

# FOREIGN MILITARY SALES CONTRACTUAL AGREEMENTS

## INTRODUCTION

Basic contract law concepts are evident in the government-to-government agreements for security assistance. In particular, this chapter examines the foreign military sales (FMS) case standard terms and conditions that are an integral component of every security assistance letter of offer and acceptance (LOA). Additionally, this chapter discusses the purpose and application of other security assistance agreements such as LOA amendments, LOA modifications, letters of intent (LOI), leases, loans and international agreements.

## CONTRACTS

A contract is an agreement between two or more parties which is enforceable by law. DoD 5105.38-M, *Security Assistance Management Manual* (SAMM) states that the FMS program is conducted using formal contracts. In the FMS process, the formal government-to-government contracts are referred to as LOAs. LOAs are also commonly referred to as cases. In practice, the terms LOA and case are synonymous.

A security assistance LOA is a bilateral agreement between the United States government (USG) and an authorized foreign purchaser. In the LOA, the USG commits itself to provide certain defense items or services and the purchaser commits itself to abide by specific terms and conditions associated with the sale and to make specified financial payments.

It is important to note that the LOA document is also used to implement security cooperation programs. Under security cooperation programs, the LOA and overall FMS processes and infrastructure are being utilized to track and implement funds appropriated by Congress for designated activities. In this role, security cooperation LOAs are not signed by a foreign purchaser and the standard terms and conditions are not included in the agreement.

### Elements of a Contract

Six basic elements must be present for an agreement to be enforceable by law as a contract. The six elements are found in each LOA as well as the other government-to-government documents used in security assistance. This section highlights how the six contract elements relate to the LOA process.

#### *Offer*

The offer is a proposal by one party to enter into a contractual relationship with another party. In order for a statement or communication to be a valid offer, the respective statement or communication must be intended to be an offer. This element plays an important role in the security assistance process. A foreign customer may submit a request for price and availability (P&A) data. When price and availability data is provided to a foreign purchaser, the SAMM requires that a statement be included with the P&A response to emphasize that providing P&A data does not constitute an offer to sell. If a foreign purchaser desires an LOA to purchase the material or services identified in the P&A data, the purchaser must submit a subsequent request for an LOA.

Under the FMS process, a formal offer is communicated by presenting an LOA, complete with the authorized USG signatures, to the prospective customer. LOAs are generally only offered in response to a specific customer's letter of request (LOR). The customer's LOR is referenced in each LOA offered. The offer remains valid through the offer expiration date cited in the LOA. After the offer expiration date, the LOA is no longer an offer and cannot be accepted unless reinstated or reissued by the USG.

### ***Acceptance***

Acceptance is an expression of agreement to the contract offer. In order for the acceptance to be effective, it must be clear, timely and in the same terms as the offer. This contract principle is key to the LOA process. Even though a customer submitted an LOR for an LOA, the customer is under no obligation to accept the LOA offered by the USG. Acceptance of the LOA is evidenced by an authorized country representative signing the LOA prior to the offer expiration date, forwarding the specified initial deposit and returning the proper number of signed LOA copies. Payment of the initial deposit is a condition of acceptance. Implementation of the FMS case cannot take place without receipt of the initial deposit. Additionally, in the acceptance process, the customer informs the USG of the applicable mark for code, freight forwarder code, procuring agency code and the name/address of their paying office. This information is entered by the customer on the bottom of the first page of the LOA.

There may be times when minor changes need to be made to an LOA after it has been offered to the purchaser. To avoid the problem of a counteroffer, the purchaser should not make pen-and-ink changes to the offer. Unauthorized pen-and-ink changes by the customer are considered a counter-offer. Pen-and-ink changes may be requested by the purchaser or initiated by the Department of Defense (DoD) implementing agency (IA) to make small administrative changes to the offer. In either situation, pen-and-ink changes can only be authorized by the issuing implementing agency after obtaining permission from the Defense Security Cooperation Agency (DSCA) and must be made prior to acceptance by the purchaser. In any event, such changes should be kept to a minimum. If more significant changes are required, a new or restated LOA may be necessary.

### ***Consideration***

Consideration exists when something of legal value or benefit is offered by one party to another. Consideration is the value of a promised action and is often manifested in monetary terms. With respect to an LOA, consideration consists of the purchaser's financial payment(s) in return for defense articles and services provided by the USG.

### ***Competent Parties***

This means that both parties must have legal capacity to enter into the contract. Competent parties relative to the LOA are the authorized United States (U.S.) and purchaser representatives that sign the LOA. Each LOA will contain a written signature by a representative of the IA that generated the LOA. Additionally, each LOA will contain an electronic countersignature signifying that DSCA has reviewed and approved the LOA.

Each customer establishes their own process for LOA review and acceptance. From a U.S. perspective, receipt of a signed LOA from the customer coupled with receipt of the initial deposit, which is typically substantial, indicates that the individual that signed accepting the LOA is an authoritative representative of that respective government.

## ***Lawful Purpose***

As a general rule, a contract which violates a statute is unlawful and will not be enforced. Under the FMS process, it is incumbent upon the agencies of both governments to insure that their respective laws and policies are complied with prior to offering or accepting a given LOA. The USG must comply with the Arms Export Control Act (AECA), Foreign Assistance Act (FAA), and other associated statutes. Each security assistance LOA includes the statement “Pursuant to the Arms Export Control Act” in the second paragraph. From the U.S. perspective, the congressional notification process for certain high-value LOAs is an example of ensuring that LOAs offered to customers comply with U.S. statutory requirements. Foreign purchasers have the responsibility to ensure that their actions regarding the LOA are in compliance with their respective national laws.

## ***Terms and Conditions***

A contract must clearly delineate what each party has committed to perform. A contract that poorly defines what, when, where, how, at what cost and under what conditions may lead to confusion and may be unenforceable due to vagueness.

The LOA document is intended to clearly establish what the USG has committed to do as well as what the foreign purchaser has committed to do. The LOA describes what is being sold along with estimated prices, delivery dates, projected sources of supply, transportation methods, payment dates and so forth. In addition, every security assistance LOA contains a set of standard terms and conditions. This same set of standard terms and conditions applies to all security assistance LOAs and is exactly the same for all foreign purchasers.

It is important to note that when the LOA form is used to implement security cooperation programs, the standard terms and conditions are not applied. The reason for this difference is that under security cooperation programs, the LOA process is being used to document the implementation of a specially appropriated program on the behalf of another element of the USG. In reality, under security cooperation, the USG represented by DSCA, is selling defense articles and services to another component of the USG rather than a foreign purchaser.

## **LETTER OF OFFER AND ACCEPTANCE STANDARD TERMS AND CONDITIONS**

The standard terms and conditions to be used with all security assistance LOAs are discussed below. The seven sections as a whole establish certain rights for the parties in the contract as well as specifying the basic provisions for the conduct of the sale to include certain limitations or constraints associated with the sale.

- Section 1** Conditions - United States Government Obligations
- Section 2** Conditions - General Purchaser Agreements
- Section 3** Indemnification and Assumption of Risks
- Section 4** Financial Terms and Conditions
- Section 5** Transportation and Discrepancy Provisions
- Section 6** Warranties
- Section 7** Dispute Resolution

## Section 1 Conditions - United States Government Obligations

1.1 Unless otherwise specified, items will be those which are standard to the U.S. Department of Defense (DoD), without regard to make or model.

1.2 The USG will furnish the items from its stocks and resources, or will procure them under terms and conditions consistent with DoD regulations and procedures. When procuring for the Purchaser, DoD will, in general, employ the same contract clauses, the same contract administration, and the same quality and audit inspection procedures as would be used in procuring for itself; except as otherwise requested by the Purchaser and as agreed to by DoD and set forth in this LOA. Unless the Purchaser has requested, in writing, that a sole source contractor be designated, and this LOA reflects acceptance of such designation by DoD, the Purchaser understands that selection of the contractor source to fill requirements is the responsibility of the USG, which will select the contractor on the same basis used to select contractors for USG requirements. Further, the Purchaser agrees that the U.S. DoD is solely responsible for negotiating the terms and conditions of contracts necessary to fulfill the requirements in this LOA.

1.3 The USG will use its best efforts to provide the items for the dollar amount and within the availability cited.

1.4 Under unusual and compelling circumstances, when the national interest of the U.S. requires, the USG reserves the right to cancel or suspend all or part of this LOA at any time prior to the delivery of defense articles or performance of defense services. The USG shall be responsible for termination costs of its suppliers resulting from cancellation or suspension under this section. Termination by the USG of its contracts with its suppliers, other actions pertaining to such contracts, or cessation of deliveries or performance of defense services is not to be construed as cancellation or suspension of this LOA itself under this section.

1.5 U.S. personnel performing defense services under this LOA will not perform duties of a combatant nature, including duties relating to training and advising that may engage U.S. personnel in combat activities outside the U.S., in connection with the performance of these defense services.

1.6 The assignment or employment of U.S. personnel for the performance of this LOA by the USG will not take into account race, religion, national origin, or sex.

1.7 Unless otherwise specified, this LOA may be made available for public inspection consistent with the national security of the United States.

***Section 1.1 Standard Items.*** This section notifies the purchaser that the items to be furnished under the LOA will typically be standard items. The term “standard” in this context means that the items provided will be the same as those currently in use by DoD. The ultimate purpose of security assistance is to enhance U.S. national security. When friends and allies use standard U.S. systems and components, opportunities for interoperability and logistics cross-servicing are greatly increased which, in turn, enhances U.S. national security. This general commitment to supply standard items will be applied subject to U.S. releasability determinations and technology transfer decisions which are discussed in Chapter 7, “Technology Transfer, Export Controls and International Programs Security.”

This condition further highlights that items will be provided without regard to make or model. This provision is necessary because the DoD generally procures using a competitive process. In the competition, the potential exists for any given manufacturer’s make or model product to be selected if the respective product meets the procurement specification requirements such as performance, form, fit, or function. Although the foreign customer may have received a certain make and model product in a prior procurement, the customer should not expect to automatically receive the exact same make and model product in future procurements. If the purchaser has certain unique requirements for specific makes or models, this condition places the responsibility on the purchaser to make those unique requirements known to the IA, otherwise the standard U.S. configuration will be supplied.

**Section 1.2 Buyer-Seller Relationship.** This section establishes the buyer-seller relationship between the international purchaser and the USG. By accepting the LOA, the purchaser allows USG representatives to act on its behalf. When the DoD procures items to fulfill the purchaser's requirements, it will generally apply the same contract clauses and procedures that it uses in procuring for itself. This affords the international purchaser the same benefits and protection that apply to DoD procurements, and is one of the principal reasons why nations choose to procure through FMS channels.

**Sole Source.** Sole source for the purposes of an LOA means the intent to obtain the items or services from only one designated supplier. The purchaser may request sole source in accordance with the procedures listed in SAMM, Section C6.3.4, and Defense Federal Acquisition Regulation Supplement (DFARS) 225.7304. More information on sole source procurement is contained in later Chapter 9, "Foreign Military Sales Acquisition Policy and Process."

**Section 1.3 Best Efforts.** The term "best efforts" is a legal term that implies a party's good faith intent to achieve a stated performance level but this term also recognizes that other factors may arise that could preclude attaining the intended goal. A party expending "best effort" will not be considered in default of the contract even though the stated performance levels are not achieved.

In regard to the LOA, this section means that the USG will take action to deliver within the estimated cost and dates cited in the LOA but the USG cannot promise or guarantee these estimates will be achieved. This condition recognizes the potential for circumstances to arise that may prevent the USG from delivering at the estimated costs or within the estimated delivery dates. As such, the purchaser understands and accepts the risk that the USG may fail to meet the LOA cost and delivery estimates.

**Section 1.4 U.S. Government Right to Cancel or Suspend.** The USG reserves the right to cancel an LOA, in part or in whole, when determined to be in the USG's best interest. The USG carefully reviews customer requests before extending an LOA offer. As indicated by Section 1.4, something significant must occur for the USG to change its position and decide to cancel or suspend the LOA sale. If the USG cancels the LOA, it will pay the costs associated with terminating its suppliers. This does not necessarily mean that the entire LOA amount will be refunded to the purchaser. Given the fact that there will be unusual and compelling circumstances surrounding the exercise of this LOA term, history shows that a politically negotiated agreement will be necessary to settle the financial obligations and disposition of material associated with cancelled or suspended LOAs. SAMM Section C6.6 states that DSCA will provide the IA direction regarding the disposition of property and the liquidation of liabilities in regard to any canceled or suspended LOA.

**Section 1.5 & 1.6 U.S. Personnel Requirements.** Sections 1.5 and 1.6 implement FAA and AECA statutory requirements which apply to U.S. personnel performing security assistance functions. Section 1.5 emphasizes that the presence of U.S. security assistance personnel in the purchaser's country does not necessarily constitute a commitment by the U.S. to conduct any combat activity with the purchaser. Additionally, Section 1.6 specifies that the U.S. will use its own personnel management processes to select individuals to conduct security assistance functions on behalf of the purchaser.

**Section 1.7 Freedom of Information Guidelines.** Section 1.7 implements the provisions of the Freedom of Information Act (FOIA). However, information provided to the USG in confidence by a foreign government may be exempt from disclosure to the public. Conditions which may exempt the LOA from release include determinations that the LOA contains information not normally released by the originator. Any decision to release or withhold information must be coordinated with DSCA and the appropriate legal counsel of the involved DoD component. The official policy for release is

found in SAMM, Section C3.4.1. More information on FOIA is contained in Chapter 7, “Technology Transfer, Export Controls, and International Programs Security Requirements.”

## **Section 2. Conditions - General Purchaser Agreements**

2.1 The Purchaser may cancel this LOA or delete items at any time prior to delivery of defense articles or performance of defense services. The Purchaser is responsible for all costs resulting from cancellation under this section.

2.2 The Purchaser agrees, except as may otherwise be mutually agreed in writing, to use the defense articles sold hereunder only:

2.2.1 For purposes specified in any Mutual Defense Assistance Agreement between the USG and the Purchaser

2.2.2 For purposes specified in any bilateral or regional defense treaty to which the USG and the Purchaser are both parties, if section 2.2.1 is inapplicable; or,

2.2.3 For internal security, individual self-defense, preventing or hindering the proliferation of weapons of mass destruction and the means of delivering such weapons or civic action if sections 2.2.1 and 2.2.2 are inapplicable.

2.3 The Purchaser will not transfer title to, or possession of, the defense articles, components and associated support materiel, related training or other defense services (including plans, specifications, or information), or technology furnished under this LOA to anyone who is not an officer, employee, or agent of the Purchaser (excluding transportation agencies), and shall not use or permit their use for purposes other than those authorized, unless the written consent of the USG has first been obtained. The Purchaser will ensure, by all means available to it, respect for proprietary rights in any items and any plans, specifications, or information furnished, whether patented or not. The Purchaser also agrees that the defense articles offered will not be transferred to Cyprus or otherwise used to further the severance or division of Cyprus, and recognizes that the U.S. Congress is required to be notified of any substantial evidence that the defense articles sold in this LOA have been used in a manner that is inconsistent with this provision.

2.4. To the extent that items, including plans, designs, specifications, technical data, or information, furnished in connection with this LOA may be classified by the USG for security purposes, the Purchaser certifies that it will maintain a similar classification and employ measures necessary to preserve such security, equivalent to those employed by the USG and commensurate with security agreements between the USG and the Purchaser. If such security agreements do not exist, the Purchaser certifies that classified items will be provided only to those individuals having an adequate security clearance and a specific need to know in order to carry out the LOA program and that it will promptly and fully inform the USG of any compromise, or possible compromise, of U.S. classified material or information furnished pursuant to this LOA. The Purchaser further certifies that if a U.S. classified item is to be furnished to its contractor pursuant to this LOA: (a) item will be exchanged through official Government channels, (b) the specified contractor has been granted a facility security clearance by the Purchaser at a level at least equal to the classification level of the U.S. information involved, (c) all contractor personnel requiring access to such items have been cleared to the appropriate level by the Purchaser, and (d) the Purchaser will assume responsibility for administering security measures while in the contractor's possession. If a commercial transportation agent is to be used for shipment, the Purchaser certifies that such agent has been cleared at the appropriate level for handling classified items. These measures will be maintained throughout the period during which the USG may maintain such classification. The USG will use its best efforts to notify the Purchaser if the classification is changed.

Section 2 outlines certain rights and obligations of purchaser associated with the LOA sales contract.

**Section 2.1 Purchaser Right to Cancel.** In Section 1.4, the USG retained the right to cancel or suspend part or all of the case. This section provides the FMS customer the right to change their mind. Simply because the customer accepted the case at one point does not mean the customer is locked into that decision. The customer is a voluntary participant and can cancel or delete items prior to delivery.

If the customer chooses to exercise this right, the customer is liable for all the termination costs. Termination costs are incurred to cancel work that is already underway to support the LOA. Most termination costs relate to payments to contractors arising from contract cancellations. Generally, contractors are entitled to certain payments when contracts are unilaterally cancelled prior to normal contract completion. Depending on how much work is already in-process or on-contract, the termination cost to cancel or delete items may be significant. Because this condition provides the right to cancel, termination liability is a factor calculated into the LOA payment schedule. The calculation of termination liability ensures that at any point in the LOA execution, the U.S. should have collected sufficient funds in advance from the customer to cover all outstanding liabilities in the event the customer elects to cancel part or all of the LOA. More information on termination liability is contained in Chapter 12, “Foreign Military Sales Financial Management.”

**Section 2.2 End-Use Purposes.** This condition stipulates that the purchaser will only use the material purchased under the LOA for certain purposes. At first, it may appear unfair that the USG attaches limitations to the sale but you must remember that the USG is selling defense articles and services rather than consumer products. Additionally, as discussed in Section 1.1, this is often the same material used by U.S. forces. As such, the USG has valid concerns over how these articles are used by the customer. More information on end-use is contained in Chapter 18, “End-Use Monitoring and Third-Party Transfer.”

**Section 2.3 Third Country Transfers.** Section 2.3 restates the obligations imposed on the FMS purchaser under the AECA. Although the FMS customer actually becomes owner of the material, the USG requires, as a condition of the sale, that the purchaser agree to not resell or transfer possession of the purchased items without first obtaining written USG consent.

This condition does not mean that the customer can never sell the material or turn over possession for maintenance to a third country. It simply means that the USG is very concerned about who has access and possession of this defense material. Before offering the LOA, the USG determined that it was in its best interest to permit the customer to possess this material. The USG wants to ensure that whatever third party may subsequently possess the material is also in the USG’s best interest.

This condition also requires FMS purchaser to respect the proprietary rights of U.S. contractors. U.S. industry often has made significant investments in defense technologies that enable the firm to compete both commercially and in the defense sector. This condition protects the intellectual property of U.S. contractors from being misused. More information on third-party transfers is contained in Chapter 18, “End-Use Monitoring and Third-Party Transfer.”

This section also specifically identifies conditions related to Cyprus. It does appear unusual that provisions regarding Cyprus would be included in the standard terms and conditions used with all security assistance LOAs. This is an example of the political influences that impact security assistance. The Congress was concerned about Cyprus. As a result, they specifically addressed this concern within the language of the AECA. Given these conditions relative to Cyprus are contained within the law, these same conditions flow over into the standard terms and conditions of the LOA.

**Section 2.4 Security Requirements.** The USG is very concerned about preserving the security of material transferred under FMS. This condition requires the FMS customer to maintain equivalent security measures. This does not mean the customer must use the same procedures. It means that the end result of the customer's security process will achieve a level of security that is equivalent to the security level provided by the U.S. Additionally, the customer is responsible for security not only when the item is in government possession but also when it is provided to domestic contractors or when it is in the transportation pipeline. More information on security controls is contained in Chapter 7, "Technology Transfer, Export Controls, and International Programs Security Requirements."

### **Section 3. Indemnification and Assumption of Risk**

3.1 The Purchaser recognizes that the USG will procure and furnish the items described in this LOA on a non-profit basis for the benefit of the Purchaser. The Purchaser therefore undertakes to indemnify and hold the USG, its agents, officers, and employees harmless from any and all loss or liability (whether in tort or in contract) which might arise in connection with this LOA because of:

3.1.1 Injury to or death of personnel of Purchaser or third parties, or

3.1.2 Damage to or destruction of (a) property of DoD furnished to Purchaser or suppliers specifically to implement this LOA, (b) property of Purchaser (including the items ordered by Purchaser pursuant to this LOA, before or after passage of title to Purchaser), or (3) property of third parties, or

3.1.3 Infringement or other violations of intellectual property or technical data rights.

3.2 Subject to express, special contractual warranties obtained for the Purchaser, the Purchaser agrees to relieve the contractors and subcontractors of the USG from liability for, and will assume the risk of, loss or damage to:

3.2.1 Purchaser's property (including items procured pursuant to this LOA, before or after passage of title to Purchaser), and

3.2.2 Property of DoD furnished to suppliers to implement this LOA, to the same extent that the USG would assume for its property if it were procuring for itself the items being procured.

Section 3 reminds the customer that the USG's purpose in the sales contract is not for financial gain. Obviously, the USG believes the sale is in its best interest but profit is not the motivating factor. In recognition of this fact, this condition states that the purchaser indemnifies the USG. This means that if financial liabilities arise in the performance of the LOA, the purchaser agrees in advance to absorb all the financial risk.

At first, the requirement for indemnification may seem unfair and appear that the USG is placing undue risk upon the FMS purchaser. However, you must remember that the USG is conducting business on behalf of the FMS customer in the same manner that the USG conducts business for itself. As a normal business practice, the USG exposes itself to certain degrees of risk. Given the broad range of risks the USG faces, it is less expensive to absorb the occasional loss than it is to purchase insurance to cover all these risks. In procurements, the USG includes limitation of liability clauses to relieve contractors from certain liabilities (like acts of God). If contractors were required to cover all potential risks, they would demand a higher contract price in compensation for being exposed to greater risk.

When it comes to FMS, the USG faces certain risks just like it does while conducting business for itself. Only this time, the USG is simply requiring the customer to absorb the risks that the USG would absorb if the actions were conducted in support of a USG requirement. So, in reality, the USG is not asking the customer to be exposed to an extraordinary degree of risk. The USG is only requiring the customer to stand in the USG's place to face the same level of risk that the USG normally faces.

**Liability Illustration.** Suppose, under an FMS case, a foreign purchaser wanted to purchase an excess aircraft and have that aircraft's avionics upgraded prior to delivery. Following case acceptance, the U.S. awarded a contract for the upgrade, removed the aircraft from storage and transported it to a contractor for upgrade work. When the contractor completed the work, the contractor's test pilot flew the aircraft on a functional check flight. During the check flight, a catastrophic problem developed which caused the aircraft to crash and be destroyed as well as causing significant property damage on the ground at the crash site.

In this hypothetical scenario, who is financially liable for the costs? The answer is that it depends. The USG would investigate the crash to determine the cause. In the investigation, the contractor's contractual responsibility would be examined to determine if contractor non-performance or negligence contributed to the accident. If the contractor would have held some financial responsibility if the work was being done for the benefit of the USG, then the contractor would also be held to the same degree of financial responsibility in the case of the work being performed for an FMS customer.

In certain situations, the USG knowingly exposes itself to certain risks under the self insurance principle. If, at the conclusion of the investigation, it was found that the contractor had fulfilled all his contractual requirements and the accident cause was in an area that the USG normally accepts the liability risk, this LOA condition states that the FMS purchaser will assume this financial liability rather than the USG or the contractor. Again, this provision simply informs the FMS customer that they should be prepared to be exposed to the same degree of financial risk that the USG exposes itself to in the normal course of business.

#### **Section 4. Financial Terms and Conditions**

4.1 The prices of items to be procured will be billed at their total cost to the USG. Unless otherwise specified, the cost of items to be procured, availability determination, payment schedule, and delivery projections quoted are estimates based on the best available data. The USG will use its best efforts to advise the Purchaser or its authorized representatives of:

4.1.1 Identifiable cost increases that might result in an overall increase in the estimated costs in excess of ten percent of the total value of this LOA,

4.1.2 Changes in the payment schedule, and

4.1.3 Delays which might significantly affect estimated delivery dates. USG failure to advise of the above will not change the Purchaser's obligation under all subsections of section 4.4.

4.2 The USG will refund any payments received for this LOA which prove to be in excess of the final total cost of delivery and performance and which are not required to cover arrearages on other LOAs of the Purchaser.

4.3 Purchaser failure to make timely payments in the amounts due may result in delays in contract performance by DoD contractors, claims by contractors for increased costs, claims by contractors for termination liability for breach of contract, claims by USG or DoD contractors for storage costs, or termination of contracts by the USG under this or other open Letters of Offer and Acceptance of the Purchaser at the Purchaser's expense.

4.4 The Purchaser agrees:

4.4.1 To pay to the USG the total cost to the USG of the items even if costs exceed the amounts estimated in this LOA.

4.4.2 To make payment(s) by check or wire transfer payable in U.S. dollars to the Treasurer of the United States.

4.4.3 If Terms of Sale specify “Cash with acceptance”, to forward with this LOA a check or wire transfer in the full amount shown as the estimated Total cost, and agrees to make additional payment(s) upon notification of cost increase(s) and request(s) for funds to cover such increase(s).

4.4.4 If Terms of Sale specify payment to be “Cash prior to delivery”, to pay to the USG such amounts at such times as may be specified by the USG (including initial deposit) in order to meet payment requirements for items to be furnished from the resources of DoD. USG requests for funds may be based on estimated costs to cover forecasted deliveries of items. Payments are required 90 days in advance of the time DoD plans such deliveries or incurs such expenses on behalf of the Purchaser.

4.4.5 If Terms of Sale specify payment by “Dependable Undertaking”, to pay to the USG such amounts at such times as may be specified by the USG (including initial deposit) in order to meet payments required by contracts under which items are being procured, and any damages and costs that may accrue from termination of contracts by the USG because of Purchaser’s cancellation of this LOA. USG requests for funds may be based upon estimated requirements for advance and progress payments to suppliers, estimated termination liability, delivery forecasts, or evidence of constructive delivery, as the case may be. Payments are required 90 days in advance of the time USG makes payments on behalf of the Purchaser.

4.4.6 If Terms of Sale specify “Payment on Delivery”, that bills may be dated as of the date(s) of delivery of the items, or upon forecasts of the date(s) thereof.

4.4.7 That requests for funds or billings are due and payable in full on presentation or, if a payment date is specified in the request for funds or bill, on the payment date so specified, even if such payment date is not in accord with the estimated payment schedule, if any, contained in this LOA. Without affecting Purchaser’s obligation to make such payment(s) when due, documentation concerning advance and progress payments, estimated termination liability, or evidence of constructive delivery or shipment in support of requests for funds or bills will be made available to the Purchaser by DoD upon request. When appropriate, the Purchaser may request adjustment of any questioned billed items by subsequent submission of a discrepancy report.

4.4.8 To pay interest on any net amount by which it is in arrears on payments, determined by considering collectively all of the Purchaser’s open LOAs with DoD. Interest will be calculated on a daily basis. The principal amount of the arrearage will be computed as the excess of cumulative financial requirements of the Purchaser over total cumulative payments after quarterly billing payment due dates. The rate of interest paid will be a rate not less than a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding short-term obligations of the USG as of the last day of the month preceding the net arrearage and shall be computed from the date of net arrearage.

4.4.9 To designate the Procuring Agency and responsible Paying Office and address thereof to which the USG will submit requests for funds and bills under this LOA.

Section 4 states the purchaser’s financial liability and obligation for items or services purchased through FMS sales.

**Section 4.1 Recovery of Cost.** This section reiterates that the LOA data reflects a best estimate and may be subject to change. This section obligates the purchaser to pay the USG the total cost for the items in accordance with the AECA.

**Section 4.2 Refunds.** The USG will refund payments that are in excess of the total final cost unless there are other unpaid financial requirements of other LOAs with the same purchaser. In this situation, the excess payments from one LOA may be applied toward the delinquent amount due on another LOA.

**Section 4.3 Payment Delays.** Any delay in making the LOA payments by the purchaser may result in the USG directing the contractor to stop work which, in turn, may lead to additional or increased costs and delayed delivery.

**Section 4.4 Terms of Sale.** The purchaser agrees to pay the total cost incurred under the LOA even if this amount exceeds the estimated costs provided earlier. The purchaser agrees to make payments in accordance with the applicable terms of sale specified on the LOA. Later Chapter 12, “Foreign Military Sales Financial Management,” gives a more detailed explanation of the specific terms of sale.

## **Section 5. Transportation and Discrepancy Provisions**

5.1 The USG agrees to deliver and pass title to the Purchaser at the initial point of shipment unless otherwise specified in this LOA. With respect to items procured for sale to the Purchaser, this will normally be at the manufacturer’s loading facility; with respect to items furnished from USG stocks, this will normally be at the U.S. depot. Articles will be packed, crated, or otherwise prepared for shipment prior to the time title passes. If “Point of Delivery” is specified other than the initial point of shipment, the supplying U.S. Department or Agency will arrange movement of the articles to the authorized delivery point as a reimbursable service but will pass title at the initial point of shipment. The USG disclaims any liability for damage or loss to the items incurred after passage of title irrespective of whether transportation is by common carrier or by the U.S. Defense Transportation System.

5.2 The Purchaser agrees to furnish shipping instructions which include Mark For and Freight Forwarder Codes based on the Offer/Release Code.

5.3 The Purchaser is responsible for obtaining insurance coverage and customs clearances. Except for articles exported by the USG, the Purchaser is responsible for ensuring that export licenses are obtained prior to export of U.S. defense articles. The USG incurs no liability if export licenses are not granted or they are withdrawn before items are exported.

5.4 The Purchaser agrees to accept DD Forms 645 or other delivery documents as evidence that title has passed and items have been delivered. Title to defense articles transported by parcel post passes to the Purchaser at the time of parcel post shipment. Standard Form 364 will be used in submitting claims to the USG for overage, shortage, damage, duplicate billing, item deficiency, improper identification, improper documentation, or nonshipment of defense articles and non-performance of defense services and will be submitted promptly by the Purchaser. DoD will not accept claims related to items of \$200 or less for overages, shortages, damages, nonshipment, or non-performance. Any claim, including a claim for shortage (but excluding a claim for non-shipment/non-receipt of an entire lot), received after 1 year from passage of title to the article or from scheduled performance of the service will be disallowed by the USG unless the USG determines that unusual and compelling circumstances involving latent defects justify consideration of the claim. Claims, received after 1 year from date of passage of title or initial billing, whichever is later, for non-shipment/non-receipt of an entire lot will be disallowed by the USG. The Purchaser agrees to return discrepant articles to USG custody within 180 days from the date of USG approval of such return.

Section 5 delineates the transportation obligations and requirements of the purchaser and defines the role of the USG in arranging for transportation when required.

**Section 5.1 Title Transfer and Delivery Point.** Section 5.1 identifies where the title transfers and where delivery occurs. Title represents ownership. This condition states that the purchaser becomes the owner of material at the initial shipping point. Delivery, in this context, does not mean the material has arrived at the final customer destination. Delivery refers to the point where transportation responsibility transfers from the USG to the purchaser. The delivery term code applied to each LOA line will indicate where the purchaser becomes responsible for transportation. Under certain delivery

term codes, the USG may arrange for transportation in various increments up to and including to an inland location within the purchaser's country. Regardless of when the purchaser assumes transportation responsibility, the title still will transfer at the initial shipping point. This means that the USG will not be financially liable for items damaged in transit even if USG arranges or provides the transportation.

This condition should not be interpreted to mean that the purchaser's financial liability does not begin until title transfer. Per Section 3, the purchaser's liability begins with case acceptance. As the USG initiates actions towards fulfilling the LOA requirements, financial liabilities begin to accrue. In Section 3, the purchaser has agreed to indemnify the USG and its contractors. Additionally, in Section 2, the purchaser has agreed to be liable for termination costs if they elect to delete items or to cancel the LOA.

**Section 5.2 Shipping Instructions.** Section 5.2 describes the customer's obligation to provide the required transportation information so that the items are shipped through the appropriate channels to arrive at the correct customer destination. The customer provides this information at the bottom of the first LOA page as part of the LOA acceptance process. The freight forwarder code identifies the commercial freight company employed by the purchaser to accomplish overseas transportation. The mark for code identifies the ultimate in-country destination address.

**Section 5.3 Insurance and Export Licenses.** Given the fact that the purchaser bears the risk of any damage that may occur in shipment, the purchaser is responsible to obtain any desired insurance coverage. Additionally, the purchaser is responsible for completing the necessary documents to clear customs. Most FMS customers delegate the task of coordinating all customs paperwork to their freight forwarder.

**Section 5.4 Delivery Documents and Claims.** Section 5.4 delineates the purchaser's obligation to accept certain USG documentation as evidence that title transfer and delivery has occurred. Additionally, this section outlines the process and conditions under which the purchaser can submit claims for discrepancies. Although the USG would like the FMS process to operate error free, in reality, things sometimes do go wrong. The customer has an avenue of recourse to submit claims for "mistakes". This process is called the supply discrepancy reporting process. More information on the supply discrepancy process is contained in Chapter 10, "Logistics Support of International Military Sales."

## Section 6. Warranties

6.1 The USG does not warrant or guarantee any of the items sold pursuant to this LOA except as provided in section 6.1.1. DoD contracts include warranty clauses only on an exception basis. If requested by the Purchaser, the USG will, with respect to items being procured, and upon timely notice, attempt to obtain contract provisions to provide the requested warranties. The USG further agrees to exercise, upon the Purchaser's request, rights (including those arising under any warranties) the USG may have under contracts connected with the procurement of these items. Additional costs resulting from obtaining special contract provisions or warranties, or the exercise of rights under such provisions or warranties, will be charged to the Purchaser.

6.1.1 The USG warrants the title of items sold to the Purchaser hereunder but makes no warranties other than those set forth herein. In particular, the USG disclaims liability resulting from infringement or other violation of intellectual property or technical data rights occasioned by the use or manufacture outside the U.S. by or for the Purchaser of items supplied hereunder.

6.1.2 The USG agrees to exercise warranties on behalf of the Purchaser to assure, to the extent provided by the warranty, replacement or correction of such items found to be defective, when such material is procured for the Purchaser.

6.2 Unless the condition of defense articles is identified to be other than serviceable (for example, “As-is”), DoD will repair or replace at no extra cost defense articles supplied from DoD stocks which are damaged or found to be defective in respect to materiel or workmanship when it is established that these deficiencies existed prior to passage of title, or found to be defective in design to such a degree that the items cannot be used for the purpose for which they were designed. Qualified representatives of the USG and of the Purchaser will agree on the liability hereunder and the corrective steps to be taken.

Section 6 describes the warranty provisions of the LOA and specifies the USG obligations and the purchaser’s responsibilities. Under FMS, the customer is purchasing from the USG itself rather than from a commercial company. This section defines what warranties the USG provides on FMS material. Section 6.1 discusses warranty provisions for items obtained from procurement and Section 6.2 concerns items delivered from DoD inventory.

**Section 6.1 Procurement Warranties.** For items supplied from procurement, the USG itself does not provide any type of performance warranty. The USG only warrants that the material will have a clear title. This simply means that there will be no financial claim or lien against the material delivered.

This does not mean that the FMS purchaser has no method of recourse if an item from procurement does not operate properly. Customers with defective items from procurement should submit a supply discrepancy report to the USG. The USG may be able to resolve the problem by seeking resolution through the contractor under the provisions of the USG procurement contract.

This condition also provides the FMS purchaser the option of identifying specific warranty requirements when they request an item via the FMS process. Based on the foreign purchaser’s specific warranty request, the USG will attempt to procure the desired warranty from the vendor in conjunction with the procurement of the material. The FMS customer will pay any additional costs necessary to acquire the desired warranty. The USG agrees to exercise the warranty rights on behalf of the FMS purchaser. The SAMM requires that special customer requested warranties be treated as a defense service on the LOA and described in an LOA note. The LOA note is to outline the process the customer is to use to exercise the special warranty rights.

**Section 6.2 Warranties from Stock.** This condition states that the U.S. will repair or replace items delivered from DoD inventories when it can be determined that the defect or damage existed prior to shipment. This can be a difficult determination. The IAs have SDR offices to evaluate these claims and make determinations regarding the appropriate corrective action. More information on the supply discrepancy process is contained in Chapter 10, “Logistics Support of International Military Sales.”

## **Section 7. Dispute Resolution**

7.1 This LOA is subject to U.S. Federal procurement law.

7.2 The USG and the Purchaser agree to resolve any disagreement regarding this LOA by consultations between the USG and the Purchaser and not to refer any such disagreement to any international tribunal or third party for settlement.

This section explains the method by which disputes will be resolved.

Section 7.1 means that all activities the USG undertakes to execute the LOA, such as procurement contracts, are subject to U.S. federal procurement law.

Section 7.2 provides for the resolution of LOA disagreements by a bilateral consultative process. The purchaser agrees that he will not seek redress from any international tribunal such as the world court or a third party.

### **ADDITIONAL LETTER OF OFFER AND ACCEPTANCE NOTES**

In addition to the standard terms and conditions, an LOA may require supplemental information to clarify requirements and responsibilities. Notes in LOAs provide more detailed information concerning items or services being offered. When LOAs are prepared before details are known, notes include general coverage of this information and an estimate of when specific information on these topics can be provided to the purchaser. These notes may be shared in advance with the purchaser to ensure any purchaser unique requirements are accommodated.

The SAMM, Table C5.T5, lists supplemental LOA notes and identifies the situations for which the respective notes should be applied. If a full line item description cannot fit in the space available under the military articles and services description, Table C5.T5 states that a separate line item description note should be used to provide a detailed description of the items being sold or services performed.

SAMM, Table C5.T5 identifies two notes that are required for all LOAs which, in reality, make these two conditions equivalent to being standard terms and conditions. These two mandatory notes for all LOAs are for end-use monitoring (EUM) and missile technology control regime (MTCR).

**Missile Technology Control Regime.** The U.S. and six other countries have agreed to restrict the transfer of sensitive missile equipment and technology. This condition states that the purchaser will not divert articles and services received under the LOA for any use that could contribute to the acquisition, design, development or production of a missile as defined by section 74 of the AECA. More information about MTCR is contained in Chapter 2, "Security Assistance Legislation and Policy." Additionally, DIASM conducts a MTCR course. Information about the MTCR course is available via the online DISAM course catalog available at web site: <http://www.disam.dsca.mil/Catalog/MTCR.asp>

**End-use Monitoring.** This condition states that the purchaser agrees to permit the USG to conduct inspections and physical inventories upon request and to view inventory and accountability records maintained by the purchaser. More information on EUM is contained in Chapter 18, "End-use Monitoring and Third-party Transfers."

### **CHANGES TO THE LETTER OF OFFER AND ACCEPTANCE**

An international purchaser's requirements and/or the conditions and circumstances of the accepted LOA may change during the course of implementation and execution. These changes can include increased or decreased costs of the item, delays in delivery, additional items, or changes in system configuration. To authorize these changes and establish an audit trail, proper documentation must be prepared for accurate and complete case management.

The specific document that implements the change, whether it is a new LOA, an amendment, or modification, will be dictated by the special conditions surrounding each change. FMS interests are best served through use of the document which best safeguards U.S. and customer interests while most effectively accomplishing the needed program change. Selection of the appropriate document to implement the change revolves around the scope of the original LOA. Scope refers to the basic intention, goal, or purpose of the original LOA agreement.

Specific details for identifying the correct document to use and for complying with the necessary administrative requirements of review and/or countersignature by DSCA are found in SAMM, Section C6.7. When a case manager has doubt as to which document is appropriate after reviewing the SAMM guidance, DSCA should be consulted.

### **Major Changes in Scope – New Letter of Offer and Acceptance**

Revisions that significantly change original requirements are normally considered to be major changes in scope. Examples would be the addition of significant military equipment (SME), or a substantial expansion of the program. Major changes normally require the preparation of a new LOA. New LOAs for major changes to an ongoing program will cross reference the previous LOA. While new LOAs are preferred for major scope changes, under certain exceptional conditions, an amendment may be used. Use of an amendment for a major scope change requires approval by DSCA.

### **Minor Changes in Scope - Amendment**

Changes to an on-going program that are not categorized as major change of scope make up this category. An amendment represents a bilateral change to the LOA. An amendment does not become effective unless the purchaser accepts the change. The purchaser has a choice in either accepting or rejecting an amendment offered by the U.S. Acceptance of the change is signified by the purchaser signing the amendment. Rejection of the change is signified by declining to sign the amendment. Examples of minor scope changes are:

- Increases or decreases to blanket order cases
- Changes in quantity,
- Addition or deletion of secondary equipment
- Changes in configuration,
- Transportation delivery code changes

Some amendments may require initial deposits, and these will not be implemented until sufficient payments have been received to cover current financial requirements, including termination liability. A sample amendment is contained in Appendix 1, “Case Document Package.”

### **Changes Not Affecting Scope - Modification**

Changes to existing LOAs that do not impact the scope of the LOA are accomplished via modifications. When the purchaser accepts the original LOA, they agree to accept the provisions of the standard terms and conditions. The standard terms and conditions permit the U.S. to make unilateral changes to the LOA under certain circumstances. A modification is the document the U.S. uses to inform the purchaser of these unilateral changes. Because the purchaser already agreed to such unilateral modifications by the USG in the standard terms and conditions of the LOA, the purchaser is not required to accept a modification. A modification becomes effective upon issuance by the USG. A modification does have a line for the purchaser to sign but, in this instance, the signature simply acknowledges receipt rather than conveying acceptance. Examples of changes implemented by a modification include:

- Price changes
- Delivery schedule changes

- Changes in the payment schedule
- Changes to correct administrative errors

The modification also plays a critical role in financial management by the U.S. security assistance community. Per the LOA standard terms and conditions, the U.S. is committed to apply its best efforts to provide the purchaser a modification when estimated total costs change, payment schedule changes or significant delivery delays occur. A modification should also be provided for cost reductions, even if relatively minor, when all items are on order and prices are reasonably firm. More information on financial management is contained in Chapter 12, “Foreign Military Sales Financial Management.” A sample modification is contained in Appendix 1, “Case Document Package.”

### **Pen and Ink Changes**

A pen and ink change refers to minor change that is authorized after an LOA or amendment is offered to the customer but is made prior to customer acceptance. These are generally small administrative or arithmetic changes. Examples are a small arithmetic change which does not increase total value and administrative changes such as an address correction, initial deposit or payment schedule adjustment, or extension of the offer expiration date. Pen and ink changes made by the customer without prior authorization by the implementing agency are considered a counteroffer and are not valid.

Pen and ink changes to modifications are not authorized. The reason for this is that a modification is a unilateral document and becomes effective upon issuance by the USG without requiring customer acceptance. Any required changes to a modification must be accomplished by issuing another modification.

### **LETTER OF INTENT**

The letter of intent (LOI) is used for the acquisition of long lead time requirements of a proposed system sale. The LOI serves as the authority and provides the funding to begin procurement in advance of actual LOA acceptance by the customer. The LOI essentially functions as a mini-LOA. All items appearing on the LOI will also appear on the LOA. Items are placed on the LOI to permit the program to proceed on schedule. Examples of LOI items are the early procurement of castings or the start of critical training. The LOI and the corresponding LOA will use the same case designator. If and when the corresponding LOA is accepted by the customer, the LOI is superseded in authority by the LOA and the LOI becomes ineffective. On the other hand, if the Purchaser requests cancellation of the program associated with an implemented LOI, the LOI will be converted into an LOA document that will be implemented and closed at actual costs.

LOIs can be generated either prior to the issuance of a system sale LOA or during the period between LOA issuance and LOA acceptance. Policy on the use of LOIs is contained in SAMM, Section C5.5.

### **Letter of Intent – Other Considerations**

Use of the LOI does not constitute authorization to take implementing action in advance of compliance with the statutory reporting requirement of Section 36(b), AECA. If the associated LOA requires congressional notification, DSCA must approve the use of an LOI. If the LOI data falls within the congressional reporting thresholds, such reporting must be completed prior to LOI implementation. The procedures for LOI congressional notification are in SAMM, Section C5.5.6.

Attachment 8-1 provides a sample LOI. The LOI format is very similar to the LOA format. LOIs, like LOAs, are prepared using the Defense Security Assistance Management System (DSAMS).

## **LEASE OF DEFENSE ARTICLES**

Normally, the USG makes defense articles available to foreign governments by FMS under the AECA. However, there are instances where a lease, rather than sale, to eligible foreign countries or international organizations is appropriate. Such arrangements are authorized under the AECA when it is determined that there are compelling foreign policy and national security reasons for leasing rather than selling, and the articles are not needed for U.S. use during the proposed lease period. For example, a foreign government may desire to obtain a defense article for a short period under a lease for testing purposes to assist it in determining whether to procure the article in quantity. As another example, the USG may only be able to respond to an urgent foreign requirement for defense property by making it available from inventory, but for national defense reasons cannot sell the property and must require its return to the inventory after a specified term. Attachment 8-2 provides a sample lease. Section C11.10 of the SMM provides lease policy.

### **Approval**

The approval of the director of DSCA must be obtained before any DoD component may enter into a lease of a defense article with a foreign country or international organization. DoD components obtain DSCA concurrence before indicating to a foreign country or international organization that a lease is being favorably considered or is an available option. The cognizant DoD component will provide a determination and forwarding memorandum in the format at SMM, Section C11.F11, along with the draft lease. A detailed rationale must be provided for any proposed lease outlining the reasons why the defense articles are being leased rather than sold.

### **Security Assistance Organization Responsibility**

The security assistance organization (SAO) or defense attaché office (DAO) where no SAO is assigned in the partner country should receive a copy of each lease entered into with that government. The SAO should assist DoD components in monitoring of the use of USG-owned equipment in the country.

### **Lease Terms and Conditions**

The basic lease format is at Attachment 8-2. Additional provisions may be added with the concurrence of the appropriate legal office of the DoD component concerned and with DSCA approval. The lease will be signed by the appropriate IA and provided to DSCA for countersignature.

A separate LOA will be used for packing, crating, handling, transportation, and the sale of associated articles and services, including any refurbishment of the defense article(s) required prior to, during, or after the lease period. The LOA will also be used to recover applicable costs if the article is lost or destroyed during the lease period.

### **Lease Identification**

Using the DSAMS, the IA assigns a unique designator to each lease. The lease designator is composed of the country code, the IA code, and a 3-position code assigned by the IA. The lease designator is included on each lease page, including schedules, appendices, and accompanying documents. FMS cases associated with leases must reference the lease designator.

## **Duration**

Leases may be written for a maximum of 5 years and a specified period of time required to complete major refurbishment work prior to delivery. Leases may include multiple items with different lease duration periods. The shortest lease period is 1 month and the longest lease period is 60 months. Leases shall provide that, at any time during the lease period, the USG may terminate the lease and require the immediate return of the defense article. Leases of less than 5 years may be extended via an Amendment but the total period under a specific lease may not exceed 5 years plus the time needed for refurbishment.

## **Amendments**

Lease amendments may be used to extend or change existing leases. Such changes include variations to payment schedules, Schedule A items, or periods of performance. Each amendment includes the original lease designator and undergoes the same staffing process as the original lease. If a lease for less than 1 year is amended so that the total period of the original lease and the amendment equals or exceeds 1 year, the amendment must be reported to the Congress before entering into the lease amendment.

## **Loss, Destruction or Damage**

The lessee must agree to pay the costs of restoration or replacement if the articles are lost, damaged, or destroyed while leased. In this case, the customer is charged the replacement cost (less any depreciation) if the U.S. intends to replace the articles or the actual article value (less any depreciation) if the U.S. does not intend to replace the articles. These charges are recouped under an FMS transaction via the LOA.

## **Lease Payment**

The lessee must agree to pay in U.S. dollars all costs incurred by the USG in leasing articles, including reimbursement for depreciation (rent) of articles while leased. The rental payment is calculated in accordance with DoD 7000.14-R, Volume 15, Chapter 7. Rental payments do not include an administrative charge.

Schedule A of each lease identifies the replacement costs of the items being leased and the schedule for rental payment due to the USG. Billings to the foreign lessee are based on this schedule of payments and are included on a separate DD Form 645 with the country's quarterly FMS billing statement. Defense Finance Agency Service deposits receipts from lease rental payments in the Miscellaneous Receipts Account 3041 (FMS Recoveries, DoD Lease Costs).

The use of foreign military financing program (FMFP) funds is not authorized for payments of lease rental charges. When authorized by DSCA, FMFP funds may be authorized for FMS cases prepared in support of a lease.

## **Exceptions**

The provisions regarding lessee rental payment shall not necessarily apply to leases entered into for purposes of cooperative research or development, military exercises, or communications or electronics interface projects, or to any defense article which has passed three quarters of its normal service life. Where a DoD component recommends an application of authorized exceptions, express authority will be requested from DSCA, identifying the authorized exception.

## **U.S. Navy Ships**

For leases of U.S. Navy ships, the guidance in SAMM, Section C11.10.3.1, applies. Ship leases are authorized under separate, specific legislation as required by 10 U.S.C. 7307.

### **LOANS**

Under the AECA Section 65 and the FAA, the DoD may lend materiel, supplies, and equipment to the North Atlantic Treaty Organization (NATO) and major non-NATO allies for research and development purposes. Loans that support cooperative research, development, test, and evaluation (RDT&E) programs, strengthen the security of the U.S. and its allies by promoting standardization, interchangeability, and interoperability of allied defense equipment. Each loan or gift transaction must be recorded in a written agreement between the Secretary of Defense and the country. Policy regarding loans is contained in SAMM, Section C11.11.

### **INTERNATIONAL AGREEMENTS**

For most foreign military sales of defense articles and services, the LOA is sufficient to establish the rights and obligations of each party to the agreement. However, in exceptional instances, it may be in the USG interest to negotiate and conclude an international agreement, memorandum of understanding (MOU), memorandum of agreement (MOA), or similar document before, concurrent with, or after conclusion of the LOA. SAMM, Section C11.9, provides guidance on the use of international agreements for security assistance programs involving commercial or government coproduction agreements.

International agreements for security assistance include standard provisions, some of which reflect the requirements of law or regulation. These agreements may also include unique provisions reflecting the interests of the involved parties. The final content of each agreement is determined during negotiations.

An international agreement generator has been adopted by the secretary of defense and the implementing agency legal advisors to establish a standard and uniform format for DoD-wide application. International agreements are further described in later Chapter 13, "International Armaments Cooperation." The Defense Acquisition University offers a course in preparing international agreements.

### **SUMMARY**

The basic contractual instrument used in FMS transactions is the LOA. The LOA standard terms and conditions establish specific rights and obligations for both the USG and the foreign purchaser. These standard terms and conditions are used in all LOAs regardless of the customer. Minor changes of scope within an LOA are accomplished through an amendment. A modification is used to record non-scope changes of the LOA, i.e., price changes or changed payment schedules, deletions of items or decreases in quantities, etc. Another type of document used in FMS is the LOI which deals with the financing the procurement of long lead time materials and components associated with a major system sale. Leases and loans of defense articles may also be made to international purchasers. For complex FMS sales, an international agreement may be required to define how issues beyond the scope of the LOA will be handled.

### **REFERENCES**

U.S. Department of Defense. DoD 5105.38-M, *Security Assistance Management Manual (SAMM)*, Chapters 5, 6, 9, and 11.





Case Description continued: meet contract award date, 15 September 2007

**This LOI pertains to the following:**

<b>(1) Item Nbr</b>	<b>(2) Description/Condition</b>	<b>(3) Qty, Unit of Issue</b>	<b>(4) Total Costs</b>
001 B4	A9C 9A9C00ACPARTS (N)(N)(R) A/C CCOMP, PARTS, (VIII) ACCESSORIES	XX	\$76,435,865
47	FX-99 Long Lead Time Engine and other Aircraft Parts (Note(s) 1)		

**Estimated Cost Summary:**

(5) Net Estimated Cost	\$76,435,865
(6) Administrative Charge	\$2,904,563
(7) Total Estimated Cost	\$79,340,428

**To assist in fiscal planning, the USG provides the following anticipated costs of this LOI:**

**Estimated Payment Schedule**

<b>Payment Date</b>	<b>Quarterly</b>	<b>Cumulative</b>
Initial Deposit LOI	\$2,854,268	\$2,854,268
15 Dec 2007	\$2,492,421	\$5,346,689
15 Mar 2008	\$3,894,407	\$9,241,096
15 Jun 2008	\$5,841,611	\$15,082,707
15 Sep 2008	\$8,100,367	\$23,183,074
15 Dec 2008	\$10,437,012	\$33,620,086
15 Mar 2009	\$11,994,774	\$45,614,860
15 Jun 2009	\$12,072,663	\$57,687,523
15 Sep 2009	\$10,125,459	\$67,812,982
15 Dec 2009	\$6,776,269	\$74,589,251
15 Mar 2010	\$3,582,855	\$78,172,106
15 Jun 2010	\$1,168,322	\$79,340,428

**Signed Copy Distribution:**

1. Upon acceptance, the Purchaser should return one signed copy of this LOI to Defense Finance and Accounting Service - Denver, ATTN: DFAS-JY/DE, 6760 E. Irvington Place, Denver, CO 80279-2000. Simultaneously, wire transfer of the initial deposit or amount due with acceptance of this LOI document (if required) should be made to ABA# 021030004, U.S. Treasury NYC, Agency Location Code: 00003801, Beneficiary: DFAS-JY/DE Agency, showing "Payment from Government of Bandaria for BN-D-QAA"; or a check for the initial deposit, made payable to the U.S. Treasury, mailed to DFAS-JDT/DE, P.O. Box 173659, Denver, CO 80217-3659, showing "Payment from Government of Bandaria for BN-D-QAA". Wire transfer is preferred.

2. One signed copy should be returned to Department of the Air Force, Air Force Security Assistance Center, 555th ISPTS/CC, 1822 Van Patton Drive, Building 210, WPAFB, OH 45433-5337.

**Note 1: Line 001 - Long Lead Time Aircraft and Engine Parts.**

This line is for procurement of critical FX-99 aircraft and J99-C11-100 engine parts with a lead time over 36 months. These parts are required to ensure that delivery of the complete aircraft can be accomplished in accordance with the purchasers need date. Spares with a lead time of less than 36 months will be procured after the Letter of Offer and Acceptance is implemented.

**Note 2. Contract Administrative Surcharge.**

For any lines on this LOA document with a Source of supply of "X: or "P", the Contract Administrative Surcharge (CAS) rates apply: for contract administration 0.65%; for quality assurance and inspection 0.65%; and for contract audit, 0.20%.

**Note 18. Sole Source Procurement.**

Paragraph 1.2 of the Letter of Offer and Acceptance Standard Terms and Conditions states in part: "Unless the Purchaser has requested, in writing, that a sole source contractor be designated, and this LOA reflects acceptance of such designation by DoD, the Purchaser understands that selection of the contractor source to fill requirements is solely the responsibility of the USG." By letter dated 1 February 2007 the Purchaser has requested that Grafton Aircraft Industries, Cedarville, Ohio be designated as prime contractor for line item 001 of this Letter of Offer and Acceptance. This note is evidence that DoD has accepted such request of the Purchaser and that such designation is required at the written direction of the Purchaser.

**Note 3. Offset Costs.**

The DoD is not a party to any offset agreements/arrangements that may be required by the Purchaser in relation to the sales made in this LOA and assumes no obligation to administer or satisfy any offset requirements or bear any of the associated costs. To the extent that the Purchaser requires offsets in conjunction with this sale, offset costs may be included in the price of contracts negotiated under this LOA. If the Purchaser desires visibility into these costs, the Purchaser should raise this with the contractor during negotiation of offset arrangements.

**Note 4. Administrative Surcharge.**

An Administrative surcharge of 3.8% has been applied to Line 001.

## Letter of Intent Standard Terms and Conditions

1. Except to the extent directly inconsistent with the provisions hereof, the terms and conditions set forth in "Letter of Offer and Acceptance Standard Terms and Conditions" of the Letter of Offer and Acceptance on which this LOI is based will apply to all activities undertaken pursuant to this LOI, and the estimated costs of such activities will be included in the Letter of Offer and Acceptance. In particular, Conditions 2.2, 2.3, and 3 are hereby incorporated by reference and made an integral part of this LOI. This LOI shall be superseded upon Purchaser's signature of the Letter of Offer and Acceptance.

2. In anticipation of the Purchaser's signature of the above mentioned Letter of Offer and Acceptance, the Purchaser Government commits to the following:

2.1. If, prior to Purchaser signature of the above mentioned Letter of Offer and Acceptance, the US DoD has reason to believe that the costs which it expects to incur in the performance of this LOI will exceed the amount set forth in block Section B, it shall promptly notify the Purchaser in writing to that effect. The notice shall state the estimated amount of and the date by which the additional obligational authority (by a new or amended LOI) will be required from the Purchaser in order to continue performance.

2.2. If, after such notification, the additional obligational authority is not granted by the date set forth in the notification, the USG is authorized, at its discretion, to terminate any and all activities under this LOI at Purchaser's expense, in accordance with section 2.3 below, in an amount not to exceed the amount set forth in section B.

2.3. The Purchaser agrees to pay the full amount of such authorized obligations and to make funds available in such amounts and at such times as may be requested by the USG for expenditures against such obligations.

3. This LOI does not prejudice the Purchaser's decision on the acceptance of the Letter of Offer. Moreover, the Purchaser may cancel all or any part of this LOI at any time by notifying the USG. Upon receipt of such notification the USG is authorized to terminate any and all activities initiated hereunder, at Purchaser's expense, in accordance with section 2.3 above, in an amount not to exceed the amount set forth in Section B.

4. Certain items for which procurements may be initiated hereunder are normally the subject of definitization conferences, at which specific items and quantities are agreed upon. If it is necessary to place any such items on order prior to any such conference, the US DoD is authorized to do so, using its best judgment, and will furnish a list of the items so ordered at the conference.

**Attachment 8-2  
Lease Agreement**



**Lease of F-16 A/B  
Between  
The United States Government  
and  
The Government of Bandaria,  
BN-D-ZAA**

This LEASE, made as of XX XXX 200X, between the United States Government (hereinafter called the "Lessor Government") represented by its Department of the Air Force and the Government of Bandaria (hereafter called the "Lessee Government") represented by its Office of Defense, Air and Defense Cooperation Attaché, Government of Bandaria.

**Witnesseth**

**WHEREAS**, The Lessor Government has determined that the lease of fifteen (15) F-16A ADF Aircraft and two (2) F-16B OCU Aircraft and, if applicable, all associated nonexpendable support equipment as listed in Schedule A of this lease (including but not limited to tools, ground support equipment, test equipment, and publications) (hereinafter referred to as the Defense Articles) are not for the time needed for public use, and

**WHEREAS**, The Lessor Government has determined that there are compelling foreign policy and national security reasons for providing such Defense Articles on a lease basis rather than on a sales basis under the *Arms Export Control Act*, and

**WHEREAS**, The Lessor Government has considered the effects of the lease of the articles on the technology and industry base, particularly the extent, if any, to which the lease reduces the opportunity of entities in the national technology and industrial base to sell new equipment, and

**WHEREAS**, This lease is made under the authority of Chapter 6 of the *Arms Export Control Act*.

**NOW THEREFORE**, The parties do mutually agree as follows:

1. In consideration of a rental charge as indicated in Schedule A, and the maintenance and other obligations assumed by the Lessee Government, the Lessor Government hereby leases to the Lessee Government and the Lessee Government hereby leases from the Lessor Government the Defense Articles for the period of sixty (60) months commencing on the date first above written (unless otherwise agreed under term of this lease) and under the terms and conditions set forth in the General Provisions hereto annexed.
2. The Lessor Government shall deliver the Defense Articles to the Lessee Government at such time and place as may be mutually agreed upon. Such delivery shall be evidenced by a certificate of delivery.

IN WITNESS WHEREOF, Each of the parties hereto has executed this lease as of the day and year first above written, unless otherwise agreed under term of this lease.

\_\_\_\_\_  
The Government of Bandaria  
By \_\_\_\_\_

\_\_\_\_\_  
(Typed Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
The United States Government  
By \_\_\_\_\_

\_\_\_\_\_  
(Typed Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

COUNTERSIGNATURE:

By \_\_\_\_\_

(Typed Name)

Director, Defense Security Cooperation Agency

## General Provisions

### 1. Operations and Use.

a. Except as may be otherwise authorized by the Lessor Government and except for the purposes of transfer from and return to the Lessor Government, the Lessee Government shall keep the Defense Articles in its own possession, custody, and control. The Lessee Government shall not transfer title to or possession of the Defense Articles to anyone not an officer, employee, or agent of the Lessee Government and shall not permit any encumbrance or other third party interest in the defense articles.

b. The Lessee Government shall, except as may be otherwise mutually agreed in writing, use the items leased hereunder only:

(1) For the purposes specified in the Mutual Defense Assistance Agreement, if any, between the Lessor Government and the Lessee Government;

(2) For the purposes specified in any bilateral or regional defense treaty to which the Lessor Government and Lessee Government are both parties, if subparagraph (1) of this paragraph is inapplicable.

(3) For internal security, individual self-defense, and/or civic action, if subparagraphs (1) and (2) of this paragraph are inapplicable.

c. To the extent that any Defense Articles may be classified by the Lessor Government for security purposes, the Lessee Government shall maintain a similar classification and employ all measures necessary to preserve such security, equivalent to those employed by the Lessor Government, throughout the period during which the Lessor Government may maintain such classification. The Lessor Government will use its best efforts to notify the Lessee Government if the classification is changed.

### 2. Initial Condition.

The Defense Articles are leased to the Lessee Government on an “as is, where is” basis without warranty or representation concerning the condition or state of repair of the Defense Articles or any part thereof or concerning other matters and without any agreement by the Lessor Government to alter, improve, adapt, or repair the Defense Articles or any part thereof.

### 3. Conditioning and Transfer Cost.

The Lessee Government shall bear the cost of rendering the Defense Articles operable and transferable and of transferring the Defense Articles from the United States or other point of origin and back to the place of re-delivery. In the event the Defense Articles are transported by vessel, only U.S. flag vessels may be used, unless waived by the Lessor Government.

### 4. Inspection and Inventory.

Immediately prior to the delivery of the Defense Articles to the Lessee Government, an inspection of the physical condition of the Defense Articles and an inventory of all related items may be made by the Lessor Government and the Lessee Government. A report of the findings shall be made which shall be conclusive evidence as to the physical condition of said Defense Articles and as to such items as of the time of delivery. A similar inspection, inventory, and a report may be made by the Lessor Government upon the termination or expiration of this Lease. The findings of that report shall be conclusive evidence as to the physical condition of the Defense Articles and as to such items as of the date of termination or expiration of this Lease. At the election of the Lessor Government, the Lessee Government at its own cost shall either promptly correct any deficiency or rebuild, replace, or repair any loss of or damage to the Defense Articles or compensate the Lessor Government for the restoration or replacement value (less any depreciation in the value as determined by the Lessor Government) of such correction, rebuilding, replacement, or repair. At the Lessor Government's choice, the Lessee Government at its own cost will remove any alterations or additions to the Defense Articles or pay the Lessor Government the cost of such removal, as determined by the Lessor Government. In the absence of removal by the Lessee Government, title to any such alterations or additions shall vest in the Lessor Government.

### 5. Maintenance.

The Lessee Government shall maintain the Defense Articles in good order, repair, and operable condition and except as provided in paragraph four, shall upon expiration or termination of this Lease return the Defense Articles in operable condition and in as good condition as when received, normal wear and tear excepted.

### 6. Risk or Loss.

All risk or loss of or damage to the Defense Articles during the term of this Lease and until their return to the place of re-delivery shall be borne by the Lessee Government.

### 7. Indemnification.

The Lessee Government renounces all claims against the Lessor Government, its officers, agents, and employees arising out of or incidental to transfer possession, maintenance, use, or operation of the Defense Articles or facilities and will indemnify and hold harmless the Lessor Government, its officers, agents, and employees for any such claims of third parties and will pay for any loss or damage to Lessor Government property.

### 8. Alterations.

The Lessee Government shall not make any alterations or additions to the Defense Articles without prior consent of the Lessor Government. All such alterations or additions shall become the property of the Lessor Government except items paid for by the Lessee Government which can be readily removed without injury to the Defense Articles and are removed by the Lessee Government prior to re-delivery of the Defense Articles. As a condition of its approval of any alteration or addition, the Lessor Government may require the Lessee Government to restore the Defense Articles to their prior condition.

9. Termination.

This Lease may be terminated without cost to the Lessor Government:

- a. By mutual agreement of the parties;
- b. By the Lessee Government on 30-days written notice; or
- c. By the Lessor Government at any time. The Lessee Government shall immediately return the leased Defense Articles at the direction of the Lessor Government. Termination will be subject to the Lessee Government's residual responsibilities hereunder (such as, duty to return leased Defense Articles promptly, to pay costs required hereunder, to indemnify and hold harmless the Lessor Government).

10. Place of Re-delivery.

Upon expiration or termination of this lease, the Defense Articles shall be returned to the Lessor Government at Davis-Monthan AFB, AZ, or as mutually agreed.

11. Title.

Title to the Defense Articles shall remain in the Lessor Government. The Lessee Government may, however, place the Defense Articles under its Flag, or display its national insignia when appropriate.

12. Reimbursement for Support.

The Lessee Government will pay the Lessor Government for any services, packing, crating, handling, transportation, spare parts, materials, or other support furnished for the Defense Articles by the Lessor Government pursuant a Letter of Offer and Acceptance under the Arms Export Control Act. FMS Case BN-D-ZAA applies.

13. Covenant against Contingent Fees.

The Lessee Government warrants that no person or selling agency has been employed or retained to solicit or secure this Lease upon an agreement or understanding for a commission, percentage, brokerage or contingent fee.

14. Officials Not to Benefit.

No members of or delegate to the Congress of the United States, or Resident Commissioner of the United States shall be admitted to any share or part of this Lease or to any benefit that may arise there from.

15. Proprietary Rights.

The Lessee Government will ensure, by all means available to it, protection of proprietary rights in any Defense Article and any plans, specifications, or information furnished, whether patented or not.

16. Reports.

When the Lessee Government performs tests and evaluations on the leased Defense Articles and prepares a formal report of the resulting data to be released to a third party, the Lessee Government will allow the Lessor Government to observe the test and evaluation and to review the report. The Lessee Government will obtain Lessor Government approval of any release to a third party.

17. Cost of Lessor Government.

The Lessee Government agrees to pay in United States dollars all costs incurred by the Lessor Government in leasing the Defense Articles covered by this Lease including, without limitation reimbursement for depreciation of such Defense Articles while leased. The Lessee Government also agrees to pay the costs of restoration or replacement, less any depreciation in the value during the term of the lease, to the Lessor Government under the Lessor Government's foreign military sales procedures. The rental charge shown in Schedule A is based on costs identified at the time of signature of this Lease and does not relieve the Lessee Government from liability for other costs in accordance with the provisions of this Lease.

18. Distribution.

Copies of the accepted Lease will be distributed by the Lessee as follows:

- a. EUCOM Regional Management Division - Original
- b. Commander - copy
- c. DSCA Europe, Russia, Americas and Sub-Saharan Africa
- d. DFAS - copy
- e. European Division

**Lease Agreement  
Schedule A  
To  
Lease Agreement**

Between the United States Government, Department of the \_\_\_\_\_  
(LESSOR) and the Government of \_\_\_\_\_(Lessee).

I. This Lease Agreement Authorizes the use of U.S. government property identified herein:

<u>Item</u>	<u>Description</u>	<u>Qty</u>	<u>Line Duration</u>	<u>Replacement Costs</u>		<u>Rental Charge (Including Depreciation) Per Month</u>
				<u>Unit Value</u>	<u>Total Value</u>	
A.						
B.						
C.						
D.						
E.						

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**Total Value \$** \_\_\_\_\_

II. Rental Payment

Initial Payment (with acceptance - as applicable):

\_\_\_\_\_ Qtr FY \_\_\_\_\_: (Amount due) Date Due: (15th day of month preceding quarter)

\_\_\_\_\_ Qtr FY \_\_\_\_\_: (Amount due) Date Due: (15th of month preceding quarter)

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**Total Rental \$** \_\_\_\_\_

III. Related FMS Case Designator: BN-D-ZAA