

## Section 9B: United States Foreign Military Sales

- 9B.1 (1994-06-23) The United States (U.S.) government "*Arms Export Control Act*" establishes the rationale for Foreign Military Sales (FMS) by recognizing that the U.S. and other countries continue to have a valid requirement for effective and mutually beneficial defence relationships.
- 9B.2 (1994-06-23) FMS shall be considered as a method of procurement when the goods or services required relate to military equipment of U.S. origin and when, on the basis of the information available at the time, those goods and services are available or can be made available from the U.S. Department of Defense (DOD).

### Requisition Receipt

- 9B.3 (1994-06-23) When Public Works and Government Services Canada (PWGSC) headquarters determines that an entire requirement will be sole-sourced to the U.S. FMS Program, the requisition is to be reallocated to PWGSC Washington. For non-Co-Operative Logistics (COLOG) requirements, PWGSC headquarters will include in the reallocated file a statement confirming the sole source decision with applicable documentation, such as Procurement Review Committee (PRC) (Short Range Acquisitions Plan {SRAP}) decisions, and the client's justification. For COLOG requirements, PWGSC headquarters will include in the reallocated file the client's justification as indicated in the Procurement Strategy Committee record of decision resulting from SRAP.

When PWGSC headquarters determines that only part of the requirement will be sole sourced to the U.S. FMS Program, an extract file is to be processed. (See [3.005](#).)

- 9B.4 (1994-06-23) The PWGSC Washington Directorate (PWGSC[W]), in its capacity as the sole accredited Canadian Procurement Agency to the U.S. DOD, shall be the departmental agency responsible for dealing with the U.S. government on all contractual matters directly related to FMS and shall coordinate all pertinent contract and administrative arrangements in the U.S. on behalf of PWGSC and its clients.

### Definitions

- 9B.5 (1994-06-23) **FMS** is a Security Assistance Program which is administered by the U.S. DOD and which allows eligible foreign governments and international agencies to purchase defense-related articles and services from the U.S. government.
- 9B.6 (1994-06-23) **Defined Order Cases** are used when the material supplied or the services provided are explicitly stated in the Letter of Offer and Acceptance. This includes the acquisition of major weapon systems and related requirements such as spares packages, technical data packages, controlled items and the applicable publications, etc.
- 9B.7 (1994-06-23) **Blanket Order Cases** are used when there is no definitive listing of items or of quantities required. These agreements which are similar to standing offers, allow clients to submit requirements directly to the identified U.S. military organization through the use of the Direct Requisitioning Procedures (DRP) with the U.S. Navy or Blanket Open End (BOE) with the U.S. Army. Support equipment including assemblies, components, special tools, test equipment, training aid devices, minor modifications performed at U.S. installations, repair and return services, training, etc., are usually the subject of Blanket Order Cases. This category of FMS cases (contracts) does not necessitate the purchase of an equity. For the purposes of sections [9B](#) and [9C](#), this category shall be deemed to fall under the COLOG arrangement.
- 9B.8 (1994-06-23) **COLOG**: A supply arrangement, similar to Standing Offers, which is negotiated with the U.S. DOD under the auspices of FMS. It enables the Canadian Department of National Defence (DND) to obtain directly from the supply systems operated by the U.S. DOD, spare parts and accessories needed for Crown-owned military equipment of U.S. origin. This category of

FMS cases (contracts) necessitates the purchase of an equity in the supply system of the appropriate military organization.

- 9B.9 (16/02/98) **Trigger Price:** A price expressed in Canadian dollars representing the cost of articles offered by the U.S. DOD, increased by a factor representing administrative costs, foreign exchange, sales tax, transportation, duty, the Goods and Services Tax (GST), and/or the Harmonized Sales Tax (HST), contractor overhead and profit, etc. This price is intended as a reference point to assist DND and PWGSC contracting officers in determining whether it would be more advantageous for Canada to acquire an item from sources in Canada (i.e. item of Canadian manufacture) or from the U.S. government.

## Planning

- 9B.10 (1994-06-23) Through its Security Assistance Policy, the U.S. government provides for various forms of security assistance to other nations.
- 9B.11 (1994-06-23) FMS is a large and complex program which is administered by the U.S. DOD. In Canada, PWGSC, as well as the client, plays an important role in the implementation and maintenance of this program.
- 9B.12 (1994-06-23) Transactions initiated within the FMS Program are covered under basic categories of contracts (known as cases in the U.S. military organizations). The main categories are:
- (a) Defined Order Cases;
  - (b) Blanket Order Cases including Blanket Open End (BOE) arrangements through the U.S. Army and Direct Requisitioning Procedures (DRP) through the U.S. Navy; and
  - (c) Co-Operative Logistics Supply Support Arrangements, commonly referred to as COLOG in Canada and CLSSA in the United States.
- 9B.13 (2005-12-16) PWGSC headquarters shall determine, before procurement through FMS is initiated, whether the provisions of the North American Free Trade Agreement (NAFTA) or the the World Trade Organization Agreement on Government Procurement (WTO-AGP) apply and shall take action accordingly. When these provisions do not apply, PWGSC shall determine whether there is an existing or potential source of supply in Canada and after consultations with DND, or any other client, shall establish whether in the circumstances, it would be more advantageous for the Government of Canada to procure in Canada or directly from the original equipment manufacturer in the U.S. or from the U.S. DoD.

## Contracting Protocol

- 9B.14 (1994-06-23) Contracting with the U.S. DOD for the supply of material or for the provision of services on a government-to-government basis, is effected through the exchange of a Letter of Request (LOR) prepared by Canada and of a Letter of Offer and Acceptance (LOA) prepared by the U.S.

## Time Frames

- 9B.15 (1994-06-23) The standard period of time for a response from the U.S. DOD to an LOR submitted by PWGSC(W) on behalf of Canada, is as follows:
- (a) 45 days from the date of receipt of the LOR for an official Price and Availability;
  - (b) 90 days from the date of receipt of the LOR for an LOA not requiring notification to Congress;
  - (c) 105 days from the date of receipt of the LOR for an LOA requiring notification to Congress

(applicable to acquisitions of equipment valued at \$14,000,000 or more);

- (d) Up to nine months in the case of technical data packages due to special inquiries or studies to be carried out.

## Procedures followed under Price Review

- 9B.16 (2005-12-16) PWGSC contracting officers shall determine the price and availability of material, which is reported by DND to be available through FMS/Defined Order and Blanket Cases and when the procurement in question is not subject to the procurement provisions of NAFTA or WTO-AGP.
- 9B.17 (1994-06-23) Items of material identified in requisitions/contract demands submitted by the client (i.e. DND) as being available through FMS shall be designated for procurement in Canada if the price offered for a domestic item through a source in Canada is below the trigger price and DND shall be so informed before a contract is awarded. Similarly, items of material identified in requisitions/contract demands as being available through FMS shall be recommended for procurement from foreign source(s) if the price offered is below that quoted from FMS and DND shall be so informed before a contract is awarded. In addition, PWGSC shall review with DND, before contract award, the business case for purchase in Canada of domestic items which may be available through FMS when the price offered through a source in Canada exceeds the FMS trigger price. Even if the price exceeds the FMS trigger price, procurement from Canadian manufacturers shall be considered when the appropriate authorities at PWGSC and at DND agree, before contract award, that it would be in the interest of the Government of Canada to procure in Canada.
- 9B.18 (1994-06-23) Regional offices shall refer to the applicable product manager at headquarters, for resolution, all cases of disagreement between the contracting officers of PWGSC and the designated supply officers at DND, regarding sourcing.

## Pricing and Payment

- 9B.19 (1994-06-23) FMS agreements, in accordance with the *Arms Export Control Act*, always contain a clause requiring full payment prior to the delivery of an end item.
- 9B.20 (1994-06-23) The FMS Program provides for an estimated case value and payment schedule. The case value includes all the additional charges, such as: packing and handling; and general and administrative costs. The item price includes the above charges and is the same that would be charged to any other purchaser, including the U.S. Armed Forces. PWGSC(W) ensures that actual payment schedule reflects actual work performance.
- 9B.21 (1994-06-23) Generally, the final price of material and services requested under FMS will not be known until the material has been delivered or the services provided. The final price is determined from the actual contract costs and other management costs which must be charged in accordance with U.S. laws and regulations.
- 9B.22 (1994-06-23) FMS agreements applicable to systems requiring a substantial production period may include a phased payment schedule.

## Recoupment Charges on U.S. Government Designed Military Equipment

- 9B.23 (1994-12-16) Under the *Arms Export Control Act*, the U.S. DoD must recoup a pro-rata share of non-recurring costs (NRCs) funded by the U.S. government on the sale of Major Defense Equipment (MDE) sold via FMS procedures. An item is considered an MDE when it is identified as Significant Military Equipment (SME) on the U.S. Munitions List (USML) and when the U.S. government has incurred either a non-recurring research and development cost for the item of

more than \$50 million or the item has had a total production cost of more than \$200 million.

- 9B.24 (1994-12-16) Effective June 27, 1992, NRCs must not be charged on either FMS or Commercial contracts for Non-Major Defense Equipment (NMDE).
- 9B.25 (1994-12-16) Effective October 8, 1992, NRCs must not be charged on Commercial contracts for MDE.
- 9B.26 (1994-12-16) Recoupment must be collected on all FMS contracts for MDE unless the Defense Security Assistance Agency (DSAA) waives the charges.
- 9B.27 (1994-12-16) U.S. law precludes blanket waivers for NRCs on FMS contracts. However, blanket waivers have been obtained for all assets use charges and for quality assurance/inspection and contract audit services. Exemption from all other recoupment charges must be sought on a case-by-case basis, before the contract is signed.
- 9B.28 (1994-12-16) If the proposal/offer contains an amount for rental/asset use charges or quality assurance/inspection and contract audit services, the contracting officer should request deletion of the amount, as Canada has been granted a waiver from all such charges. (Reference: U.S. DOD FAR Supplement 245.405[3] and the DOD *Security Assistance Management Manual* 5105.38-M, Section 1301-1 respectively.)

## NRCs - Commercial Contracts

- 9B.29 (1994-12-16) When soliciting proposals from U.S. or Canadian contractors for defence supplies valued at over \$500,000, contracting officers must request that the proposal clearly indicate the type and amount of recoupment charges, if any, which are payable to the U.S. DOD.
- 9B.30 (1994-12-16) The following clause must be used in bid solicitations and contracts for defence supplies issued directly to the U.S. or Canadian defence suppliers.

"The contract price to be paid shall not include any charges for recoupment of non-recurring costs (NRCs) payable to U.S. Department of Defense."

## NRCs - FMS

- 9B.31 (1994-12-16) All FMS procurements are handled by the PWGSC(W) office in its capacity as the solely accredited Canadian Procurement Agency to the U.S. DOD.
- 9B.32 (1994-12-16) When soliciting proposals, an LOR to the U.S. DOD is generated by PWGSC(W) which includes a request for the U.S. Service to identify if NRCs are involved in this requirement. If the ensuing proposal/LOA from the U.S. DOD includes NRCs, then PWGSC(W) pursues a waiver. A request for waiver will be submitted to the Director, Defense Security Assistance Agency (DSAA), by PWGSC(W) prior to the signing of the LOA.
- 9B.33 (1994-12-16) Upon receipt, the request for waiver will reside on a pending list. PWGSC(W) will then work with the client to determine if there is adequate justification for submitting a standalone waiver or whether some other reciprocal arrangement can be exercised.
- 9B.34 (1994-12-16) When sufficient justification exists, a standalone waiver request will be submitted to DSAA by PWGSC(W). Responsibility for providing adequate justification resides with the client.
- 9B.35 (1994-12-16) Recoupment charges may be reduced or waived for sales that significantly advance U.S. interests in standardization with NATO, where additional or unusual benefits can be clearly identified and demonstrated. Such benefits must generally be attributable to a unique military, foreign policy, or economic advantage of the sale. Examples of specific grounds for submitting a standalone waiver request are when:

- (a) Canada does follow-on development of a U.S. item of potential U.S. interest;
- (b) an item is jointly developed by Canada and the U.S. and put into production in the U.S. and Canadian rights are involved;
- (c) the item is a component or subsystem required for a joint Canadian/U.S. project;
- (d) the inclusion of U.S. development charges is a major factor in a Canadian "make or buy" decision;
- (e) a trade-off of development costs on dissimilar items may be appropriate, such as when both countries plan procurement of both items at the same time;
- (f) Canadian procurement of a U.S. item can be expected to influence favourable decisions or third countries to buy the U.S. item;
- (g) the size of the Canadian procurement is such that our share of the NRCs appears to be out of proportion;
- (h) specific joint operational, maintenance or logistic benefits can be identified as resulting from the sale; and
- (i) future Canadian repair capability may provide unique and joint benefits as a result of the sale.

*Note: This list of examples is not exhaustive; clients must evaluate the potential justification on a case-by-case basis.*

9B.36 (1994-12-16) When a standalone waiver is granted by the DSAA, the waiver request is removed from the pending list and the LOA amended to delete these charges.

9B.37 (1994-12-16) In the event a standalone waiver is not granted by the DSAA or it is not requested by PWGSC(W), the original request will remain outstanding on the pending list. These outstanding waiver requests are available for future consideration as non-standalone waivers, which may be granted as a method of providing funding for a specific purpose in furthering U.S. and Canadian interests.

## Release of Information

9B.38 (1994-12-16) The U.S. government does not compete with U.S. industry for foreign sales and does not knowingly provide other governments with "comparison pricing information" especially when it is known that a commercial contract is being negotiated.

## Processing of Documents

9B.39 (1994-12-16) When a decision is made to satisfy a requirement through FMS, the file is either wholly reallocated or extracted to PWGSC(W) after the procurement plan/contract planning and advance approval (CPAA) is prepared and the initial requisition review is carried out by the receiving PWGSC organization (headquarters or region).

9B.40 (1994-12-16) Material to be obtained through FMS must be identified by U.S. National Stock Numbers. The second group of digits (country designator) must be 00 or 01. The designation 21, which indicates the presence of a Canadian number, is not acceptable and its use will cause the demand to be rejected.

9B.41 (1994-12-16) Each request will be reviewed by PWGSC(W) to ensure the adequacy and appropriateness of the information. If satisfactory, an LOR to the applicable U.S. Armed Forces organization will be prepared and submitted by PWGSC(W).

- 9B.42 (1994-12-16) Upon receipt of the LOA, PWGSC(W) will carry out a verification to determine whether the LOA corresponds to the LOR and, if satisfactory, will request funding from the main file holder in cases where the file at PWGSC(W) is an extract.
- 9B.43 (1994-12-16) Funds are transferred from the Canadian client to the U.S. government via a Canadian account at the Federal Reserve Bank in New York following the acceptance of the LOA by PWGSC(W). No action will be initiated by the U.S. DOD until the transfer of funds has been completed.

## **Contract Administration**

- 9B.44 (1994-12-16) PWGSC(W) is responsible for contract administration including billing/payments and expediting delivery, except for COLOG.
- 9B.45 (1994-12-16) Program Management Reviews and/or Status Review meetings may be arranged by PWGSC(W) to allow clients to discuss related matters with representatives from the U.S. DOD.

## **Contract Amendments**

- 9B.46 (1994-12-16) Contract amendments, when required, will be negotiated by PWGSC(W).
- 9B.47 (1994-12-16) When funds in certain contracts (cases) have not been fully expended, a case amendment extending the period of time to use up funding may be requested. This normally applies to arrangements where the scope of work is not affected.

## **Contract Closing**

- 9B.48 (1994-12-16) When delivery is completed and final determination of cost is made, PWGSC(W) will initiate closing action and will seek finalization of accounts. If funds are due to Canada, a cheque payable to the Receiver General for Canada will be requested by PWGSC(W). If funds are owed to the U.S.A., funds will be requested from the Canadian client.
- 9B.49 (2001-12-10) Closure of FMS contracts involving procurement from commercial vendors may take place years after delivery of material because of the need to audit and renegotiate certain requirements peculiar to the U.S. DOD procurement process.
- 9B.50 (1994-12-16) At the time of closure, the estimated amounts in the LOA are changed to actual costs.