

Legal Reviews of Payment-in-Kind (PIK) Acquisition and Cross Servicing Agreement (ACSA) Orders

I. References and Authority:

10 USC §§ 2341-50 establishes authority for SECDEF (on behalf of the US Government) to enter into ACSAs with foreign nations. This authority devolves thru the chain of command from SECDEF to the COCOMs as communicated by the Joint Chiefs (in contrast to FAR contracting authority which devolves through the HCA and PARC). Typically, the COCOMs conduct the actual negotiation and signing of ACSAs and Implementing Arrangements (IAs). The ACSA and IA set forth the overarching framework for the acquisition of LSSS; they do not commit either party to any particular transactions. Once an overarching ACSA is in place, units request 409th to negotiate and execute specific ACSA Orders to obtain specific LSSS.

Guidelines for using the statutory authority are established in The Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 2120.01B, Department of Defense Directive (DODD) 2010.9, Department of Defense Financial Management Regulation (DODFMR) Volume 11A, Chapter 8, Combatant Command (COCOM) regulations (e.g., EUCOM Reg. 60-8, AFRICOM Instruction 4000.01, and AFRICOM SOP 4000.01), and Service Component Command (SCC) regulations (e.g., USAREUR Reg. 1-3).

During negotiation of these international agreements, COCOMs attempt to include standard clauses in every ACSA and IA (such as the “reciprocal pricing clause”). However, each ACSA (and accompanying IA, if there is an IA) is an independent and unique international agreement. Thus, the pertinent ACSA and IA are integral binding references for the ACSA Order.

Generally, the ACSA, IA, ACSA statutes, and ACSA regulations are the only necessary references to conduct a legal review of an ACSA Order. 10 USC 2343 contains an exhaustive list of statutes that are waived for ACSA Orders. The FAR system may be used as a non-binding source of general principles of prudent procurement practice for ACSA Orders. Additionally, although the FAR itself doesn’t apply to ACSA Orders, the FAR contains statutory citations that may apply to the ACSA Order.

II. Extent of 409th’s Involvement with ACSA Orders: The 409th ACSA Ordering Officer (Mr. Marius Fara) executes Payment-in-Kind (PIK) ACSA Orders when a US military element seeks to obtain LSSS with a total value exceeding \$25,000. All other ACSA matters are handled outside 409th. Equal-value-Exchange (EVE) and Replacement-in-Kind (RIK) orders are generally handled by the G8 Agreements division of the appropriate Army Service Component Command (USAREUR or USARAF).

III. ACSA Order Legal Review Checklist:

___ 1. Has the person executing the ACSA Order been “designated specifically” to have authority? See DODD 2010.9, para 4.12; AER 1-3, para 3-4; and AFRICOM 4000.01, para 2d. Also see 5 CFR § 2635.101(b)(6) and JER para 2-100, which state that employees shall not knowingly make unauthorized promises of any kind purporting to bind the government.

___ 2. Is the transaction for “Logistic Support Supplies and Services” (LSSS)?

- ___ a. Does the requirement fit within the definition of LSSS in 10 USC 2350?
 - ___ b. Is the item designated as significant military equipment on the United States Munitions List, 22 CFR § 121? If so, it does not fit within the definition of LSSS in 10 USC 2350.
 - ___ c. Does the requirement fit within the list of permissible examples of LSSS in CJCSI 2120.01B, A-3 and A-A-1? AER 1-3, Appendix C also contains a list of examples of permissible LSSS.
 - ___ d. Does the requirement fit within the lists of prohibited items in DODD 2010.9, paras 4.5, 4.5.1 and 4.5.2 and the list of prohibited items in CJCSI 2120.01B, para 5b?
 - ___ e. Is the LSSS for airlift, sealift, or another form of transportation services to be funded by USTRANSCOM? See CJCSI 2120.01B, Enclosure D, para. 4a2b.
 - ___ f. 409th generally only executes ACSA Orders to obtain (as opposed to transferring) LSSS. Note that there are additional statutory prohibitions on transferring certain types of LSSS to foreign militaries, such as the Arms Control Export Act, 22 USC 2751. Also, 10 USC 2348 states that inventories of supplies for elements of the armed forces may not be increased for the purpose of transferring supplies under ACSA Orders.
- ___ 3. Is the LSSS reasonably available from US commercial sources, taking into consideration all relevant circumstances (e.g., timeliness, costs, purpose of exercise or operation, and location)? 10 USC 2342 (c) and CJCSI 2120.01B, Enclosure D, para. 4a1b prohibit using ACSA Orders to obtain LSSS that is reasonably available from US commercial sources.
- ___ 4. Does the PWS/SOW make sense?
- ___ 5. Does the US have an ACSA with the nation? Use the ACSA Global Automated Tracking and Recording System (AGATRS) online database to view the ACSA and any subsequent Implementing Arrangements (IAs).
- ___ 6. Does the ACSA Order cite the correct ACSA under which the ACSA Order is issued?
- ___ 7. Does the ACSA Order comply with the terms of the pertinent ACSA and any IAs?
- ___ 8. Has the proper ACSA Order form been used, and is the form complete? The ACSA or IA will specify the form and contents. For ACSA Orders for USAREUR organizations, AER 1-3, para 3-8 contains additional data requirements, such as a statement of determination that the LSSS is not reasonably available from US commercial sources.
- ___ 9. Are the proper approvals included? For example, see AR 58-1 for NTVs, and see AR 70-13 for services.

___ 10. Is the LSSS being acquired for an element of the armed forces that is deployed OCONUS? 10 USC 2341

___ 11. Is the transaction between a US military force and a foreign nation's or international organization's military force? For example, a transaction between the US Army and German Polizei is not permitted under ACSA statutes. See 10 USC 2341 and DODD 2010.9, para 4.3.1.

___ 12. Is the LSSS being acquired to support one of the following situations? CJCSI 2010.01, para 5a and DODD 2010.9, para 4.3.5 state that ACSA Orders should primarily be used to support the following situations:

___ a. Unforeseen circumstances or exigencies (such as war, contingency operations, humanitarian or foreign disaster relief operations, or peace operations conducted under Chapter VI or VII of the United Nations Charter)? or

___ b. Combined exercises, training, deployments, port calls, operations, or other cooperative efforts?

___ 13. Did the ACSA Ordering Officer consider whether it would be more appropriate to use a different procurement method, such as a FAR contract, Economy Act Order, or Weapon System Partnership Agreement Order? The purpose of an ACSA Order is to simplify and expedite reimbursable acquisitions and exchanges of LSSS between US military and foreign nations' military forces. However, there are additional considerations for the ACSA Ordering Officer. For example, what is the US government's recourse if the LSSS is defective? CJCSI 2010.01, paragraph 5j describes a dispute resolution process, which is primarily based upon negotiation at the lowest level possible. Is this dispute resolution process sufficient for this particular procurement of LSSS or would a FAR T4D process better protect USG interests in this case? Other considerations include that an ACSA Order may be quicker and more streamlined than a FAR procurement; perhaps the US can avoid foreign taxes with an ACSA order. The decision to use a contract or ACSA Order is unique to the situation and depends on many factors, including the nature of the LSSS being acquired, the financial significance of the acquisition, and whether the transaction is one-time or continuing.

___ 14. If the pertinent ACSA or IA does not contain a "Reciprocal Pricing Agreement," did the ACSA Ordering Officer make a determination that the price is fair and reasonable? DODFMR, Volume 11A, Chapter 8, paragraph 080602.

___ 15. Is there a PRC (or an equivalent certification of funds from a RM) with a proper line of accounting? (apply the standard purpose, time, and amount rules). CJCSI 2120.01B, Enclosure D, para.4a3b. SAF clauses may be used with ACSA Orders. CJCSI 2120.01B, Enclosure D, para 5c.

___ 16. Does the ACSA Order require bills to be rendered on a 30-day cycle? DODFMR, Volume 11A, Chapter 8, paragraph 080202.

___ 17. Does the ACSA Order state a firm-fixed price, or does it state the maximum liability of the ordering/receiving organization? DODFMR, Volume 11A, Chapter 8, paragraph 080501 U, and CJCSI 2120.01B, Enclosure D, para. 4a2a, and para 5d. Note: CJCSI 2120.01B, Enclosure D, para 5d prohibits modifying an ACSA Order by increasing the not to exceed amount; rather than a modification, a new ACSA Order is required.

___ 18. Except during a period of hostilities involving the armed forces, is the total value of the ACSA Order, when combined with all other ACSA Orders, within the threshold limitations described in 10 USC 2347? Also see DODFMR, Volume 11A, Chapter 8, paragraph 080204.