

Recent Legislation Permits Lower Defense Budgets through NATO Technology Sharing

By

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INTRODUCTION

Recent U.S. legislation for North Atlantic Treaty Organization (NATO) cooperative projects permits U.S. flexibility in contracting for NATO cooperative programs to further achieve the objectives of the NATO Rationalization, Standardization, and Interoperability (RSI) program. Secretary of Defense Caspar W. Weinberger in issuing implementing guidance, recently emphasized that:

We must leave no doubt of our commitment to attain adequate Alliance conventional capabilities. Armaments cooperation, through the partnership arrangements made possible by this legislation, is one of the key means of improving NATO conventional capabilities. I encourage each of you to use the authority provided by this legislation as you pursue armaments cooperation initiatives within your respective areas of responsibility.

These projects have the equally important symbolic purpose of providing incentives to the Europeans to share as partners with the United States in the burdens of development and deployment of modern conventional weapons. Written Memoranda of Agreement must clearly describe the cooperative programs with NATO that are to be jointly managed.

LEGISLATION

Section 115 of Public Law 99-83, August 8, 1985 (International Security and Development Cooperation Act of 1985), modified Section 27 of the Arms Export Control Act (AECA), codified at 22 U.S.C. Section 2767, to establish the authority for United States and NATO Cooperative projects for research, test and evaluation, development, and production. (In other related legislation, Section 1102, Public Law 99-145, November 8, 1985, the Defense Authorization Act for 1986, authority was provided for contracting practices associated with these cooperative projects. The portion of section 1102 dealing with Section 27, AECA, was not implemented, since Section 115, Public Law 99-83, properly placed legislative authority under the AECA.) This legislation is frequently referred to as the Quayle Amendment.

CONTRACTING AUTHORITY

The President has been granted authority analogous to that used in FMS to enter into contracts on behalf of NATO participants and to waive on a reciprocal basis those charges which are normally applied to FMS cases. In addition, the Secretary of Defense is granted new procurement flexibility. This authority may not be delegated below the DOD Acquisition Executive or the Deputy Secretary of Defense (DEPSEC). Special authority was also provided so that DOD may negotiate cooperative projects between the U.S. and NATO or individual member nations. The legislation also authorizes the Secretary of Defense to transfer funds to another NATO participant

to contract for U.S.G. requirements using foreign contracting procedures, as long as U.S. sources are not precluded from bidding.

TECHNOLOGY TRANSFER CONCERNS

The legislation does not eliminate traditional concerns of contractors concerning technology transfers. Experiences of some European contractors with the security precautions of the United States have caused frustration and embitterment in some cases and have tended to discourage collaboration with the United States. For their part, U.S. contractors have complained that it is difficult, if not impossible, to limit the transfer of technology to specific companies or countries when you are dealing with the Europeans because of the maze of cross-ownership arrangements which exist in Europe and which extend beyond national borders in many cases. In order for the legislation to become effective, the reluctance of both European and U.S. contractors must be overcome and it is necessary to eliminate the duplication of efforts and minimizing of standardization.

In the past, coproduction has often been more expensive for foreign governments than purchasing from a single production line because of increased production recurring costs. In addition, with a single line, the share of R&D costs is substantially reduced. The benefits and liabilities of these type programs are documented in DOD's annual reports to Congress which discuss military and economic costs associated with nonstandardization. These reports have been required since Congress added the Culver-Nunn Amendment to the 1975 DOD Appropriation Authorization Act.

WAIVER OF CONTRACTUAL REQUIREMENTS

In the past, the legal requirements for including certain U.S. contract terms and conditions have frustrated contracting efforts and have been the frequent subject of objection by foreign contractors. Section 1102(b), Public Law 99-145, added a new section 2407 to Title 10, U.S. Code, to permit flexibility in the acquisition of defense equipment under NATO cooperative projects. The new authority, established within 10 U.S.C. Section 2407(c), states that Chapter 137 of Title 10 will continue to apply to these contracts except to the extent that it is waived by the Secretary of Defense. Under subsection (c), the Secretary of Defense, in order to achieve the desired objectives, may waive with respect to any NATO cooperative R&D or production contract or subcontract to be performed overseas, the application of any law other than the Arms Export Control Act or 10 U.S.C. Section 2304 [Competition Requirements pursuant to Competition in Contracting Act (CICA)].

Specifically, waivable items by the Secretary of Defense are listed as those which prescribe procedures to be followed in the formation of contracts; prescribe terms and conditions to be included in contracts; prescribe requirements for/or preferences to be given to goods grown, produced, or manufactured in the United States or in U.S. Government-owned facilities, or for services to be performed; or prescribe requirements regulating the performance of contracts. Any waiver made by the Secretary of Defense must include a determination that the cooperative project will further NATO RSI.

To carry out such projects on a case-by-case basis, DOD may require subcontracts to be awarded to certain contractors. In addition, authority for disposal of jointly acquired property is provided without regard to United States property disposal law under conditions of 10 U.S.C. Section 2407(f).

SECDEF IMPLEMENTING GUIDANCE

The Secretary of Defense on 28 January 1986 issued guidance and delegated responsibilities relative to implementing the statute. While a full description of the responsibilities cannot be provided at this time, a general description of some of the parties' responsibilities is discussed herein. DOD is presently surveying existing directives and instructions and identifying those requiring revision by responsible OSD elements. The Under Secretary of Defense for Research and Engineering (USDRE), in coordination with the Under Secretary of Defense for Policy (USDP), the Assistant Secretary of Defense for Acquisition and Logistics (ASD (A&L)), the Assistant Secretary of Defense for Command, Control, and Communications (ASD(C³I)), and the Office of General Counsel, are to develop comprehensive instructions on the procedures for entering into and conducting cooperative programs with NATO Allies.

Military Departments and Defense Agencies generally will be responsible for initiating cooperative projects, for negotiating the necessary international agreements, and for funding and implementing the resulting programs. Pursuant to Executive Order 11958 which delegated the authority of Section 27 of the Arms Export Control Act to the Secretary of Defense, the SECDEF has delegated, with the power to redelegate, the authority of Section 27(a) to negotiate and conclude cooperative agreements as described in Section 27(b)(1) to the Under Secretary of Defense for Research and Engineering (USDRE) for programs involving research interchange and codevelopment, and rationalization, standardization, and interoperability, including reciprocal memoranda of understanding (except logistics) agreements. The Assistant Secretary of Defense for Acquisition and Logistics (ASD (A&L)) has been delegated the same authority with power to redelegate to Military Departments for programs involving logistical support of defense equipment. The Under Secretary of Defense for Policy (USDP) is to coordinate with USDRE and ASD (A&L) in identifying candidate cooperative projects, and in developing and promulgating policies and procedures for implementing cooperative projects, authorizing negotiations, and for approving agreements.

The authority of Section 27(d) to enter into contracts or incur other obligations for a cooperative project on behalf of the other participants without charge to any appropriation was delegated to the Secretaries of the Army, Navy, Air Force, and Directors of the Defense Agencies. Pursuant to the SECDEF authority under 10 U.S.C. 2407(a) based on the delegation authority of Section 27 of the AECA in Executive Order 11958, he authorizes (with certain limitations) the same parties to carry out contracts or obligations as incurred under Section 27.

Where an international agreement contemplates exercising the CICA exception to full and open competition provided for in 10 U.S.C. 2304(c)(4) for selection of a prime contractor, the negotiating DOD component must obtain the approval of ASD (A&L) who must also approve where subcontracts pursuant to 10 U.S.C. 2407(b) are to be awarded to particular subcontractors which are specifically required pursuant to Section 27(a). Only the Deputy Secretary of Defense may sign a Determination and Findings which waives the application of certain provisions of law pursuant to 10 U.S.C. 2407(c)(1) for contracts outside the United States. Waiver requests are to be submitted through ASD (A&L).

The Director of the Defense Security Assistance Agency (DSAA) was delegated responsibility to reduce or waive certain charges otherwise considered appropriate under Section 21(e) when sales are made as part of cooperative projects.

In addition, the Director, DSAA, is responsible for transmitting to Congress the certification required by Section 27(f). ASD (A&L) is responsible for complying with the Congressional reporting requirements prescribed in 10 U.S.C. 2407(d)(1) and (2), if such information was not made part of the Section 27(f) certification process. Prior to the signature of any agreement, the

certification package is required to include a detailed description of the proposed project, an estimate of the amount of sales and exports expected to be made or approved, and identification of the dollar amount of any charges which are expected to be reduced or waived under AECA, Section 27. Congress wishes to be continuously informed of U.S. participation in this program.

SAMM AND DFARS CHANGES TO BE MADE

Changes will likely be made in the future to Chapter 14 of the *Security Assistance Management Manual (SAMM)* and to Part 25 of the *Defense Federal Acquisition Regulations Supplement (DFARS)*. (Similar topics are now at SAMM Chapter 14, Special Programs and Activities, Section II, Foreign Manufacture of U.S. Defense Equipment, Subsection E, NATO Cooperative Projects under the AECA, Section 27.) Since NATO Cooperative Projects are not the usual security assistance projects and include "reverse FMS type purchases," another document might possibly include this guidance. Likewise, DFARS Subpart 25.74 concerns "Purchases from NATO Participating Country Sources," but Subpart 25.73 discusses special concerns relative to the U.S. purchasing equipment and services for FMS participants. As with any legislation pertaining to new areas, it will take some time to coordinate and arrive at practical and legal solutions for implementing the program at the field level.

COMPARISON WITH FMS

Previous legislation under the Arms Export Control Act did not permit a realistic partnership arrangement during the production and support of military systems acquisition. The new legislation is not a substitute for Foreign Military Sales (FMS). It complements FMS procedures by making possible a partnership arrangement for truly cooperative projects. FMS procedures will continue to be used as they are today when the appropriate arrangement is a buyer-seller transaction. With this incentive, it is expected that there will be increased cooperative projects so that there are savings to United States R&D costs, reduced duplication of development and production within NATO, and an earlier and more frequent deployment of common or interoperable military systems by NATO members.

COVERAGE FOR EXISTING PROGRAMS

A "grandfather" provision would allow the SECDEF to include programs already underway, e.g., NATO SEA SPARROW, RAM, SEA GNAT, Multiple-Launch Rocket System (MLRS), and MLRS Terminally Guided Warhead. The first program under this new legislation was the procurement phase of the MLRS project and was certified by DOD in late 1985 to Congress. Each of these projects has received development funds and some technology from NATO Allies, but the United States has been unable to supply the U.S. products to the Allies who shared in these developments--except as FMS customers under the AECA with all its attendant costs and impediments to acquisitions for their own forces. However, in the case of NATO AWACS, the United States used an innovative "NATO to U.S. Agency" authority for permitting the United States to obligate contracts on behalf of NATO. Specific authorizing legislation is required on a yearly basis to do this. The present legislation will no longer require the "Agency" arrangement for NATO member countries in joint approved projects.

SUMMARY

Since the next few years will see a flatter defense budget, the Department of Defense hopes to open up markets and to have access to technology and products that are developed elsewhere. This

would stretch available U.S. dollars and provide an incentive for our allies to make more of an investment in their conventional arms. This new legislation provides a means for achieving these goals.

ABOUT THE AUTHOR

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