

*Some Practical Guidance for Contracting Officers Regarding End-Use Certificates*

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This paper will address the concept of an end-use certificate ("EUC"). It will also provide some practical guidance for contracting officers in dealing with a commonly encountered scenario concerning EUCs.

For a number of years, the United States has required foreign purchasers of armaments and other equipment on the U.S. Munitions List to provide assurances against third party transfer and certain uses without the consent of the United States Government ("USG"). These are commonly referred to as EUCs. The International Traffic in Arms Regulations ("ITARs") (which contains the U.S. Munitions List), requires the execution of a "nontransfer and use certificate", Form DSP-83, which requires the foreign end-user to agree that it will not reexport, resell or otherwise transfer the technical data, defense article of military equipment which it has received from the USG. See, 22 C.F.R section 123.10, In the Foreign Military Sales context, similar assurances are included in the terms and conditions of the LOA. Direct commercial sales require an authorized representative of a foreign country to provide comparable assurances in the form of a separate EUC.

Frequently, during the course of an acquisition, foreign countries request the contracting officer to sign EUCs for defense products purchased by DoD from their countries. DFARS 225.802 -71, *End user certificates*, provides the following guidance:

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to the effect that the Armed Forces of the United States is the end user of the equipment, and that it will not be transferred to third parties without authorization from the Government of the country selling the item. When encountering this situation, refer to DoD Directive 2040.3, End User Certificates, for guidance.

In a 9 April 1991 memorandum, the Deputy SECDEF established a policy addressing EUCs, which was later incorporated in DoD Directive 2040.3. That Directive defines an EUC as a written agreement in connection with the transfer of military equipment or technical data to the USG that restricts the use or transfer of that item by the USG. It also sets forth levels of approval at the DA and DOD levels. (DOD Dir 2040.2, para.3.1). One of the policy reasons underlying the requirement for senior level approval is that agreement to an EUC, in effect, impinges on the sovereignty of the USG and potentially restricts the US's ability to honor worldwide security arrangements to allied and friendly countries. Agreement to an EUC may also contravene established international agreements that recognized permissible use of items for "defense purposes". The Directive, at para 4.3 creates three categories of EUC with differing levels of approval, as follows:

Category I. Secretaries of the Military Departments and Directors of Defense Agencies may authorize EUCs:

- For acquisition of items classified for security purposes by a foreign government,
- For the acquisition of items covered by the nonproliferation agreements to which the United States is a party, such as missile technology, or
- That permit the item to be "used for defense purposes" . . . by the United States.

Category II. EUCs that are not Category I or III are Category II. Secretaries of the Military Departments and Directors of Defense Agencies may authorize Category II EUCs only after a determination is made through the coordination procedures set forth in subsection 6.1.2., below, that, notwithstanding the use or transfer limitations, the purchase is in the U.S. national interest. The least restrictive provisions possible should be negotiated.

Category III. Secretaries of Military Departments and Directors of Defense Agencies may not authorize the signature of EUCs that limit the right:

- For use by or for the U.S. Government in any part of the world, or
- To provide the item to allies engaged together with the United in armed conflict with a common enemy.

Waivers to this prohibition may be granted by the Under Secretary of Defense (Acquisition) (USD(A)).

Acquisition Letter number 92-3 dated April 30, 1992, sets forth approval authority levels within the Department of the Army. The authority to execute Category I or II EUCs has been delegated to the Army Acquisition Executive ("AAE"). The authority to sign subsequent EUCs on the same procurement will be delegated by the AAE to the contracting officer after the AAE executes the initial EUC. The authority to execute Category III EUCs resides with the Secretary of the Army, after receiving a formal waiver from the Under Secretary of Defense (Acquisition). All requests for execution of an EUC should include the proposed EUC language and all pertinent information concerning the item and the acquisition.

When a contracting officer is faced with a request to sign an EUC, the first step should be to analyze the request to determine if it is truly an "EUC" that fits within the definition of the DOD Directive. One typical scenario is the submission of the certificate of the foreign government labeled "End Use Certificate" or words to that effect, and containing language that the item is to be used by the USG only for 'defense purposes'.

This is typically the case when dealing with the Swedish government. Swedish companies are firm in their insistence that the certificate, in its unaltered form, must be signed in order for the acquisition to be accomplished. In this scenario the contracting officer does not have much choice and the procedures of DOD Directive will need to be followed. A contracting officer's determination and findings, which addresses all of the circumstances of the acquisition, should be prepared and the request for authority to sign an EUC should be sent to the AAE.

However, if the analysis reveals the foreign company's request is in the nature of a general request for an "end use" certificate or statement, the contracting officer should determine exactly what is being requested by the foreign supplier: i.e. does it truly fit the definition of an "end use restriction" within the terms of DOD Directive 2040.3?. For example, does it contain any limitations or restriction on the USG's use of the item, either in CONUS or OCONUS? Does it limit the USG's use of the item only for "defense purposes? Sometimes foreign companies misuse the term "end use certificate" when all they really require is a statement of what will be done with the item. In this instance, the contracting officer should be advised to seek clarification of the request. Frequently, the company will agree to accept a statement by the contracting officer that merely recites what is being done with the item. For example, one foreign company agreed to accept a statement such as: "It is hereby certified that the 3500 pounds of X, being purchased from ABC Foreign Co. to be delivered to Picatinny Arsenal, NJ USA under contract 123456 will be used by the U.S Government and its contractors." This is merely a factual statement of what is transpiring during the acquisition. Note, that there is no language

limiting or restricting the USG's use of the item. Obviously, any statement the contracting officer signs should not contain the phrase "end-use certificate" or any similar phraseology.

This latter method of working with the contracting officer and the foreign company to clarify the exact nature of their request for an "end-use" certificate, if successful, has the salutary effect of avoiding a delay in the acquisition and streamlining the process.