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 (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) 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 FMS agreements. The agreement is documented in a Letter of Offer and Acceptance (LOA) (see DoD 5105.38-M, Security Assistance Management Manual). The 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.

(b) Acquisitions for FMS are conducted under the same acquisition and contract management procedures as other defense acquisitions.

(c) Solicitations shall separately identify known FMS requirements and the FMS customer.

(d) Contracts for known FMS requirements shall clearly be marked “FMS requirement” on the face of the contract along with the FMS customer and the case identifier code.

225.7302 Procedures.

On FMS programs that will require an acquisition, the contracting officer assists the departmental/agency activity responsible for preparing the LOA by—

(a) Working with prospective contractors to—

(1) Identify, in advance of the 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 LOA to—

(1) Assist, as necessary, in preparation of the 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 FMS.
Price FMS contracts using the same principles as are used in pricing other defense contracts. Application of the pricing principles in FAR Parts 15 and 31 to an FMS contract, however, may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

225.7303-1 Contractor sales to other foreign customers.
If the contractor has made sales of the item required for the foreign military sale to foreign customers under comparable conditions, including quantity and delivery, price the FMS contract in accordance with FAR Part 15.

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—

(1) Selling expenses (not otherwise limited by FAR Part 31), e.g.—

(i) Maintaining international sales and service organizations.

(ii) Sales commissions and fees in accordance with FAR Subpart 3.4.

(iii) Sales promotions, demonstrations, and related travel for sales to foreign governments. Paragraph 126.8 of the International Traffic in Arms Regulations (ITAR) (22 CFR Part 121) may require Government approval for these costs to be allowable. If Government approval is required for promotion or demonstration costs to be allowable, the approval must be obtained.

(iv) Configuration studies and related technical services undertaken as a direct selling effort to a foreign country.

(2) Product support and post-delivery service expenses, such as—

(i) Operations or maintenance training, training or tactics films, manuals, or other related data; and

(ii) Technical field services provided in a foreign country related to accident investigations, weapon system problems, operations/tactics enhancement, and related travel to foreign countries.

(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 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.

(4) Costs that are the subject of advance agreement under the appropriate provisions of FAR Part 31; or where the advance understanding places a limit on the amounts of cost that will be recognized as allowable in defense contract pricing, and the agreement contemplated that it will apply only to DoD contracts for the U.S. Government's own requirements (as distinguished from contracts for FMS).

(b) Costs not allowable under FAR Part 31 are not allowable in pricing 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 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 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 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 of the Arms Export Control Act (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.

225.7303-3 Government-to-government agreements.
If a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict

with the provisions of this section, the language of the government-to-government agreement prevails.

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, 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 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), 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.

(b) Direct costs associated with meeting a foreign customer's additional or unique requirements will be allowable under such contracts. Indirect burden rates applicable to such direct costs shall be permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use.

(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 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 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 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 (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions and warranties requested by the FMS customer).

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

225.7305 Limitation of liability.

The contracting officer must advise the contractor whenever the foreign customer will assume the risk for loss or damage under the appropriate limitation of liability clause(s) (see FAR Subpart 46.8). Consider the costs of necessary insurance, if any, obtained by the contractor to cover the risk of loss or damage in establishing the FMS contract price.

225.7306 Exercise of options for FMS.

Consider changes to cost and profit attributable to pricing differences between U.S. and FMS requirements when exercising an option to satisfy an FMS requirement. Also consider such changes if the option is already identified for FMS, but it is exercised for country B requirements instead of the country A requirements for which it was priced.

225.7307 Offset arrangements.

In accordance with the Presidential policy statement of April 16, 1990, DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved.

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 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 FMS.