military materiel, and improve mutual support capability of friendly allied nations.

**c.** When they supplement and reinforce the U.S. FMS program.

**d.** When they are in the best interest of the U.S.

A coproduction project may be limited to the assembly of a few end-items with a small

input of local country parts, or it may extend to a major manufacturing effort requiring the build-up of capital industries. Coproduction is a program under the aegis of the U.S. Government, by diplomatic or DOD agreement, either directly through the FMS program or indirectly through specific licensing arrangements by designated commercial firms, which enables an eligible foreign government, international organization, or designated foreign commercial producer to acquire the "know-how" to manufacture or assemble, repair, maintain and operate, in whole or in part, a specific weapon, communication or support system, or an individual military item.

The "know-how" furnished through coproduction programs may include research, development production data and/or manufacturing machinery or tools, raw or finished materiel, components or major sub-assemblies, managerial skills, procurement assistance or quality-control procedures. Third country sales limitations and licensing agreements are also included, as required. Thus coproduction programs may be limited or extensive depending upon the major objectives to be attained.

Coproduction projects may be initiated by DSAA or, subject to prior approval of DSAA, by the Military Departments, the Military Assistance Advisory Groups, and by authorized representatives of foreign governments and international organizations. The cognizant DOD component will ensure appropriate coordination will DSAA and furnish technical and negotiating assistance as required. After such agreements are signed, the appropriate DOD component will perform the necessary managerial and reporting functions.

In all cases, as prerequisite, the restrictions imposed by Section 42(b) of the FMS Act will be complied with, namely: "No credit sale shall be extended and no guarantee shall be issued in any case involving coproduction or licensed, production outside the United States origin unless the Secretary of State shall, in advance of any such transaction, advise the appropriate committees of the Congress and furnish the Speaker of the House of Representatives and the President of the Senate with full information regarding the proposed transaction, including, but not limited to, a description of the particular defense article or articles which would be produced under license or coproduction, and the probable impact of the proposed transaction on employment and production within the United States."

### 15. Processing Letters of Offer for $25 Million or More or for Major Defense Equipment of $7 Million or More

In compliance with Section 36 of the Arms Export Control Act, Congress must be provided with notification of all Letters of Offer to sell any defense articles or services for $25 million or more, or any major defense equipment of $7 million or more, before such Letter of Offer is issued. OSD General Counsel has determined that the term "Letter of Offer" used in the AEC Act pertains to any proposed sale of defense articles or services to any foreign government, whether or not the initial document (or set of documents) to be used to consummate the sale is a DD Form 1513 or a document bearing another name. If a document other than a DD Form 1513 is used for this purpose, a DD Form 1513 shall be subsequently executed to conclude the final details of the agreement unless an exception is authorized by the Director, DSAA. The statutory requirement for reporting, as well as the requirement for advance notification to Congress, extends to any undertaking by the Department of Defense to establish an FMS transaction. This includes but is not limited to FMS transactions embodied in the following:

(1) Memorandum of Understanding for Coproduction of military items,

(2) Cooperative Research and Development Agreements, and

(3) Providing specific items or services under any existing general agreements, such as the Engineering Assistance Agreement entered between the Army Corps of Engineers and the Saudi Arabian Government in 1965.

In order to provide the Congress with sufficient time to review such cases, DSAA has agreed to provide the Congress with 20 days advance notification of such cases prior to the formal submission of the statutory notification. The Arms Export Control Act provides that the Letter of Offer shall not be issued if Congress, within 30 calendar days after receiving the notification, adopts a concurrent resolution stating that it objects to the proposed sale, unless the President, in his notification to Congress, certifies that an emergency exists which requires such sale in the national security interests of the United States. DSAA is responsible for preparing and submitting the reports to the Congress. To minimize delays in processing such notifications, consistent with the legislative and other requirements, the procedures at Appendix B are placed in effect.

## 16. Sales Commissions and Fees

ASPR 1–505 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 ASPR 1–505, 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 government 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 Letter of Offer and Acceptance (Form DD 1513) 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 Letter of Offer. 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 governments. The Note will also include a statement that acceptance of the Letter of Offer by the purchasing government, with inclusion of the Note, will constitute that governments' approval of the sales commissions and fees involved.

### b. Ex-Post Facto Notification to Purchasing Government

When it is not possible to determine prior to presentation of the Letter of Offer whether the price quoted for the articles or services includes sales commissions and fees, the purchasing government 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 government within 30 days of the data of the notification, the Department of Defense will determine whether or not 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 DSAA

All Letters of Offer which specify that a sales commission and fee is included in the case will be coordinated with DSAA, regardless of the dollar value in the case, prior to LOA dispatch to the requesting government. Letters of Offer which carry the notation that no sales commissions and fees are included in the case do not require coordination with DSAA except as may be required by other policies and procedures which may be in effect.

In addition, all ex-post factor notifications will also be coordinated with DSAA prior to dispatch.

In each such instance, the submission of the LOA or notification to DSAA for coordination shall be in writing, shall contain a certificate that the agent is *bona fide* in accordance with the criteria set forth in ASPR 1–505, and should provide the rationale for reasonableness or an explanation if the reasonableness of the fee cannot be determined.

#### d. Disallowance of Agent's Fees

No fee shall be accepted by the contracting officer if disapproved by the purchasing government.

If, in making the determination required by ASPR 1–505, 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 Letter of Offer will be tendered pending withdrawal by the prospective contractor of the fee for such agent from his proposal.

#### e. Exceptions

The procedure contained in paragraph a above will not be followed in case of Australia, Iran, Israel, Japan, Jordan, Kuwait, Pakistan and Saudi Arabia. These governments have requested that the following statement be included in all Letters of Offer:

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

(A) For firm fixed price contracts or fixed price contracts with economic price adjustment: The contractor certifies that the contract price (including any subcontracts awarded hereunder) does not include any direct or indirect costs of sales commissions or fees for contractor sales representatives involved in Foreign Military Sales to the Government of (_____).

(B) For all other types of contracts: Notwithstanding any other provision of this contract, any direct or indirect costs of sales commissions or fees for contractor sales representatives involved in Foreign Military Sales to the Government of (_____) shall be considered as an unallowable item of cost under this contract."

Accordingly, approval of sales commissions and fees must be sought and obtained prior to contract award unless the contractor certifies that no such fee/commission is included in the cost of the contract.

#### f. Proprietary Information

Inclusion of a "Note" to the Letter of Offer with respect to sales commissions and fees shall not be deemed, with respect to distribution and availability of Letters of Offer, as altering the proprietary nature, if any, of such data for the purpose of 18 U.S.C. 1905.

## 17. Engineering Review of U.S. Provided Foreign Communications Systems

The following guidance applies to all U.S.-provided foreign communications systems.

#### a. Projects provided or Financed Under Security Assistance

For all foreign communications systems provided or financed under Security Assistance requiring fixed communications facilities, such projects are fully coordinated with the Defense Communications Agency (DCA). DCA should be notified at the earliest stages of planning and kept informed during all phases of implementation. This coordination specifically includes providing DCA with the results of initial surveys as well as subsequent detailed engineering plans and significant changes thereto. Projects requiring such coordination include those which contain fixed communications elements only as a portion of the overall project. The purpose of this coordination is to determine the extent to which the communications systems involved are compatible with the Defense Communications System (DCS) and if use of the systems by the DCS would be beneficial to the

U.S. The results of DCA review of these projects will be submitted to DSAA through the JCS.

**b. Commercial Communications Projects**

In addition to projects covered by paragraph a above, foreign communications projects being provided by U.S. industry that come to the attention of military departments or other DOD elements should be brought to the attention of DCA in order that plans can be obtained and reviewed for compatibility with DOD communications systems.

## 18. Patent Rights

In the event that an individual, commercial entity or foreign country should assert ownership of a foreign patent on an item intended for sale or being sold under FMS, and there are reasonable grounds for the belief that a purchasing country may be subjected to a possible claim for foreign patient infringement, the Military Departments in coordination with DSAA, are authorized to make such a sale, provided a "note" is added to the DD Form 1513 for the FMS case advising the purchaser of the existing allegation of a foreign patent right. The note should read substantially as follows:

"(Name of individual, commercial entity or foreign country, and address.)" has alleged that he/they own exclusive foreign patent rights in certain components of the (Name of FMS item) offered herein. In this connection, the Purchaser's particular attention offered herein connection, the Purchaser's particular attention is invited to Conditions A.3 and C.1 on the reverse of this DD Form 1513.

## 19. DOD P&A Versus a Commercial Proposal

There are cases when a foreign government has requested and received Letters of Offer, 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 Letter of Offer. The Letter of Offer should not be withdrawn unless the foreign government has requested such action. In no case should the Letter of Offer be withdrawn by request from commercial sources without prior concurrence from DSAA.

The Military Departments should not, except under unusual circumstances where such action is specifically approved by DSAA, engage in comparison studies requested by a foreign government of an FMS offer versus a commercial proposal.

# CHAPTER H

# FOREIGN MILITARY SALES—COMMERCIAL AVAILABILITY

## 1. Purpose

This chapter establishes guidelines for sale by the Department of Defense of articles and services which are commercially available. Provisions of this chapter apply to all elements of the Department of Defense.

## 2. Legislative Provisions

a. The Foreign Military Sales Act, as amended, states that: "It remains the policy of the United States to facilitate the common defense by entering into international arrangements with friendly countries which further the objective of applying agreed resources of each country to programs and projects of cooperative exchange of data, research, development, production, procurement, and logistic support to achieve specific national defense requirements and objectives of mutual concern," and that "all such sales be approved only when they are consistent with the foreign policy interests of the United States."

b. The Act also states: "No license may be issued under this Act for the export of any major defense equipment sold under a contract in the amount of $25,000,000 or more to any foreign country which is not a member of the North Atlantic Treaty Organization unless such major defense equipment was sold under this act."

## 3. Department of Defense Policy

DOD policy regarding these provisions of legislation is to encourage the use of commercial sources by foreign purchasers provided that the use of such sources is not contradictory to the objectives and limitations outlined in paragraph 2 above.

Responsibility for determining whether, within the context of this chapter, an item or service is to be offered for sale by DOD rests in the first instance with the Military Department processing the foreign government's purchase request. Questions of interpretation should be referred to DSAA for decision.

Nothing in this chapter will be construed as precluding DOD from making any sale, regardless of the defense articles or services involved, that is approved on a case-by-case basis by the Director, DSAA.

## 4. Guidelines for Determining Commercial Availability

a. Items or services will be considered to be available from commercial sources when, as a practical matter, such sources are fully capable of meeting the foreign country's requirements and the following criteria are met:

(1) The foreign country has the necessary technical and administrative capability to make a prudent purchase of the item or service directly from U.S. commercial sources. A previous commercial procurement of the same or similar item or service

could be one form of evidence of such capability.

(2) There is no specific government-to-government agreement approved by the Director, DSAA, or higher authority, covering such sale.

**b. Special Cases.** In addition, provided the above criteria are met, an item or service will be considered to be commercially available under any of the following conditions.

(1) The item or service has been determined previously to be commercially available to other foreign purchases; provided, however, that such previous determination shall not be considered as making the same determination mandatory in any given case.

(2) The Military Department concerned is aware of a previous request by the purchasing country for price and availability data from a U.S. commercial source.

(3) The defense item or service requested is covered by a known exclusive licensing arrangement in the territory where the purchasing government is located.

(4) The sale by the USG of the defense item requested would involve known foreign patent infringement.

(5) The items are not directly related to a requirement for support or maintenance of military equipment (e.g., furniture, cement), providing such items are normally traded by and used by civilian enterprises.

## 5. Guidelines for Sale Through FMS Procedures

In the absence of special circumstances, the following types of cases normally will be sold through FMS procedures if requested by the foreign purchaser:

**a.** Classified articles and services.

**b.** Supply Support Arrangements and similar follow-on support sales arrangements.

**c.** Surplus personal property including MAP disposable property.

**d.** Department of Defense long supply stocks when, in the judgment of the Military Department concerned, reduction of such stocks is desirable.

**e.** Repair parts or components normally carried in DOD stocks, and support services, when, in the judgment of the Military Department concerned, such parts, components or services are required for follow-on support of end items previously sold by the Military Department.

**f.** All ammunition rounds above 20mm in caliber.

**g.** All aircraft flares which are not procured in complete form from commercial sources.

**h.** All defense items which contain components as Government-Furnished Equipment (GFE).

**i.** Any defense item normally procured by the Military Department which the U.S. producer requests be sold through FMS channels provided that such FMS does not infringe on a known exclusive licensing arrangement covering the territory in which the purchasing government is located.

**j.** Any defense item not normally procured or type-classified by the Military Departments, when the FMS is requested by a foreign government and the U.S. producer agrees, provided that such FMS does not infringe upon a known exclusive licensing arrangement covering the territory in which the purchasing government is located.

**k.** Any defense item or service known to be available from two or more producers which a foreign government insists on procuring through FMS procedures for which the foreign government designates a sole-source producer. In such cases the foreign government will be requested to negotiate its own price directly with the designated

## APPENDIX B

## PROCEDURES FOR PROCESSING FMS LETTERS OF OFFER WHICH MUST BE REPORTED TO CONGRESS

The following procedures will be followed in preparing and processing Letters of Offer for $25 million or more, or for the sale of major defense equipment for $7 million or more.

(1) An advance notification will be provided to DSAA in the format shown at Figure App. B–1 for any current case projected to be in the amount of $25 million or more or for any current case for the sale of major defense equipment for $7 million or more, for which either:

(a) A Letter of Offer/Acceptance (LOA) is under preparation; or

(b) A Letter of Intent (pursuant to DSAA memorandum I–12188/75, 24 November 1975) is authorized to be accepted by a military department.

The advance notification will be submitted to DSAA/TC through DSAA/TS within 10 working days after preparation of an LOA is initiated, or whenever an LOA already under preparation appeals likely to exceed the $25 million or $7 million for major defense equipment threshold. This advance notification will be treated as Confidential; however, the formal submission of the LOA will remain in accordance with established classification procedures. No statutory notification will be submitted to the Congress until the advance notification has been provided. Any exception must be for extraordinary circumstances and must be fully justified.

(2) Following the submission of the advance notification provided for in para 1 above, a copy of each letter of offer for $25 million or more or for major defense equipment for $7 million or more, will be furnished to Comptroller, DSAA, after coordination by the Directorate of Operations, DSAA, when the letter of offer is in such form that it would be signed and issued to the purchaser but for these requirements. Blocks 5 and 6 will be left incomplete on the original and on all copies of the DD Form 1513 at this stage of processing. Block 4 (Offer Expiration Date) should be completed with a date no earlier than 90 days after the date on which the copy of the letter of offer is provided through DSAA Operations to Comptroller, DSAA. A memorandum in the form of Figure App. B–2 will be provided concurrent with the copy of the Letter of Offer.

The Military Department will furnish one copy of the unsigned Letter of Offer to the purchaser as an enclosure to a transmittal letter in the format of Aigure App. B–3. This will be done only after receiving express authority from the Comptroller, DSAA.

Concurrent with the transmittal of the unsigned copy of the letter of offer to the purchaser, the Director, DSAA, will on the same date, in satisfaction of the requirements of Section 36, notify the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate, respectively.

Upon the expiration of the statutory 30 days waiting period, the Comptroller DSAA, will, if Congress has not during that period

adopted a concurrent resolution objecting to the proposed sale, authorize the applicable Military Department to sign the DD Form 1513. The Military Department will forward the signed LOA to the Joint Financial Management Office, DSAA for counter-signature prior to release to the purchaser by the Military Department. If the Congress adopts a concurrent resolution objecting to a proposed sale, the Director, DSAA, will promptly notify the applicable Military Department of that fact, and in view of the President's Signing Statement of 1 July 1976 on H.R. 13680, 94th Congress (P.L. 94-329), seek the guidance of the President as to the course of action which should be taken. The provisions of Section 36 of the foregoing implementing procedures also apply to any amendment totalling $25 million or more to an existing FMS case unless such amendment results solely from identifiable cost increases, and to any amendment adding a major defense equipment for $7 million or more. The provisions also apply in the case of any amendment which would increase the value of an existing case from under $25 million to a value over $25 million. Such amendments will not be issued unless absolutely necessary. Instead, new letters of offer will be processed to cover the new requirement which normally would be covered by amendment.

## Advance Notification of Possible
## Section 36(b) Statements
## Foreign Military Sales

a. *Prospective Purchaser:*

b. *Description and Quantity or Quantities of Articles or Services under Consideration for purchase:*

c. *Estimated Value(s) of This Case:*

d. *Description of Total Program of which This Case is a Part* (including any associated weapons, training, construction, logistical support, or other direct supply implications not included in the case itself):

e. *Estimated Value of Total Program of which This Case is a Part* (including the estimated number and dollar value of any increments and the duration of the total program, if it is a multi-year project):

f. *Prior Related Cases, if any* (including dates, values, descriptions, etc.):

g. *Military Department:*

h. *Estimated Date Letter of Offer/Acceptance (LOA) Ready for Statutory Notification to Congress:*

i. *Case Designator:*

j. *A Description of Each Payment, Contribution, Gift, Commission or Fee Paid or Offered or Agreed to be Paid in order to Solicit, Promote or Otherwise to Secure Such Letter of Offer. Description Should Include:*

(1) Name of person who made such a payment, contribution, gift, commission, or fee;

(2) The name of any sales agent or other person to whom such payment, contribution, gift, commission or fee was paid;

(3) The date and amount of such payment, contribution, gift, commission, or fee;

(4) A description of the sale in connection with which such payment, contribution, gift, commission or fee was paid;

(5) The identification of any business information considered confidential by the person submitting the information under section 39 of the Arms Export Control Act to the Secretary of State.

**Figure App B–1**

MEMORANDUM FOR THE COMPTROLLER, DSAA

SUBJECT: FMS Letters of Offer Which Total $25 Million or More, or $7 Million or More for Major Defense Equipment

The following information is provided in accordance with the reporting requirement of Section 36(b) of the Arms Export Control Act.

a. Country:
b. Military Department:
c. Case Designator:
d. Total Value:
e. Type and Quantity of Equipment:
f. Security Classification of Sale:
g. Sales Commission, Fee, etc. Paid, Offered, or Agreed to be Paid:*
h. The impact of such sales or transfers on the current readiness of United States forces:
i. The adequacy of reimbursements to cover, at the time of replenishment to United States' inventories, the full replacement costs of those items sold or transferred:
j. If reimbursements are inadequate, explain impact and justification for such disparity:

* Information supplied under g. above shall be in the same detail as is required to be supplied under paragraph 10 of figure App B–1.

The following additional information, as requested by the House Armed Services Committee, is provided:

a. Effect of proposed sale on U.S. readiness posture (materiel—personnel—other).
b. Effect of the proposed Foreign Military Sale on current Department of Defense procurement programs (costs—deliveries—etc.).
c. Is this foreign military sale item one which must be offered by the Defense Department, or can it be procured commercially in direct negotiations between a U.S. contractor and the foreign government involved?
d. If known, what impact will this foreign military sale have on arms control considerations (international impact, regional impact, etc.)?
e. What will be the monetary impact of this foreign military sale to the United States Government (net loss or profit, balance of payments implications, etc.)?

**Figure App B–2**

Dear

Enclosed for consideration and analysis by your government is an unsigned advance copy of "United States Department of Defense Offer and Acceptance" (DD Form 1513) for FMS case .

Section 36 of the Arms Export Control Act requires that notification be given to the Congress of the United States before the Department of Defense issues any offer to: (1) sell defense articles and services, the estimated total costs of which are $25,000,000 or more, or (2) sell major defense equipment, the estimated total costs of which are $7,000,000 or more. Section 36 further provides that the offer to sell not be issued if the Congress, within thirty (30) calendar days after receiving such notification, adopts a concurrent resolution stating in effect that it objects to the proposed sale. (Under the Constitution of the United States, a concurrent resolution of the Congress does not require Presidential approval and is not subject to veto by the President).

The Department of Defense is this date transmitting to the Congress the required notification of the enclosed proposed FMS case . Assuming that the Congress does not object to this proposed FMS case, the enclosed DD Form 1513 will be signed and issued to your Government by the authorized Department of Defense representative on or about , 197 . In the event that the Congress should object to this proposed sale, you will be promptly notified of that fact.

Should your Government wish to accept this proposed FMS case, it should await receipt of the signed DD Form 1513 and complete Blocks 23, 28, and 29 on the original and top three copies of the signed DD Form 1513 only. Completion by your Government of Blocks 23, 28, and 29 on the enclosed unsigned advance Copy of the DD Form 1513 will not be deemed to be valid.

Sincerely yours,

**Figure App B–3**