Issues Re Direct Sales Statute 10 U.S.C. 2539b

We recently had some issues with 10 U.S.C. 2539b, "Availability of Samples, Drawings, Information, Equipment, Materials, and Certain Services," that are worth sharing. This statute allows the Secretary of Defense and the secretaries of the military departments to: Sell, rent, lend, or give samples, drawings, and manufacturing or other information; sell, rent or lend government equipment or materials; and sell the services of/make available any government laboratory, center, range or other testing facility.

The references for approval authority for this statute can be found in: 1) "Interim Draft Department of Defense (DoD) Guidance Implementing 10 U.S.C. 2539b, 'Authority to Sell'," dated 17 April 1997, 2) Assistant Secretary of the Army (Research, Development and Acquisition (SARDA)) Delegation SARDA-98-01, dated 12 February 1998, and 3) Delegation of Authority No. 4-98, dated 26 March 1998. The approval authority is with the Heads of Contracting Activities for paragraphs (a)(1) and (a)(2)(A) of the statute, with the option of redelegating no lower than the Principal Assistant Responsible for Contracting. The approval authority for paragraph (a)(2)(B) remains at the SARDA level, most likely because it involves "demonstrations to a friendly foreign government." However, the approval authority for paragraph (a)(3), the sale of testing services, is delegated down to the actual directors or commanders of government laboratories themselves. Notwithstanding, the U.S. Army Industrial Operations Command (IOC), in accordance with IOC Direct Sales Policy, 8 March 1999, requires that the sales of such testing services still be directed and controlled by Headquarters, IOC and that the IOC direct sales contracting officer is the signatory on these contracts.

The 1997 Interim Draft DoD Guidance is very comprehensive in terms of how the various words in the statute are to be interpreted. For example, "person or entity" (the statute uses this phrase in terms of to whom we may sell) is defined: "means an individual, partnership, corporation, association, state, local, or tribunal government, or an agency or instrumentality of the United States." The issue came up as to whether we could sell testing services to, ultimately, a foreign government. Although the foreign government had a liaison office in the United States, the liaison office insisted that the customer was truly the country's Ministry of Defense. Therefore, this statute could not be an option in this instance, and the customer was then advised to pursue foreign military sales channels. This is an opposite conclusion to another sale where we successfully used this statute, whereby the foreign customer had an actual "corporation…of the United States."

The 1997 Interim Draft DoD Guidance also dictates that sales of property or services of whatever nature shall be without any express or implied warranty, and that the recipient must agree in writing that the government shall not be liable for any direct or consequential damages. Further, the recipient must agree to indemnify and hold harmless

the U.S. Government for any loss, claim, damage, or liability of any kind arising out of or in connection with property or services so provided. This type of indemnification, which does not even except gross negligence or willful misconduct, may not be the most attractive to potential buyers. Potential buyers may like, however, that the statute requires the test results are confidential. Please see the above-referenced documents for further details.

POC is Ms. Terese Harrison, Attorney-Advisor, U.S. Army Industrial Operations Command (IOC), DSN 793-8447, email harrisont@ioc.army.mil.