
PURCHASER'S LIABILITY IN FOREIGN MILITARY SALES TRANSACTIONS

[The following information -- an updated version of a May 1973 paper prepared by the Office of the General Counsel, DoD -- has been used to explain to FMS purchasers the general thrust of the liability provisions contained in Paragraph C of the DD Form 1513.]

This memorandum is being provided in response to inquiries from Foreign Military Sales (FMS) purchaser countries as to the meaning of the liability provisions in Paragraph C of the General Conditions (Annex A) of DD Form 1513, effective 1 August 1977. The provisions of Paragraph C are divided into separate phrases, and this memorandum deals with those seriatim. The full text of the General Conditions is attached to [provided at the end of] this memorandum.

I. Paragraph C.1

a. "It is understood by the Purchaser that the USG in procuring and furnishing the items specified in this Offer and Acceptance does so on a nonprofit basis for the benefit of the Purchaser." -- This statement recognizes that the United States Government (USG) enters into FMS transactions for the convenience and benefit of foreign governments which desire to make use of articles and services from American sources. Purchasing through FMS procedures often results in cost savings to foreign purchasers, in that lower unit prices result from foreign purchasers being able to consolidate their order with larger orders. All FMS transactions are carried out without profit to the USG, as the USG charges only the cost of the items plus a small surcharge for the overhead costs of administering FMS cases. The USG is authorized to enter into FMS agreements with friendly countries by the Arms Export Control Act, as amended, a law passed by the U.S. Congress. This Act specifies that FMS transactions must be done at no loss to the USG, and it is for this reason that the USG must include the indemnification and hold harmless provisions of paragraph C.1 of Annex A of the DD Form 1513.

b. "The Purchaser therefore undertakes . . . to indemnify and hold the USG, its agents, officers, and employees harmless from" -- This is the central, operative portion of this paragraph, stating what responsibility the Purchaser has toward the USG with respect to losses or liabilities which arise in connection with the FMS sale. The Purchaser's undertaking to "indemnify" means that, if the USG suffers a loss to specified USG property, or becomes liable to a third party for a loss which the third party suffers, the Purchaser must reimburse the USG for such loss or liability. The Purchaser's undertaking to "hold harmless" means that, if the Purchaser itself suffers certain specified losses or liabilities, it agrees not to seek reimbursement for such losses or liabilities from the USG. The meanings, above, are only general definitions; the

Purchaser's undertakings are limited by other provisions of Paragraph C.1, as explained below. As stated in this phrase, the indemnification and hold harmless undertakings are for the benefit of the USG, and of its departments or agencies (such as the Army, Navy or Air Force), and any individual employed by or serving as an agent of the USG or any of its departments or agencies. (Reference hereafter to "USG" will also mean agents, officers and employees of the USG, as appropriate.)

c. "subject to A.3 above" -- This phrase means that nothing in paragraph C-1 detracts from the provisions of Paragraph A.3 of Annex A of the DD Form 1513. Specifically, the USG remains committed to repair or replace defective or damaged items delivered from DoD stocks, and to exercise on behalf of the Purchaser any rights or warranties accruing to the Purchaser from USG procurement contracts. There is also no effect on the provisions of Paragraph B.6 of Annex A, relating to claims. Additionally, in Paragraph A.3.c, the USG disclaims any warranty or guarantee except as contained in its normal procurement contracts, and disclaims liability for patent infringement occasioned by use or manufacture by the Purchaser of items outside of the U.S. This latter provision covers patent infringement actions brought against the Purchaser outside the U.S. Obviously, the USG is in no position to know whether an item manufactured in the U.S. is covered by a patent issued in the customer country.

d. "any or all loss or liability (whether in tort or in contract) which might arise in connection with this Offer and Acceptance because of" -- This phrase indicates that the indemnification and hold harmless undertakings apply only to a limited category of losses or liabilities, namely those following the words "because of." This phrase also indicates that, within the limited group of liabilities for which the Purchaser must accept the risk, there are liabilities arising either in tort (wrongful activity causing harm to person or property) or in contract. The USG may incur a contract liability because of various provisions of its procurement contracts with U.S. suppliers. Examples of contractual provisions under which the USG may incur a liability for which the Purchaser would be required to indemnify the USG are given below. (It should also be noted that these provisions do not affect the Purchaser's obligation, under Paragraph B.1 of Annex A of the DD Form 1513, to pay to the USG the full contract cost of any items procured from the Purchaser, even if the final total cost exceeds the amounts estimated in the Letter of Offer and Acceptance.) Loss or liability from a tort action can, of course, cover a wide range of situations, some of which will be discussed below.

In the case of loss or liability arising in tort, the indemnification and hold harmless undertakings apply without making any distinction based on fault. This requirement is mandated by the Arms Export Control Act, which authorizes the sale of defense articles and services on a no-loss, full reimbursement basis. Since the USG sells defense articles and services for the convenience and benefit of the Purchaser, it is not unreasonable to require the

Purchaser to reimburse the USG for any loss or liability to it resulting from the sale, including those which may involve negligence or other fault on the part of USG personnel. The benefits reaped by FMS purchasers are manifold and include: lower unit prices from consolidation of orders with larger orders of the USG and other FMS purchasers; USG contracting expertise with U.S. contractors; efficient and corruption-free procurement procedures; ability to deal only with trusted U.S. service personnel sharing a common military background and perspective; U.S. military expertise in recommending configuration, options, and levels of support and spares; avoidance of expense of establishing and maintaining a procurement office in the U.S.; inspections under exacting USG standards; and ability to buy into the DoD logistics support system. Accordingly, it is not unfair for the USG, in rendering its assistance to the Purchaser for the Purchaser's benefit, to establish protections to assure that it will incur no losses.

It should be noted that, under the Federal Tort Claims Act, the USG generally will not be liable for, and so the indemnity clause will be inapplicable to, injury or loss of property caused by certain specified intentional torts, misrepresentations, or discretionary acts of its employees, or acts committed by a USG employee acting outside the scope of his office or employment.

Purchaser countries have been concerned about their role in legal actions for which they may ultimately be responsible under these indemnity provisions. As a general rule, the USG will resolve all disputes involving its procurement contracts in a manner most advantageous to the Purchaser. This is a part of the general contract management function which the USG undertakes in Paragraph A.1 of Annex A of the DD Form 1513. Purchasers will not normally be involved in such contractual activity. In the case of tort claims, when the USG is the object of legal action arising from an FMS case, the USG will immediately consult with the Purchaser to determine whether it will be proper to invoke the indemnity provisions of the FMS agreement. If it is determined that the Purchaser should indemnify the USG, the Purchaser's representatives will be allowed to participate as fully as is feasible in preparing for, defending, or settling any legal claim or action against the USG, or against both the USG and the Purchaser.

It is noted that the provisions of Paragraph C.1 describing the indemnification and hold harmless undertakings do not set forth the precise point in time that these undertakings come into force. This is because there is no single point in time. Subsequent discussion will give some concrete examples.

e. "(i) injury to or death of personnel of Purchaser or third parties" -- This phrase is the first of the three subsections which specifically describe the types of situations for which the indemnity and hold harmless undertakings are applicable. This phrase first states that any personal injury or death of personnel of the Purchaser cannot be made a liability of the USG or any of its agents or employees. This undertaking would apply at any time in

the course of the agreement, and after delivery of the items. Nothing, however, prevents the Purchaser or any individual employee of the Purchaser from seeking legal redress for injury or death from any third parties. The second part of this phrase states that, if the USG is made liable for injury or death of some third party because of activities connected with this agreement, the Purchaser must indemnify the USG. Such liability would normally not occur during the manufacturing phase of a contract, since USG contractors are generally required to carry -- and in other cases do carry as a matter of sound business practice -- adequate insurance coverage for accidents or injuries occurring in their facilities. Most likely, the third party liability would occur as a result of flight testing or ferrying of aircraft or other activities subsequent to the completion of manufacturing. It should be noted that the indemnification undertaking does not apply to any loss or liability associated with injury to or death of DoD personnel.

f. "(ii) damage to or destruction of (A) property of the DoD furnished to Purchaser or suppliers specifically to implement this Offer and Acceptance" -- It is common practice for the USG to supply tools and other equipment to contractors for their use in producing items for USG use. Under normal USG contracting procedures, contained in the Defense Acquisition Regulation ("DAR", formerly known as the Armed Services Procurement Regulation), the USG assumes the risk of loss of this "government-furnished property" ("GFP") if, while the GFP is in the contractor's facility, it is damaged or destroyed because of accident or natural disaster (e.g., flood, fire, explosions, etc.). In FMS procurements, the USG will authorize the contractor to utilize the GFP provided to the contractor for USG procurement purposes, such as consumable material or USG-owned production equipment, to produce end items also for foreign countries. If the Purchaser has a unique requirement which requires the USG to provide the contractor with special GFP, or if additional GFP (such as material to be consumed or incorporated in an end item during contract performance) is required for the purchaser's production run apart from USG requirements, the risk of damage to or destruction of that special or additional GFP must be borne by the Purchaser. Except for this type of situation, the USG will bear the risk of damage or destruction to its own property in connection with any FMS agreement.

g. "(ii) damage to or destruction of . . . (B) property of Purchaser (including the items ordered by Purchaser pursuant to this Offer and Acceptance, before or after passage of title to Purchaser)" -- This phrase indicates that the Purchaser must relieve the USG of liability in the event of any damage or destruction to Purchaser's property. This, of course, covers the end items after passage of title to the Purchaser. It also covers the following situations before passage of title of the end items to the Purchaser: (1) damage or loss to aircraft during flight testing and ferrying overseas from U.S. plants by the USG; (2) damage to or destruction of a partially completed item during manufacture, when the unfinished item is specifically identified as one being produced

for an FMS purchaser; and (3) damage to or destruction of components or subsystems, identified as having been procured for an FMS requirement (e.g., aircraft engines, electronic parts and other items which the USG or foreign customer procures separately and turns over to the prime contractor for incorporation into the end item). Accordingly, the Purchaser bears the risk of loss of identifiable components and unfinished items, even before title to the item passes to the Purchaser. However, it must be emphasized that this provision of the FMS agreement is limited to the undertaking to indemnify and hold the USG harmless in connection with such loss. If a contractor is responsible for such loss, the USG will enforce all available contractual remedies on the Purchaser's behalf, pursuant to the general contract management responsibility of the USG. (Purchaser's direct action against contractors or subcontractors may be limited by Paragraph C.2 of Annex A, explained below.) Also, the Purchaser may take legal action against any third party which may be liable for damage or destruction of Purchaser's property (e.g., the pilot or owner of a private airplane involved in an accident with Purchaser's aircraft during flight testing or ferrying).

The above discussion has focused on the Purchaser's property which has been procured by the USG under an FMS agreement. Of course, there is also the possibility of sale of property from USG stocks. In such cases, the items cannot be identified as belonging to the Purchaser until passage of title. Accordingly, Purchaser's responsibility for loss of such property under this provision of the FMS agreement does not begin until passage of title. The only exception is in the case of Supply Support Agreements (also called Cooperative Logistics Supply Support Agreements), whereby a foreign Purchaser buys a share of the USG stockpile of specified spare parts. In this regard, if there is loss or damage to this stockpile which the USG must ultimately bear, the Purchaser must bear its pro rata share of such loss. This exception is set forth in the Supply Support Agreement.

Finally, it should be pointed out that the Purchaser's undertaking to indemnify and hold the USG harmless in case of damage to or destruction of Purchaser's property also applies whenever the USG performs services on Purchaser's property (such as overhaul or repair) or transports such property as a reimbursable defense service.

h. "(ii) damage to or destruction of . . . (C) property of third parties" -- As in the case of personal injury to third parties, the USG must be indemnified against any loss or liability in case of any legal action against the USG because of third party property damage. As mentioned above, USG contractors normally carry insurance against third party claims arising from manufacturing operations. Any third party property damage claims arising after completion of the manufacture of the item must be at the risk of the Purchaser. Such risk may include a period before passage of title, as during aircraft flight testing and ferrying.

i. "(iii) patent infringement" -- This phrase covers a different subject than the provision about patent infringement in Paragraph A.3.c of Annex A of the DD Form 1513. Paragraph A.3.c refers to patent infringement actions which may be brought against the Purchaser outside the U.S. The provision concerning patent infringement in Paragraph C.1 of Annex A states that, if patent infringement actions are brought against the USG, in connection with an FMS procurement, the Purchaser must indemnify the USG against that liability. Under U.S. law, the USG has the right to make use of any invention or knowledge, but if such use infringes a patent, the patent holder has the right to seek compensation from the USG for use of its patent. Such claims for compensation for use of patents will normally be settled by the USG as part of its contract management responsibility under Paragraph A.1 of Annex A of the DD Form 1513, and the Purchaser will not normally be advised of or involved in patent compensation actions. Any compensation paid by the USG for patent usage will be included as part of the price of the item ordered under the FMS agreement, and the Purchaser must, of course, pay the full price of the item. It should be noted, however, that if a U.S. procurement contract provides that the contractor will indemnify the USG for patent infringement (see DAR Section 9-103), the USG will look to the contractor for indemnity first, before passing on such costs to the foreign Purchaser under the FMS agreement.

Subsections e through i, above, have provided descriptions and examples of the specific areas of liability for which the Purchaser undertakes to indemnify and hold the USG harmless against loss or liability. It should be remembered that these are only examples and that in any particular case, after consideration of all the facts, the USG may seek to invoke these provisions in order to avoid a liability to itself which would be contrary to the provisions of the Arms Export Control Act. Additionally, the above explanations concerning Paragraph C.1 only address the relationship of the Purchaser and the USG. In this regard, except as provided in Paragraph C.2, the provisions of Paragraph C of Annex A do not affect the Purchaser's legal relationship with any other party.

II. Paragraph C.2

This paragraph, though somewhat complex and lengthy, in fact is designed to solve a very limited problem involving the legal relationship of an FMS Purchaser and U.S. contractors and subcontractors; it does not involve the USG's legal position. (Reference hereafter to "contractor" means both contractors and subcontractors.) The problem concerns damage from defects in contract end items. Of course, both for itself and for FMS procurements, USG officials inspect contract end items before accepting them. Occasionally, items develop defects at a later date which could not be discovered earlier, and sometimes these defects lead to accidents or other damage to the Purchaser or third parties. Some historical background will aid in understanding this provision.

In American law, there has long been controversy between manufacturers and purchasers concerning responsibility for loss of or damage to goods resulting from defects or failures occurring after sale. A purchaser with a defective item may suffer two kinds of loss (also called "damages"). The first loss is some part or the entire value of the defective item itself (called "direct damages"), and the second is all loss or damages beyond those to the defective item (broadly called "consequential damages"). It is very difficult to give a complete definition of consequential damages, but an example would be property damage or personal injuries (to the owner or third parties) occurring from an accident which is caused by a defective part in the original item purchased from a manufacturer.

The problem, of course, is that while direct damages are limited by the value of the item purchased, consequential damages are virtually limitless, depending on circumstances. This makes financial planning by manufacturers difficult and leads to much legal controversy. The matter of consequential damages in the field of U.S. defense procurement has been particularly unsettled for a great many years. This is because of the great complexity of the major weapons systems involved, and the impossibility of preparing reasonable reserves against the myriad of direct and consequential damages to which a defense contractor may be liable. As a result, it is current policy of the USG and its defense contractors for the USG to accept, and to self-insure against, the risk of direct and consequential damages to the USG resulting from defects in contract end items, as set forth in DAR Section 1-330.

This policy is partially formalized in DAR Section 7-104.45 [provided at the end of this article]. This section provides that the contractor shall not be liable for loss of or damage to USG property resulting from defects in the contract end item. This clause is designed to relieve the contractor of liability for consequential damages to USG property, as for instance when a defect in a small component causes destruction of a large system, like an airplane or missile. When the end item in the contract is itself a major system (normally meaning an item valued at over \$100,000), the DAR clause specifically relieves the contractor of liability for consequential damages to USG property, and also for the value of direct damage to or destruction of the end item itself. If the end item is small (normally meaning an item valued at less than \$100,000), the contractor is relieved of liability for consequential damages to USG property, but may be liable for the value of the defective item if other clauses in the contract would make it so liable. This formula is responsible for keeping procurement costs down, because it eliminates the need for contractors to carry large reserves or insurance against these risks. It may be noted that DAR Section 7-104.45 is only a limited answer to the problem of consequential damages, since it only applies to damage to USG property.

A serious problem arose several years ago when an FMS purchaser brought a lawsuit in a U.S. court against U.S. contractors

for loss of an aircraft allegedly resulting from a defective part. The case was settled, but the contractors realized that despite the policy of the USG to relieve them of liability for consequential damages and some direct damages from defective end items, there might be nothing to prevent an FMS purchaser from seeking such damages. Since the contractors base their financial planning on avoiding insurance or reserves for such risks, they presented to the USG the following dilemma. Either some way must be found to relieve the contractors of the risk of liability to foreign government purchasers, as the USG regularly does for its own procurement, or else the price of goods for FMS would increase greatly to cover insurance, if such insurance were available at all.

It was felt that requiring insurance coverage was unwise and needlessly costly. Also, because the Arms Export Control Act, as amended, authorizes FMS sales only at no loss to the USG, the USG cannot accept or indemnify the contractor against any of the risks of consequential damages from FMS sales. The alternative was to have the FMS purchaser countries relieve the contractors of liability in the same way that the USG does in DAR Section 7-104.45.* The USG feels this alternative is a fair solution because it does no more than place the FMS purchaser in the same legal position as the USG with respect to these consequential damages problems.

It is to accomplish this purpose that Paragraph C.2 is written. It means simply that, if there is a defect in goods supplied through FMS which causes damage or loss to an FMS Purchaser, the Purchaser cannot bring legal action against the contractor unless the USG would be able to bring such action in a similar situation. If DAR Section 7-104.45 would bar the USG from seeking recovery from the contractor, the Purchaser is likewise barred. In other words, the Purchaser should read the provisions of DAR Section 7-104.45 and consider that the term "Government" refers to the Purchaser's government. This is the entire operative effect of Paragraph C.2.

* DAR Section 6-1308 suggests another alternative that may be available:

6-1308 Limitation of Liability. In acquisitions for FMS, the foreign purchaser shall be advised that the appropriate Limitation of Liability clause(s) (see 1-330) is included in the FMS contract (see Condition C on the DD Form 1513). If the foreign customer does not agree to assume the risk for loss or damage as provided in the clause(s) and objects to the inclusion of such clause(s) in the Offer and Acceptance, the contractor shall be so advised. The costs of necessary insurance, if any, to be obtained by the contractor to cover such risk of loss or damage shall be considered in establishing the FMS contract price of such items.

To complete the explanation of this paragraph, the following points should be noted:

a. Paragraph A.2 of Annex A of the DD Form 1513 states that a Purchaser may request the USG to obtain special contractual provisions or warranties on its behalf. Any such special provisions requested by a Purchaser which would alter the "rule" contained in DAR Section 7-104.45 would, if obtainable, prevail over that DAR section, and would accordingly overcome, in whole or in part, the effect of paragraph C.2 of Annex A. Such special warranties would almost always increase the price of the item.

b. None of the discussion in this Part II, concerning damage from defects, directly involves the question of warranties. A warranty is, essentially, a promise to correct defects. If a defect is discovered, and a warranty is still in effect, the contractor would be obliged to correct the defect where discovered, and for all similarly defective items sold to the Purchaser. (The USG will always exercise existing warranty provisions on behalf of the Purchaser.) This is not the same thing as paying the Purchaser the value of an item which is damaged or destroyed because of the defect, or paying for consequential damages from such defects. Normally, as noted in Paragraph A.2 of Annex A, USG procurement contracts contain very limited or no warranty provisions.

c. As will be seen in reading DAR Section 7-104.45, that clause does not become operative until "acceptance" of the goods by the USG. This point in time is the beginning of the Purchaser's obligations under Paragraph C.2. In almost all cases, "acceptance" will occur at the same time as title is passed to the Purchaser. In some cases, however, the USG will take "acceptance" and then transport or ferry the items to the Purchaser country (e.g., aircraft are normally ferried by U.S. crews). Title then is passed to the Purchaser's government only in its country. During the period after "acceptance" and before passage of title, Paragraph C.2 is applicable; this is the meaning of the parenthetical phrase "before or after passage of title to Purchaser."

d. It should be carefully noted that Paragraph C.2 requires the Purchaser to undertake only to "relieve the contractors and subcontractors of the USG from liability". This means, as explained in l.b. above, that the only obligation under this paragraph is to refrain, under given circumstances, from seeking legal recovery from contractors for certain losses. This paragraph does not require the Purchaser to indemnify contractors against any losses which the contractors may suffer.

e. It should be noted that nothing in Paragraph C.2 detracts from the obligation of the USG, under Paragraph A.3.a, to replace or repair defective or damaged items sold from DoD stocks.

f. It has been explained above that Paragraph C.2 involves simply the application of DAR Section 7-104.45 to

Purchasers. DAR Section 7-204.33 and DAR Section 7-1912 apply to cost-type and service contracts, respectively, the principles discussed above in connection with DAR Section 7-104.45. At this time, these are the only clauses in the DAR dealing with liability of the contractor for consequential damages resulting from defects. If any new provisions are added to the DAR or to other laws or regulations governing USG procurements, dealing with this question, under Paragraph C.2 they would apply to Purchasers in the same way that DAR Section 7-104.45 does.

While it is hoped that this memorandum clarifies the meaning of Paragraph C of Annex A, it is not intended in any way to amend or modify the Terms and Conditions set forth in the DD Form 1513. The Department of Defense is always ready to answer further questions on this subject.

2 Atch:

1. Text of General Conditions (Annex A of the DD Form 1513).
2. Text of DAR Section 7-104.45 (a), (b), and (c).

A. THE GOVERNMENT OF THE UNITED STATES:

1. Agrees to furnish such items from its Department of Defense (hereinafter referred to as "DOD") stocks and resources, or to procure them under terms and conditions consistent with DOD regulations and procedures. When procuring for the Purchaser, the DOD shall, in general employ the same contract clauses, the same contract administration, and the same inspection procedures as would be used in procuring for itself, except as otherwise requested by the Purchaser and as agreed to by the DOD. Unless the purchaser has requested that a sole source contractor be designated, and this Letter of Offer and Acceptance reflects acceptance of such designation by the DOD, the Purchaser understands that selection of the contractor source to fill this requirement is solely the responsibility of the Government of the United States (hereinafter referred to as "USG"). Further, the Purchaser agrees that the United States DoD is solely responsible for negotiating the terms and conditions of all contracts necessary to fulfill the requirements in the Letter of Offer.
2. Advises that when the DOD procures for itself, its contracts include warranty clauses only on an exceptional basis. However, the USG shall, with respect to items being procured, and upon timely notice, attempt to the extent possible to obtain any particular or special contract provisions and warranties desired by the Purchaser. The USG further agrees to exercise, upon the Purchaser's request, any rights (including those arising under any warranties) the USG may have under any contract connected with the procurement of any items. Any additional cost resulting from obtaining special contract provisions or warranties, or the exercise of rights under such provisions or warranties, or any other rights that the USG may have under any contract connected with the procurement of items, shall be charged to the Purchaser.
- 3.a. Shall, unless the condition is otherwise specified herein (e.g., "As is"), repair or replace at no extra cost defense articles supplied from DOD stocks which are damaged or found to be defective in respect of material 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 at all for the purpose for which they were designed. Qualified representatives of the USG and of the Purchaser, upon notification pursuant to paragraph B.6. below, shall agree on the liability of the USG hereunder and the corrective steps to be taken.
- b. With respect to items being procured for sale to the Purchaser, the USG agrees to exercise warranties on behalf of the Purchaser pursuant to A.2. above to assure, to the extent provided by the warranty, replacement or correction of such items found to be defective.
- c. In addition, the USG warrants the title of all items sold to the Purchaser hereunder. The USG, however, makes no warranties other than those specifically set forth herein. In particular the USG disclaims any liability resulting from patent infringement occasioned by the use or manufacture by or for Purchaser outside the United States of items supplied hereunder.
4. Agrees to deliver and pass title to the items to the Purchaser at the initial point of shipment unless otherwise specified in this Offer and Acceptance. With respect to defense articles procured for sale to the Purchaser, this will normally be at the manufacturers' loading facilities; with respect to defense articles furnished from 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 otherwise than the initial point of shipment, the supplying Military Department or Defense Agency will arrange movement of the items to the authorized delivery point as 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. Advises that: a. Unless otherwise specified, USG standard items will be furnished without regard to make or model.
- b. The price of items to be procured shall be at their total cost to the USG. Unless otherwise specified, the cost estimates of items to be procured, availability determination, payment schedule, and delivery projections quoted are estimates based on current available data. The USG will use its best efforts to advise the Purchaser or its authorized representatives by DD Form 1513-2:
 - (1) of any identifiable cost increase that might result in an increase in the "Estimated Total Costs" in excess of 10 percent;
 - (2) of any changes in the payment schedule(s); and
 - (3) of any delays which might significantly affect the estimated delivery dates;
 but its failure to so advise of the above shall not affect the Purchaser's obligation under paragraphs B.1. and B.3. below.
- c. The USG will, however, use its best efforts to deliver items or render services for the amount and at the times quoted.
6. Under unusual and compelling circumstances when the national interest of the United States so requires, the USG reserves the right to cancel or suspend all or part of this Offer and Acceptance at any time prior to the delivery of defense articles or performance of services (including training). The USG shall be responsible for all termination costs of its suppliers resulting from cancellations or suspensions under this paragraph.
7. Shall refund to the Purchaser any payments received hereunder which prove to be in excess of the final total cost of delivery and performance of this Offer and Acceptance, and are not required to cover arrearages on other open Offers and Acceptances of the Purchaser.
8. Advises that personnel performing defense services provided under this Offer and Acceptance will not perform any duties of a combatant nature, including any duties relating to training, advising, or otherwise providing assistance regarding combat activities, outside the United States in connection with the performance of these defense services.
9. Advises that in the assignment or employment of United States personnel for the performance of this Offer and Acceptance, the USG will not take into account race, religion, national origin or sex.
10. Advises that, notwithstanding Purchaser's agreement to pay interest on any net amount by which Purchaser may be in arrears on payments (as provided for in paragraph B.3.g. below), USG funds will not be used for disbursements by DOD to its contractors in the event of any such arrears in payments. Accordingly, failure by the Purchaser to make timely payments in the amounts due may result in delays in contract performance by DOD contractors, claims by contractors for increased costs (including the above mentioned interest costs), claims by contractors for termination liability for breach of contract or termination of contracts by the USG under this or other open Offers and Acceptances of the Purchaser at Purchaser's expense.

B. THE PURCHASER:

1. Shall pay to the USG the total cost to the USG of the items, even if the final total cost exceeds the amounts estimated in this Offer and Acceptance.
2. Shall make payment(s) for the items by check(s) or by wire transfer payable in United States dollars to the Treasurer of the United States.
- 3.a. Shall, if "Terms" specify "cash with acceptance", forward with this Offer and Acceptance a check or wire transfer in the full amount shown as the estimated total cost, and agrees to make such additional payment(s) as may be specified upon notification of cost increase(s) and request(s) for funds to cover such increases.
- b. Agrees if "Terms" specifies payment to be "cash prior to delivery" to pay to the USG such amounts at such times as may be specified from time to time by the USG (including any initial deposit set forth under "Terms") in order to meet payment requirements for articles or services to be furnished from the resources of the US Department of Defense. USG requests for funds may be based on estimated requirements to cover forecasted deliveries of articles or costs to provide defense services. It is USG policy to obtain funds 90 days in advance of the time DOD plans such deliveries or incurs such expenses on behalf of the Purchaser.
- c. Agrees, if "Terms" specify payment by "dependable undertaking" to pay to the USG such amounts at such times as may be specified from time to time by the USG (including any initial deposit set forth under "Terms") in order to meet payments required by contracts under which items are being procured, and any damages and costs that may accrue, or have accrued, from termination of contracts by the USG because of Purchaser's cancellation of this Offer and Acceptance under paragraph B.7. hereof. 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. It is USG policy to obtain such funds 90 days in advance of the time USG makes payments on behalf of the Purchaser.
- d. Agrees, if "Terms" specify "payment on delivery" that bills may be dated as of the date(s) of delivery of the defense articles or rendering of the defense services, or upon forecasts of the date(s) thereof.
- e. Agrees, if "Terms" specify payment under a Credit Agreement between the Purchaser and DOD, to pay to the USG on a "dependable undertaking" basis, in accordance with B.3.c. above, such costs as may be in excess of the amount funded by the Credit Agreement.
- f. Agrees, that requests for funds or billings under paragraphs B.3.a. through e. above 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 Offer and Acceptance. 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 request for funds or bills will be made available to the Purchaser by DOD upon request. When appropriate, Purchaser will request adjustment of any questioned billed items by subsequent submission of required discrepancy reports in accordance with paragraph B.6. below.
- g. Agrees 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 Offers and Acceptances with the DOD. Interest shall be calculated on a daily basis. The principal amount of the arrearage shall 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 shall 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.

- h. Shall designate the Procuring Agency and responsible Paying Office and address thereof to which the USG shall submit requests for funds and bills under this Offer and Acceptance.
4. Shall furnish shipping instructions for the items with its acceptance of this Offer and Acceptance. Such instructions shall include (a) Offer/Release Code, (b) Freight Forwarder Code, and (c) the Mark for Code, as applicable.
5. Shall be responsible for obtaining the appropriate insurance coverage and customs clearances, and, except for items exported by the USG, appropriate export licenses.
6. Shall accept title to the defense articles at the initial point of shipment (see A.4. above). Purchaser shall be responsible for in-transit accounting and settlement of claims against common carriers. Title to defense articles transported by parcel post shall pass to the Purchaser on date of parcel post shipment. Standard Form 364 shall be used in submitting claims to the USG for overage, shortage, damage, duplicate billing, item deficiency, improper identification or improper documentation and shall be submitted by Purchaser promptly. Claims of \$100.00 or less will not be reported for overages, shortages, or damages. Claims received after one year from date of passage of title or billing, whichever is later, will be disallowed by the USG, unless the USG determines that unusual and compelling circumstances involving latent defects justify consideration of the claim.
7. May cancel this Offer and Acceptance with respect to any or all of the items listed in this Offer and Acceptance at any time prior to the delivery of defense articles or performance of services (including training). It shall be responsible for all costs resulting from cancellation under this paragraph.
8. Shall, except as may otherwise be mutually agreed in writing, use the items sold hereunder only:
- For the purposes specified in the Mutual Defense Assistance Agreement, if any, between the USG and the Purchaser;
 - For the purposes specified in any bilateral or regional defense treaty to which the USG and the Purchaser are both parties, if subparagraph a. of this paragraph is inapplicable; or
 - For internal security, individual self-defense, and/or civic action, if subparagraphs a. and b. of this paragraph are inapplicable.
9. Shall not transfer title to, or possession of, the defense articles, components and associated support material, related training or other defense services (including any plans, specifications or information) furnished under this Offer and Acceptance to anyone 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 by B.8. above, unless the written consent of the USG has first been obtained. To the extent that any items, plans, specifications, or information furnished in connection with this Offer and Acceptance may be classified by the USG for security purposes, the Purchaser shall maintain a similar classification and employ all measures necessary to preserve such security, equivalent to those employed by the USG, 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. The Purchaser will ensure, by all means available to it, respect for proprietary rights in any defense article and any plans, specifications, or information furnished, whether patented or not.

C. INDEMNIFICATION AND ASSUMPTION OF RISKS:

- It is understood by the Purchaser that the USG in procuring and furnishing the items specified in this Offer and Acceptance does so on a nonprofit basis for the benefit of the Purchaser. The Purchaser therefore undertakes, subject to A.3. above, 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 Offer and Acceptance because of: (i) injury to or death of personnel of Purchaser or third parties; (ii) damage to or destruction of (A) property of the DOD furnished to Purchaser or suppliers specifically to implement this Offer and Acceptance, (B) property of Purchaser (including the items ordered by Purchaser pursuant to this Offer and Acceptance, before or after passage of title to Purchaser), or (C) property of third parties; or (iii) patent infringement.
- Subject to any express, special contractual warranties obtained for the Purchaser in accordance with A.2. above, 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: (i) Purchaser's property (including the items procured pursuant to this Offer and Acceptance, before or after passage of title to Purchaser) and (ii) property of the DOD furnished to suppliers specifically to implement this Offer and Acceptance, to the same extent that USG would assume for its property if it were procuring for itself the item or items procured pursuant to this Offer and Acceptance.

D. ACCEPTANCE:

- To accept this Offer and Acceptance, the Purchaser will not later than the expiration date of the Offer and Acceptance, as set forth herein, return three copies properly signed to the security assistance accounting center designated herein, accompanied by such initial deposit or other payment as may be required by the Terms herein. In addition, Purchaser will concurrently return three copies properly signed to the U.S. Military Department or Defense Agency making the offer. When properly accepted and returned as specified herein, the provisions of this Offer and Acceptance shall be binding upon the USG and the Purchaser.
- It is understood that implementation of the Offer and Acceptance cannot proceed without a proper acceptance. Failure to comply with Terms and Conditions required for acceptance, as, for example, delay in submission of any required initial deposit or payment of full estimated cost, as the case may be, may require revision or reissue of the Offer and Acceptance.
- Unless a written request for extension is made by the Purchaser and granted in writing by an authorized representative of the appropriate U.S. Military Department or Defense Agency, this Offer and Acceptance shall terminate on the expiration date set forth herein.

E. ENCLOSURES:

Enclosures attached hereto are, by this reference, incorporated herein and are made a part hereof as though set forth in full.

F. PUBLIC INSPECTION:

This Offer and Acceptance will be made available for public inspection to the fullest extent possible consistent with the national security of the United States.

EXPLANATORY NOTES

- The item or reference numbers appearing in the "ITEM OR REF. NO." column may not correspond with references used in Purchaser's original request. However, this number, together with the case identifier shown should always be used as a reference in future correspondence.
- Availability leadtime quoted is the estimated number of months required to complete delivery of the item(s) in accordance with the terms of delivery after receipt of acceptance of this Offer pursuant to Section D. of the Conditions, and the conclusion of appropriate financial arrangements. Phased deliveries are shown by quantity and leadtime for each increment, where applicable. Items for which delivery leadtime is not shown are noted in column headed "Item Description" as items to be installed in the applicable end item prior to shipment.
- The planned source of supply for each item is expressed in the following codes:

S	(*)	Service Stocks
P	(*)	Procurement
R	(*)	Rebuild/Repair/Modification
X	(*)	Stock and procurement, e.g., initial repair parts
E	(*)	"Mimex" major items in long supply or excess

*Availability is stated in months.
- Condition of the defense articles shown in the "AVAILABILITY AND REMARKS" column is expressed in the following codes:

A1	-	Items to be provided in existing condition without repair, restoration or rehabilitation which may be required. Condition indicated in item description.
M	-	Articles of mixed condition (new, reworked, and rehabilitated) may be commingled when issued. Example: repair parts, ammunition, set assemblies, kits, tool sets and shop sets.
B	-	Serviceable defense articles.
O	-	Obsolete or non-standard item in an "AS IS" condition for which repair parts support may not be available from DOD.
S	-	Substitute. Suitable substitutions may be shipped for unavailable defense articles unless otherwise advised by the Purchaser.
U	-	Reworked or rehabilitated defense articles possessing original appearance insofar as practicable; including all Modification Work Orders and Engineering Change Orders as applied to such defense articles when issued but defense articles should not be considered as having had total replacement of worn parts and/or assemblies. Only parts and components not meeting US Armed Forces serviceability tolerances and standards will have been replaced; in all instances such defense articles will meet US Armed Forces standards of serviceability.
- Training notes:

AP	-	Annual Training Program.
SP	-	Special Training designed to support purchases of US equipment.
NC	-	This offer does not constitute a commitment to provide US training.
SC	-	US Training concurrently being addressed in separate Offer and Acceptance.
NR	-	No US training is required in support of this purchase.
- For meaning of delivery codes, see Military Assistance Program Address Directory (MAPAD).
- The use of Offer/Release Codes "Y" and "Z" will incur a storage fee of .125% per month for shipment delays in excess of 15 days.

[The following is a reprint from Armed Services Procurement Regulation, pp. 7:105 and 7:106. (DAC #76-26, 15 Dec 80; DAC #76-18, 12 Mar 79). Note: The Armed Services Procurement Regulation is presently known as the Defense Acquisition Regulation (DAR).]

CONTRACT CLAUSES AND SOLICITATION PROVISIONS

7-104.45 Limitation of Liability.

- (a) In accordance with 1-330, insert the following clause.

LIMITATION OF LIABILITY (1974 APR)

(a) Except for remedies expressly provided elsewhere in this contract, the Contractor shall not be liable for loss of or damage to property of the Government (excluding the supplies delivered under this contract) occurring after acceptance of the supplies delivered under this contract and resulting from any defects or deficiencies in such supplies.

(b) The foregoing limitations shall not apply when the defects or deficiencies in such supplies or the Government acceptance of such supplies resulted from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who have supervision or direction of:

- (i) all or substantially all of the Contractor's business; or
- (ii) all or substantially all of the Contractor's operations at any one plant or separate location, in which this contract is being performed; or
- (iii) a separate and complete major industrial operation in connection with the performance of this contract.

(c) Notwithstanding paragraph (a) above, if the Contractor carries insurance or has established a reserve for self-insurance covering liability for damages or losses suffered by the Government through purchase or use of the contract supplies required to be delivered to the Government under this contract, the Contractor shall be liable to the Government to the extent of such insurance or reserve for self-insurance for damages or losses to property of the Government occurring after acceptance of the supplies delivered to the Government under this contract and resulting from any defects or deficiencies in such supplies.

(d) The substance of this clause, including this paragraph (d) suitably altered to reflect the relationship of the contracting parties, shall be included in all subcontracts hereunder.

(End of clause)

(b) In accordance with 1-330, in procurement of major items, insert the following clause.

LIMITATION OF LIABILITY -- MAJOR ITEMS (1979 MAR)

(a) Except as provided below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) occurring after acceptance of the supplies delivered under this contract and resulting from any defects or deficiencies in such supplies.

(b) The foregoing limitations shall not apply when the defects of deficiencies in such supplies or the Government acceptance of such supplies resulted from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who have supervision or direction of:

- (i) all or substantially all of the Contractor's business; or
- (ii) all or substantially all of the Contractor's operations at any one plant or separate location, in which this contract is being performed; or
- (iii) a separate and complete major industrial operation in connection with the performance of this contract.

(c) Notwithstanding paragraph (a) above, if the Contractor carries insurance or has established a reserve for self-insurance covering liability for damages or losses suffered by the Government through purchase or use of the contract supplies required to be delivered to the Government under this contract, the Contractor shall be liable to the Government for damages or losses to property of the Government occurring after acceptance of the supplies delivered to the Government under this contract and resulting from any defects or deficiencies in such supplies to the extent of such insurance or reserve for self-insurance.

(d) This clause does not diminish the Contractor's obligation, to the extent otherwise arising under this contract, relating to correction, repair, replacement or other relief for any defect or deficiency in supplies delivered under this contract. If loss or damage has occurred and correction, repair, or replacement is no longer feasible or desired by the Government, the Contractor shall, as determined by the Contracting Officer:

- (i) pay to the Government the amount which it would have cost the Contractor to make such correction, repair or replacement before the loss or damage occurred, or
- (ii) provide other equitable relief.

(e) The provisions of this clause shall not limit or otherwise affect the Government's rights pursuant to the following listed clauses, if included in this contract:

Ground and flight risks,
Government property, and
Warranty of Technical Data.

(f) In all subcontracts hereunder, except those covered by (g) below, the Contractor shall either:

- (i) insert, with the advance written consent of the Contracting Officer, the substance of this clause, including this paragraph (f), suitably altered to reflect the relationship of the contracting parties; or
- (ii) insert the substance of the clause in 7-104.45(a) suitably altered to reflect the relationship of the contracting parties.

(g) In subcontracts for both major items for which this clause is appropriate, and other end items for which the clause in 7-104.45(a) is appropriate, the substance of both clauses shall be included, with the advance written consent of the Contracting Officer. The Contractor shall identify high unit cost items for line item and include the following preamble to this clause:

(The provisions of this clause shall apply only to those items identified in this contract as being subject to this clause.)

(End of clause)

(c) In contracts for the purpose of both major items (see 1-330) for which the clause in (b) above is appropriate, and other contract end items for which the clause in (a) above is appropriate, the clauses in both (a) and (b) above shall be included. The Contracting Officer shall identify high unit cost items by line item and include the following preamble to the Limitation of Liability - Major Items clause:

(The provisions of this clause shall apply only to those items identified in this contract as being subject to this clause.)