OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

ACQUISITION AND TECHNOLOGY

August 17, 1998

DP(DAR)

In reply refer to
DFARS Case: 98-D015
D. L. 98-020

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT, ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Letter of Offer and Acceptance

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) to remove the DD Form 1513, United States Department of Defense Offer and Acceptance, from Part 253 and to revise Subpart 225.73 to refer to the Letter of Offer and Acceptance, rather than the DD Form 1513.

The attached final DFARS rule is effective immediately.

Eleanor Spector

Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir

DFARS CASE 98-D015
Letter of Offer and Acceptance
Final Rule

SUBPART 225.73—ACQUISITIONS FOR FOREIGN MILITARY SALES

225.7300 Scope of subpart.

(a) This subpart contains policies and procedures for acquisitions for foreign military sales (FMS) under the Arms Export Control Act **[(22 U.S.C. Chapter 39)]**. Section 22 of the Arms Export Control Act ~~(Pub. L. 90-629, as amended)~~ **[(22 U.S.C. 2762)]** authorizes DoD to enter into contracts for resale to foreign countries or international organizations.

(b) This subpart does not apply to—

(1) ~~Foreign military sales~~ **[FMS]** made from inventories or stocks;

(2) Acquisitions for replenishment of inventories or stocks; **[or]**

(3) Acquisitions made under DoD cooperative logistic supply support arrangements.

225.7301 General.

(a) The U.S. Government sells defense articles and services to foreign governments or international organizations through ~~foreign military sales (~~FMS~~)~~ agreements. The agreement is documented ~~on a DD Form 1513, DoD~~ **[in a Letter of]** Offer and Acceptance **[(LOA) (see DoD 5105.38-M, Security Assistance Management Manual)]**. The ~~DD Form 1513~~**[LOA]**—

(1) Lists the items and services, estimated costs, and terms and conditions of the sale;

(2) Is presented to the foreign customer; and

(3) Provides for signature of the foreign customer to indicate acceptance.

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225.7302 Procedures.

On FMS programs that will require an acquisition, the contracting officer assists the departmental/agency activity responsible for preparing the ~~DoD Offer and Acceptance~~ **[LOA]** by—

(a) Working with prospective contractors to—

(1) Identify, in advance of the ~~DoD Offer and Acceptance~~**[LOA]**, any unusual provisions or deviations;

(2) Advise the contractor if the departmental/agency activity expands, modifies, or does not accept any requirements proposed by the contractor;

(3) Identify any logistics support necessary to perform the contract; and

(4) For acquisitions over $10,000 that are to be awarded noncompetitively, asking the prospective contractor(s) for information on price, delivery, and other relevant factors. The request for information must identify the fact that the information is for a potential foreign military sale and must identify the foreign customer.

(b) Working with the departmental/agency activity responsible for preparing the ~~DoD Offer and Acceptance~~ **[LOA]** to—

(1) Assist, as necessary, in preparation of the ~~DD Form 1513~~**[LOA]**;

(2) Identify and explain all unusual contractual requirements or requests for deviations; and

(3) Assist in preparing the price and availability data.

225.7303 Pricing acquisitions for ~~foreign military sales~~[FMS].

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225.7303-2 Cost of doing business with a foreign government or an international organization.

(a) In pricing FMS contracts where non-U.S. Government prices as described in 225.7303-1 do not exist, except as provided in 225.7303-5, recognize the reasonable and allocable costs of doing business with a foreign government or international organization, even though such costs might not be recognized in the same amounts in pricing other defense contracts. Examples of such costs include, but are not limited to—

* * * * *

(3) Offset implementation costs.

(i) A U.S. defense contractor may recover costs incurred to implement its offset agreement with a foreign government or international organization if the ~~foreign military sale Letter of Offer and Acceptance~~ **[LOA]** is financed wholly with customer cash or repayable foreign military finance credits.

(ii) The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

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(b) Costs not allowable under FAR Part 31 are not allowable in pricing ~~foreign military sale~~ **[FMS]** contracts, except as noted in paragraph (c) of this subsection.

(c) The provisions of 10 U.S.C. 2372 do not apply to contracts for ~~foreign military sales~~**[FMS]**. Therefore, the cost limitations on independent research and development and bid and proposal (IR&D/B&P) costs in FAR 31.205-18 do not apply to such contracts, except as provided in 225.7303-5. The allowability of IR&D/B&P costs on contracts for ~~foreign military sales~~ **[FMS]** not wholly paid for from funds made available on a nonrepayable basis shall be limited to the contract's allocable share of

the contractor's total IR&D/B&P expenditures. In pricing contracts for such ~~foreign military sales~~**[FMS]**—

(1) Use the best estimate of reasonable costs in forward pricing.

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under **[paragraph (e)(1)(A) of]** Section 21~~(e)(1)(A)~~ of the Arms Export Control Act~~, as amended~~**[(22 U.S.C. 2761)]**, the United States must charge for administrative services to recover the estimated cost of administration of sales made under the Arms Export Control Act.

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225.7303-4 Contingent fees.

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under DoD contracts, provided the fees are determined by the contracting officer to be fair and reasonable and are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business (see FAR Part 31 and FAR Subpart 3.4).

(b)(1) Under DoD 5105.38-M, ~~Security Assistance Management Manual, Letters of Offer and Acceptance~~ **[LOAs]** for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) must provide that all U.S. Government contracts resulting from the ~~Letters of Offer and Acceptance~~ **[LOAs]** prohibit the reimbursement of contingent fees as an allowable cost under the contract, unless the payments have been identified and approved in writing by the foreign customer before contract award (see 225.7308(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, contingent fees exceeding $50,000 per FMS case shall be unallowable under DoD contracts, unless payment has been identified and approved in writing by the foreign customer before contract award.

225.7303-5 Acquisitions wholly paid for from nonrepayable funds.

(a) In accordance with 22 U.S.C. 2762(d), ~~foreign military sales~~ **[FMS]** wholly paid for from funds made available on a nonrepayable basis shall be priced on the same costing basis with regard to profit, overhead, IR&D/B&P, and other costing elements, as is applicable to acquisitions of like items purchased by DoD for its own use.

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(c) A U.S. defense contractor may not recover costs incurred to implement its offset agreement with a foreign government or international organization if the ~~foreign military sale Letter of Offer and Acceptance~~ **[LOA]** is financed with funds made available on a nonrepayable basis.

225.7304 Source selection.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full and open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the ~~Letter of Agreement~~ **[LOA]** or other written direction sufficiently fulfills the requirements of FAR **[Subpart]** 6.3.

(b) Do not allow representatives of the FMS customer to—

(1) Direct the deletion of names of firms from bidders mailing lists or slates of proposed ~~A-E~~ **[architect-engineer]** firms. (They may suggest the inclusion of certain firms);

(2) Interfere with a contractor's placement of subcontracts; or

(3) Participate in the price negotiations between the U.S. Government and the contractor.

(c) Do not accept directions from the FMS customer on source selection decisions or contract terms (~~other than the~~ **[except that, upon timely notice, the contracting officer may attempt to obtain any]** special contract provisions and warranties ~~referred to in Condition A.2 of the DD Form 1513~~**[requested by the FMS customer]**).

(d) Do not honor any requests by the FMS customer to reject any bid or proposal.

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225.7306 Exercise of options for ~~foreign military sales~~[FMS].

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225.7308 Contract clauses.

(a) Use the clause at 252.225-7027, Restriction on Contingent Fees for Foreign Military Sales, in all solicitations and contracts for ~~foreign military sales~~**[FMS]**.

(b) Use the clause at 252.225-7028, Exclusionary Policies and Practices of Foreign Governments, in all solicitations and contracts for the purchase of goods and services for international military education training and ~~foreign military sales~~**[FMS]**.

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