

International Procurement

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The most significant legal developments in international procurement during 1997 occurred in the defense arena. However, important developments applicable to both civilian and defense procurement were also made, such as: the multilateral agreement reached on an anti-bribery convention regarding public officials; the violation of U.S. anti-boycott regulations by the U.S. Department of Justice and U.S. Air Force in a civilian procurement arising out of a defense contract; and a ban on all U.S. Government purchases from eight Chinese entities found to have transferred components to Iran that can be used to construct chemical weapons.

I. International Defense Sales

A. ADMINISTRATION LIFTS RESTRICTIONS ON ADVANCED WEAPONS SALES TO LATIN AMERICA

On August 1, 1997, the Clinton Administration lifted a twenty year restriction on the export from the United States of advanced conventional weapons to Latin American nations. President Carter imposed the restriction in 1977 in an attempt to deny advanced weaponry to the military regimes then ruling the majority of South America.

The Clinton Administration's announcement preceded by several days the August 7, 1997 deadline imposed by Chile, after which the Chilean government was prepared to approach countries other than the United States regarding the purchase of eighteen to twenty-four advanced fighter aircraft. Following the lifting of the restriction, proposed sales of advanced weapons to South American countries will be evaluated on a case-by-case basis, similar to most other nations worldwide.

B. UNITED STATES DEFENSE EXPORT LOAN GUARANTEE PROGRAM

As described in last year's report, in late 1996 the United States implemented the Defense Export Loan Guarantee Program (the DELG Program) within the Department of Defense (DOD) to help finance sales by U.S. defense companies to foreign governments. In 1997, the DOD offered to underwrite as much as \$1.2 billion in loans under the DELG Program, and

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the DELG Program issued its first final commitment for the sale of unmanned air vehicles to Romania during the summer of 1997. However, by year end, fewer than ten defense companies had submitted applications for loan guarantees.

A number of defense contractors expressed concern during the first year of the DELG Program's operation that the magnitude of the fees that the United States charges foreign governments to mitigate the U.S. Government's exposure to financial liability dampens the interest of foreign governments in taking advantage of the DELG Program. Contractors also expressed a desire to have the current program amended to allow foreign governments to finance the exposure fees rather than pay the fees up front, as currently required.

C. REGISTRATION OF ARMS BROKERS AND LICENSING OF CERTAIN ARMS BROKERING ACTIVITIES

Effective December 24, 1997, the State Department Office of Defense Trade Controls (ODTC), pursuant to the National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, required all U.S. persons wherever located, and foreign persons located in the United States or otherwise subject to the jurisdiction of the United States, who act as agents for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration to register with ODTC. Also effective December 24, 1997, pursuant to the same legislation, a broker must obtain a license from ODTC before engaging in certain defined brokering activities, and prior notification must be provided to ODTC regarding proposed transactions involving significant military equipment valued at less than one million dollars.

The new regulation defines brokering activities to mean acting as a broker in the manner set forth immediately above, and includes the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service—irrespective of its origin. The new regulation does not apply to activities by U.S. persons that are limited exclusively to U.S. domestic sales, nor to persons exclusively in the business of financing, transporting, or freight forwarding whose business activities do not also include brokering defense articles or defense services. Thus, air carriers who merely transport licensed United States Munitions List items are not required to register, nor are banks who only provide commercially available lines or letters of credit to persons registered with ODTC. However, if a bank or its employees is directly involved in arranging an arms deal, or the bank holds title to defense articles, the bank is required to register with ODTC.

There is no requirement to obtain a license for brokering activities that are arranged wholly within and destined exclusively for NATO or NATO member countries, Japan, Australia, or New Zealand, except where those activities relate to certain enumerated items on the United States Munitions List. The List includes fully automatic firearms, nuclear weapons and propulsion related items, Missile Technology Control Regime Category I items, classified defense articles or defense services, and significant military equipment valued at over one million dollars.

D. PRATT & WHITNEY CLOSES "DOTAN" AFFAIR BY PAYING \$14.8 MILLION FINE TO THE U.S.

On May 20, 1997, the Pratt & Whitney Group of United Technologies Corporation agreed to pay the U.S. Government \$14.8 million to settle allegations that United Technologies

conspired to divert \$10 million in U.S. military funding into a fund under the exclusive control of an Israeli Air Force officer Rami Dotan. The United States filed suit against United Technologies in 1995 alleging that United Technologies and Dotan established a slush fund that could be spent at Dotan's discretion, without oversight by the Defense Security Assistance Agency as required, or by Israeli procurement authorities. The United States also alleged the existence of a scheme whereby United Technologies prepared and submitted false purchase orders to Israel to collect \$10 million for engine improvement work that was never performed and, with Dotan, concealed a side-deal to use the funds as a bank for Dotan. Dotan is presently serving a thirteen-year prison term as a result of his activities in connection with United Technologies and other U.S. defense contractors.

E. TAIWAN POLICY ON COMMISSIONS TO SALES AGENTS

Effective July 1, 1997, Taiwan temporarily suspended its ban on the payment of commissions to agents in connection with sales by foreign firms to Taiwan's Ministry of National Defense (MND). MND Directive Order (86), dated January 8, 1997, "The Operational Requirements of Military Organizations Concerning the Registration, Administration and Application of In-Country Representations or Agents of Foreign Suppliers," will remain in effect for a one-year trial period.

The MND Directive order allows for the payment of commissions in connection with sales to the MND by foreign companies if made to a bona fide agent or consultant. During the trial period, all in-country agents are required to register with the MND. Each agent must submit with the registration application, among other things, several documents executed by the supplier: 1) a Letter of Authorization that is notarized and certified by Taiwan officials in the supplier's home country; 2) a "Certificate of Commitment to Notify [MND of] Changes in Authorization," that includes a power-of-attorney making the supplier jointly liable for any act, omission, or negligence of the agent (for acts within the scope of the power-of-attorney), and an obligation to notify MND of any changes to the status of the supplier or agent that would affect its ability to perform (and to indemnify MND for any damages arising from a failure to make timely notice); and 3) a certificate containing a variation of the standard U.S. government contract "Covenant Against Contingent Fees" and "Officials Not to Benefit" clauses.

If a foreign supplier/offeror uses a foreign agent that is not registered, it must submit the required forms during the pre-qualification period, and may lose the contract if the agent is found to be unqualified. Significantly, the triggering events under the "Certificate of Commitment" are fairly broad, including events such as: change in organizational structure of the supplier; change in the person issuing the Letter of Authorization; revocation of export license; loss of distribution rights; intellectual property disputes; administrative litigation; and serious criminal or civil litigation or arbitration.

II. Update on Germany's Response to USTR Action Regarding Discriminatory Procurement

As described in detail in last year's report, in 1996 USTR identified Germany, under Title VII of the U.S. 1988 Omnibus Trade and Competitiveness Act, as having a "significant pattern or practice of discrimination" in its heavy electrical equipment procurement sector. USTR delayed imposing sanctions on Germany during the pendency of negotiations between the

United States and Germany regarding remedies for procurement irregularities, during which Germany agreed to institute several important reforms.

On December 4, 1997, the German Government introduced final legislation to the German Parliament which would create a new three-judge panel at the Supreme Court, or *Oberlandesgericht*, of each German state, with jurisdiction to hear all disputes regarding the solicitation of bids or the award of contracts by German government and quasi-governmental entities. The introduction of this legislation followed a year of consultation between the German federal Government, German state Governments, and German industry. It is widely expected that the legislation will pass the Parliament during the spring of 1998. USTR, meanwhile, continues to monitor the German legislative process, in consultation with U.S. industry.

III. U.S. Government Agencies Violate Anti-boycott Regulations

The Commerce Department, on February 28, 1997, announced that the U.S. Department of Justice, the U.S. Air Force, and a Justice Department contractor, CACI, Inc., violated the anti-boycott provisions of the U.S. Export Administration Regulations. The violations arose out of a lawsuit that a U.S. defense contractor brought against the Air Force. During the course of defending the Air Force, the Justice Department sent a team to Saudi Arabia to microfilm documents relevant to the suit. The team included representatives from the Air Force, the Justice Department, and CACI.

At a meeting to draft plans for the microfilming project, the team prepared a statement on its "Screening/Selection Process," which included the following statement: "No Jews or Jewish surnamed personnel will be sent as part of the Document Acquisition Team because of the cultural differences between Moslems and Jews in the Region." The statement also mandated "no Israeli stamped passport, as per Saudi rules." At least one Jewish applicant was denied employment on the microfilming team because of his religion.

The Commerce Department settled the charges against the Air Force and the Justice Department by requiring that both entities institute procedures designed to prevent future violations of the anti-boycott regulations. In addition, the Commerce Department levied substantial monetary fines on three individuals from the Justice Department, the Air Force, and CACI—as well as on CACI itself.

IV. Anti-bribery Developments Related to Government Procurement

On December 17, 1997, twenty-nine members of the Paris-based Organization for Economic Cooperation and Development (OECD), including the fifteen European Union countries and the United States, Canada, Mexico, Japan and Korea, signed "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions." The Convention is designed to outlaw business bribes of foreign officials for business gain and to make it a criminal offense to offer or give bribes to public officials to obtain or retain business. All signatories have an obligation to enact legislation that makes it "a criminal offense, under their own laws, to offer, promise or give bribes, either directly or through agents, to foreign public officials to win or keep government business." The Convention will enter into force once five of the OECD's top ten exporting countries, including the United States, Japan, Germany, France, and Britain, ratify the Convention. If not ratified by those countries during 1998, the Convention will go into effect when any two countries ratify it.

V. Ban on U.S. Government Purchases from Certain Chinese Companies and Persons

The United States, effective May 21, 1997, imposed economic sanctions upon eight Chinese companies and individuals for transferring components to Iran that can be used to construct chemical weapons. Pursuant to the Arms Export Control Act and the Export Administration Act of 1979, U.S. Government agencies are prohibited from purchasing goods or services from the named entities and persons (and no party may import products produced by the eight entities into the United States). The ban is effective for at least one year and until further notice by the U.S. Department of State.

