
Ask an Instructor Questions and Answers

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[The following is a feature added to the Journal “Education and Training” section which provides our readership insight into some of the more globally applicable questions and answers which we have received through our web site

http://www.disam.dsca.mil/Research/Ask_Instructor/askinstructor.asp. We hope you find it useful, and solicit your feedback on both this article and the utility of the “Ask an Instructor” program managed by DISAM. Questions and answers may be changed or edited to suit the Journal and its readership.]

Question

How does a nation turn Foreign Military Sales (FMS) supplied hardware in to the Defense Reutilization Management Office (DRMO) when said equipment is no longer required? The *Security Assistance Management Manual* (SAMM) reference is below, but it is not specific, we require more detail. See SAMM C8.6.2. Disposal. A key aspect of end-use monitoring (EUM) is the development of a disposal plan by the host nation in coordination with the Security Cooperation Office (SCO). Disposal constitutes a change in end-use for which prior consent from the DOS is required for *United States Munitions List* (USML) items that are not being disposed of by a Defense Reutilization and Marketing Office (DRMO). After a non-USML item has been demilitarized (in accordance with U.S. standards) if necessary, it is no longer a defense article and may be disposed of without DoS approval unless the item was provided on a grant basis by the USG, in which case it would require DoS authorization prior to disposal. This also applies to scrap (Condition Code S) items. However, transfer of USML items to a private entity, even if demilitarized, requires prior approval from the DoS, even for disposal by scrapping. Because the potential for unauthorized disclosure of classified or sensitive information, safety concerns, and other factors vary among countries; the SCOs are to ensure that DOD disposal procedures are followed by the host nations.

Answer

Unfortunately the SAMM is unclear about disposal, and the wording of this section is being reviewed for a change. The fact is: FMS customers may NOT turn property in to a local or regional DRMO. The DRMOs only accept US property. Title to the material has transferred to the FMS customer, so the property is no longer US property. DRMS will provide demilitarization services if the customer wishes to establish a services Letter of Offer and Acceptance (LOA) with DRMS for that purpose. The Security Cooperation Officer can oversee the destruction/demilitarization of US-origin material; however, the physical disposal of the material residue is at the discretion of the FMS customer. FMS customers who do not wish to demilitarize their material may alternatively try to transfer it to another party with DoS consent (if significant military equipment/major defense equipment (SME/MDE), or sell it through the Worldwide Warehouse Redistribution Service (if secondary or support item, non-SME).

There is an exception to all of the above, and that is for material that was acquired under the old Military Assistance Program (MAP). In that situation the USG retains the right to take back the material when the customer no longer needs it, however, the USG has to want it back. If that is the

case, the turn-in process would be through the DRMO. If the USG has no desire to retain the old MAP material, then follow the procedures in the first paragraph of this response message.

Question

Where does all the Contract Administration Services (CAS) money that is collected on FMS Procurement cases go? I see the description for them being under the FMS cases for QA, Auditing, and contract administration. However, when an acquisition shop creates a new contract to procure the items on the case they receive no funds to recoup for the effort. So where does the CAS go? (Beside Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA), which mostly only get involved after the contract is awarded) thanks!

Answer

I think your core question concerns whether the contracting (PCO) organizations that award contracts are entitled to a share of the CAS collections. The answer is NO. Under the standard level of service principle, the FMS admin charge (3.8%) is intended to recoup the cost of contracting activities up to and including contract award. Typically, contracting actions are accomplished by the implementing agency that prepared the LOA. You can read more about the FMS admin charge in the *DOD Financial Management Regulation*, Vol 15 (Security Assistance), Chapter 7 (Pricing), Section 070601 avail at: <http://www.dod.mil/comptroller/fmr/15/>. Additionally, see the SAMM Section C5.4.9.1 and Table C5.T6 for activities covered by the admin charge.

The CAS is an authorized charge applied to FMS billing deliveries for procured items. CAS is collected by DFAS Indianapolis into the CAS surcharge account. These CAS funds are used exclusively to pay for contract administration and audit functions (primarily performed by DCMA and DCAA). You can read more about CAS in the *DOD Financial Mgmt Reg*, Vol 15 (Security Assistance), Chapter 7 (Pricing), Section 070405. Additionally, refer to the DSCA policy letter on CAS avail at: http://www.dsca.mil/SAMM/policy_memos/2002/DSCA_02_14.pdf.

Question

Where is it stated in a policy or written in a regulation that the USG cannot provide the Prime Contractor a copy of the implemented LOA? How does the Prime Contractor get a copy of the LOA?

Answer

Official policy for FMS is contained in the SAMM avail at: <http://www.dsca.mil/samm/>. SAMM C4.1 states that FMS is conducted via formal contracts (LOAs) between the USG and an authorized foreign purchaser. SAMM C5.4.1 also makes this same point. As it relates to your question, the contractor is not a legal party to the gov-to-gov LOA contract and as such has no right to the contract (LOA). Note that they may request a copy under the *Freedom of Information Act* (FOIA). See SAMM C3.6 for more info and the role of the purchaser. SAMM C6.3.6.2 states the policy regarding providing the FMS customer with a copy of the procurement contract. Basically, it states that the FMS customer is not a party in the procurement contract and therefore does not have a legal right to the procurement contract. The SAMM does not outright state that the contractor cannot have a copy of the LOA but, the above references establish that the principle of being a party to the contract itself establishes rights of access to the contract. Under FMS, the contractor is working directly for the USG under the terms of a *Federal Acquisition Regulation/Defense Federal Acquisition Regulation Supplement* (FAR/DFARS) contract. See SAMM C6.3.1. The contractor should be concerned about what is on

the procurement contract rather than what is on the LOA. It is the USG's role to manage the LOA from both a logistics and financial standpoint. These are internal USG processes and that is why the contractor does not play a direct role in the LOA or LOA financial management. Contractors need to focus on the procurement contract from a logistics and financial standpoint.

Question

I have a question about transportation when an FMS case has a long warranty period. We have several customers that have asked to procure a ten year warranty in conjunction with their missile procurement. The ten year warranty starts at USG acceptance of the DD 250. The customer is responsible for transportation costs associated with returning the missiles for warranty repair, whether by Defense Transportation System (DTS) or customer. Do we need to keep the FMS case open for the duration of the ten year warranty to cover transportation? We hope not, since that would require keeping the program management line open for the entire warranty period. What is the proper way to handle this? Is the FMS case, with DSP-94, the license under which the warranty repair is imported and exported? Can it still be cited even if the case is closed?

Answer

Bad news. You may NOT close the entire case until after all the warranties have expired. But you can close other lines on the case that don't involve the warranty. SAMM C6.3.8 says that the purchaser may request performance warranties, which are provided and paid for on the LOA as a defense service. If, as part of the warranty arrangement, the customer is sending missiles back to the US for repairs, then the DOD will still be obligated to oversee the active warranty line. If the customer is returning anything via DTS, then the customer is paying the transportation bill via the LOA, so you have to keep the transportation line open as well. And even if the customer doesn't use DTS and arranges for commercial transportation through his freight forwarder, then you're still responsible for keeping the repair line open and managing that. So no matter how you slice it, no you can't close the entire case. As far as the import/export question goes, it depends. If the item is unclassified, the DSP-94 and LOA will suffice, along with *International Traffic in Arms Regulation* (ITAR) exemption 123.4 to import and re-export the material after repair. However, if the material is classified, your customer must apply for a DSP-85 from the DoS, Directorate of Defense Trade Controls (DDTC). Finally, if the case is closed the DSP-94 will not be valid. The case must be open in order for the material to move in or out of the USA. You may have to amend the case and change the performance period to cover the duration of the warranty.

Question

What is the government view on supporting a commercial sale with either an FMS blanket order case or by buying into a Cooperative Logistics Supply Support Agreement (CLSSA) Foreign Military Sales Order (FMSO) 2 account for in-service support? Will the USG say you have to buy the end-item FMS, too, or would they be willing to mix and match?

Answer

DOD does follow-on support for Direct Commercial Sale (DCS)-purchased end items all the time. If the end item is standard to the DOD inventory then getting a CLSSA or a blanket order spares case established shouldn't be a problem. DOD generally doesn't care if the end item was sold commercially. What makes follow-on support tricky is if the end-item is a high-tech weapons system with a unique configuration for that specific international customer, to which the DOD is not privy. If the weapon

system configuration is such that it is non-standard to DOD, then getting follow-on support may require DOD to first do a configuration study (on an FMS case) of the end item, which would require the manufacturer to release drawings, specs, and other data that the contractor is often unwilling to do for copyright or proprietary reasons. The only time DOD insists that the customer buy the end-item via FMS is if the customer is using the Foreign Military Financing Program (grant) to buy defense equipment. Then the law requires the USG to control the use of those funds by overseeing the contract. There is a list of FMS-only designated items which the DSCA weapons division maintains. These items are sensitive (Man-Portable Air Defense System (MANPAD) missiles and Communications Security (COMSEC) equipment, for example) and/or the configuration and/or distribution of them must be controlled. Hence, one may not purchase them commercially (it also depends on who the customer is). I recommend advising the weapons system program manager of the FMS customer's intent. That way, if there are configuration concerns, the program manager can address them before any contracts are signed. That's particularly important if government furnished equipment/government furnished material (GFE/GFM) has to be provided to the manufacturer by the DOD. That is a long answer to a short question, but it is better than saying "it depends."