

Cooperative Air Defense: A Case Study of Creative Procurement

By

Gerald Wilburn

The United States Secretary of Defense and the Minister of Defense of the Federal Republic of Germany signed an agreement on 6 December 1983, on Cooperative Measures for Enhancing Air Defense for Central Europe. A follow-on Agreement was subsequently signed on 12 July 1984, to implement the provisions of the basic Agreement. The main thrust of the Agreements was the equal burden-sharing and mutual reinforcement of individual defense capabilities which, together, provide an important and innovative model for future cooperation among all the Allies. The Implementing Agreement contains many unique methods for the accomplishment of the basic Air Defense Agreement for both the PATRIOT and ROLAND Missile Systems.

This article addresses only one of those unique methods--the one by which Germany will man and operate 12 U.S.-owned PATRIOT fire units as an offset investment for U.S.-provided equipment and services.

The U.S. and German governments agreed that these 12 fire units would be configured with certain German-Origin Government Furnished Equipment, termed GO-GFE, in lieu of U.S. GFE. The basic purpose for equipping these units with GO-GFE was to insure that the units could be readily manned by German soldiers and also to insure interoperability with German-owned PATRIOT fire units. To meet this requirement, it would be necessary to procure the GO-GFE for the 12 fire units from the same German industry sources and under the same contract conditions as the GFE that Germany was procuring for its own PATRIOT fire units. In order to insure that the GFE was common with equipment and training being purchased by Germany, and to provide logistics and training commonality, it was necessary for the U.S. to enter into some type of separate agreement with the German government to provide the required GFE.

Many major issues and serious constraints came into play once the efforts began to formulate such an agreement. These problems included the following:

- Cost to the U.S. The cost could not exceed what the GFE would have cost had it been entirely U.S.-provided, i.e., \$135,000,000.
- Funds to procure U.S. PATRIOT GFE had already been programmed throughout the Army Materiel Command (AMC) community for the 12 fire units involved. The funds, somehow, had to be recouped and then redirected for issue to the German government to procure the GO-GFE.
- The Implementing Agreement stated that the vehicle for such procurement and payment to Germany would be decided by the *Steering Committee* established by the same agreement. This responsibility was later delegated to the Army Missile Command (MICOM) by the PATRIOT/ROLAND Working Group Committee which was subsequently established to monitor and insure proper implementation of the overall U.S./German Air Defense Agreement.
- No known procedures existed within the U.S. government for procuring services/goods on a *Government-to-Government* basis, i.e., FMS in reverse.

- Based on all data provided by German procurement and legal officials, the Federal Republic of Germany also did not have a mechanism which would allow for the sale of services/goods to other countries.

- There was no guidance available within any government agency contacted to accomplish the task at hand. The general response was "*I don't think you can do that;*" or, "*It's never been done before--let me know how to do it when you figure it out*"; etc.

Based on the foregoing, MICOM had to take the *bull-by-the-horns* and try to devise some type of vehicle which would allow for the transfer of funds between the two governments that did not violate any U.S. statutes or policies, and at the same time, would fulfill the requirements established by the U.S. Secretary of Defense and the German Minister of Defense.

Initial efforts by the MICOM PATRIOT International Office began in January 1985. Contacts with all higher levels were generally responded to with the type of *quips* cited above. Due to the absence of real guidance, the first effort undertaken was to prepare a draft *International Agreement* that addressed the GO-GFE effort only. While this effort was underway, the separate matter of firmly identifying the PATRIOT U.S. GFE that would ultimately be replaced by German GFE was occurring. This, in itself, was a major task since the funds of several other AMC subordinate agencies (other than MICOM) were involved, i.e., AMCCOM, CECOM, CSLA, TACOM, and TROSCOM.

In February 1985, a meeting was called with AMC officials to lay the basic groundwork and to discuss the method that MICOM was proposing. It was agreed that once the PATRIOT Project Office had firmly identified the GFE to be replaced (by item, by agency, and by individual cost), action would be taken by AMC to notify all agencies involved. The required data was developed and subsequently provided to AMC Headquarters in early March 1985. In mid-April, a call letter was issued by AMC to all the involved agencies, requesting a validation of the cost data that had been provided by the PATRIOT Project Office. (In most cases the Army Master Data File was used as the basis for pricing items of equipment.) The original intent, once these costs had been validated by the managing agency, was to establish a separate MICOM budget line exclusively for the GO-GFE effort; this was to be accomplished by reprogramming funds from the managing agency to MICOM. If approved, this approach would have alleviated the need for handling a multitude of funding documents and would also have eliminated the necessity of other agencies participation once the funds had been reprogrammed to MICOM. However, this approach was subsequently disapproved by the Department of the Army (DA). A decision was made at this point to leave all PATRIOT GFE funds in the appropriate hardware lines in which they were originally budgeted, with AMC Headquarters acting to assure that execution of the funds was accomplished to support the PATRIOT Project Manager's needs. MICOM, however, was assigned the lead responsibility for coordinating all requirements with other agencies and also with the Federal Republic of Germany, as necessary.

The first draft of the proposed *International Agreement* was prepared in April 1985. After internal staffing and three subsequent revisions, a copy was given to German representatives at the first PATRIOT German Program Management Review in June 1985. The German government responded with its comments, which were generally in agreement with the concept. All echelons of higher government level were also provided draft copies of the Agreement. Several revisions to the original document were then made--eleven to be exact--between April 1985 and March 1986, working out all of the areas of disagreement with German officials. During this period, no additional guidance was provided by higher headquarter's concerning the proper instrument required to accomplish this task. Several additional obstacles, however, were encountered during this period--more *You can't do that's!*

In late October 1985, the AMC General Counsel, based on a draft version of the proposed agreement, made the determination that:

- An International Agreement does not constitute authority to obligate or disburse U.S. funds.
- The proposed method of payment of U.S. funds to Germany constituted a *cash advance* per the provisions of the Federal Acquisition Regulations (FAR) and DOD supplements thereto, and therefore would require approval by the Comptroller of the Army (COA) before any funds could be transferred between the two governments. (It should be noted that no specific legislation existed that addressed this aspect of the Air Defense Agreement.)

Another meeting was held with higher headquarters on 22 November 1985 to further discuss the issue. At this meeting a method was devised which it was believed would alleviate the necessity for the COA's approval. The method was documented by MICOM representatives, but was subsequently disapproved. Higher headquarters made the determination that the proposed agreement did, in fact, constitute *advance funding* under the provisions of the FAR and would definitely require the COA's approval. It was reiterated time and time again that the effort was between *Governments* and not between a Government and a Contractor, and that the FAR requirements should not apply. Moreover, it was for this reason that the term *contract* had purposely been avoided since the beginning of the effort.

Nevertheless, based on this decision, and in an effort to avoid any further delays, a package was prepared by the PATRIOT International Office and forwarded to the COA for review and approval. The package was submitted in January 1986 and subsequently approved by the COA in June 1986.

In the interim, however, a separate version of the proposed *Agreement* was prepared in the form of an annex to the existing Air Defense Agreement. DA had indicated that perhaps this type document might be more expedient since we were encountering so many problems with a separate agreement. An annex would simply be an extension of the basic Air Defense agreement. Unfortunately, this effort proved to be in vain since the same financial provisions applied no matter what type of instrument was used.

At this point, time was becoming a critical factor. Deployment of the PATRIOT Systems to Germany depended on the formulation of some type of bilateral document to provide funds to Germany. Another request to higher headquarters was made in March 1986 by the PATRIOT International office requesting specific authority be granted in whatever form necessary that would allow MICOM to enter into a separate agreement with Germany as originally proposed in the beginning. Higher headquarters responded with the following:

- Two issues affect the procurement of German-Origin Government Furnished Equipment needed to equip the U.S.-owned PATRIOT fire units to be manned and operated by Germany. The first is the legality of allowing another government to procure German-manufactured equipment using funds appropriated by the U.S. Congress. The second is the identification of the proper instrument to support this procurement strategy.

- The Congress authorized the implementation of the U.S./German Agreement on the Improvement of the Air Defense of Central Europe. This agreement included the requirement for Germany to man U.S.-owned PATRIOT Systems. Subsequent negotiations developed the plan to substitute GO-GFE for U.S-GFE with a dollar threshold for which the U.S. would be liable. (Change one to the U.S./GE Implementing Agreement was nearing completion and was awaiting subsequent negotiations with Germany pending resolution of separate issues). Therefore, the best course of action concerning the development of documents needed to transfer funds to Germany to

procure GO-GFE would be for MICOM to develop an appropriate agreement and *contract* (this was the first time the term *contract* has been officially introduced into the effort) that would be executed between MICOM and the German Procurement Agency. These documents would then be agreed to between the two agencies and implemented. The final goal would be to insert the document in its final form as an appendix to the Implementing Agreement at a later date.

As a result of this response, another meeting was held with higher headquarters representatives on 5 June 86, at which time additional guidance was obtained. (At this point the Army Missile Command Procurement Office became actively involved in the effort since it was evident that U.S. contracting procedures had to be followed.) Basic directions received were:

- Revert to the original form of a separate agreement between the Army Missile Command and the German government with certain additions.
- Include in the agreement only the three U.S. non-waivable FAR clauses, i.e., Officials Not to Benefit; Covenant Against Contingent Fees; and Gratuities.
- Structure the agreement as much like a normal U.S. Army contract as possible, satisfy U.S. legal requirements, and at the same time maintaining a format that would be acceptable to the German government.
- Obtain authority from the Assistant Secretary of the Army for Research, Development, and Acquisition (SARDA) for a *one-time* deviation/waiver of the FAR, DFARS and AFARS for all waivable clauses.
- Obtain separate approval from SARDA, via a Determinations and Findings format, for authority to omit FAR Clause 52.215-1, Examination of Records by the Comptroller General, with the substitution of a clause suitable to both governments.
- Obtain SARDA approval of Justification for Other Than Full and Open Competition.

These approval/waivers were obtained as requested, and I might add in *record-time*, by handcarrying the requests through all channels of command to the SARDA. The original agreement was reformatted, to include the necessary FAR Clauses, and was structured as near to a U.S. Army contract as possible. The final document was termed a *Procurement Agreement* with a U.S. Army contract number assigned, to be administered by the Army Missile Command Procurement Office in much the same manner as an ordinary U.S. Government-to-Contractor contract. The advance payments authorization was not utilized in the final version since the agreement was written to allow for reimbursable funding, utilizing options for subsequent year funding.

The Procurement Agreement which, in essence, serves as an FMS case in reverse, was handcarried to Germany and was subsequently signed within the German Ministry of Defense on 25 July 1986.

In summary, and as "lessons learned" that may be of benefit to any other agency that may have similar requirements, the following should be noted:

- U.S. policies are interpreted to forbid Government-to-Government financial transactions, in the absence of specific legislative authority, unless U.S. contracting channels are used.
- Policies should be established, to include obtaining legislation, that would allow for: (1) *reverse* FMS with foreign allies; (2) approved International Agreements to serve as the legal basis for any waivers/deviations that are necessary to implement provisions of the agreement.

ABOUT THE AUTHOR

Mr. Wilburn is employed by the U.S. Army Missile Command, Security Assistance Management Directorate, Redstone Arsenal, Alabama. He presently works as an International Program Specialist in the PATRIOT/Other Air Defense Systems Management Division, PATRIOT Program Development Branch. He has served his entire civil service career, which began in 1954, at the Army Missile Command. For the past several years he has been working extensively in the international arena with both the HAWK and PATRIOT missile systems.