

INTERNATIONAL GOVERNMENT CONTRACTOR

Information and Analysis on Legal Aspects of International Public Procurement

Vol. 5, No. 1

January 2008

Developments

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President Bush Issues Export Control Directive

President Bush issued an export control directive January 22 designed to improve the often criticized process for licensing exports of defense equipment, services and technical data. The reform focuses on the growing backlog of license applications at the U.S. State Department Directorate of Defense Trade Controls (DDTC), which regulates arms exports.

An administration statement said the directive would meet the sometimes competing goals of promoting national security and facilitating the U.S.' continued international economic and technological leadership. The directive seeks to advance a more efficient and transparent export-licensing process, ensure proper export controls, and "clarify and strengthen the ability of the U.S. Government to monitor and deny U.S. controlled goods, services or technologies to a potential enemy."

The directive reflects recommendations by the National Security Council and the departments of State and Defense. Specific provisions include:

- additional financial resources and intelligence support for timely adjudication of defense trade licenses;
- issuance of guidelines requiring a decision on defense trade export-license applications within 60 days of an application, absent "strong reason" for additional time;
- upgrades to the electronic licensing system to handle all types of defense trade licenses and to give all agencies access to the system;
- updated controls on exports involving dual and third-country nationals from NATO and other allied countries;
- creation of a mechanism to resolve disputes between the departments of State and Commerce over licensing jurisdiction;

- establishment of a multi-agency working group to improve procedures for export-enforcement investigations; and
- increased end-user focus, including emphasis on the Validated End User program for reliable end users and expansion of the Commerce Department Entity List to increase scrutiny of exports to foreign parties with a record of activities contrary to U.S. security and foreign policy interests.

The directive addresses many of the issues raised by the Coalition for Security and Competitiveness, an industry group, in a March 6, 2007 letter to the president. The directive also contains remedial measures similar to those in H.R. 4264, introduced Nov. 14, 2007, by Rep. Brad Sherman (D-Calif.). See 4 IGC ¶ 18; 4 IGC ¶ 91.

The coalition commended the new directive. Noting that high-technology products accounted for \$345 billion worth of all U.S. exports of manufactured goods in 2006, the coalition said that improving the export licensing process is critical to "safeguarding our national security and advancing our technological leadership and global industrial competitiveness."

The export control system has been the subject of much Government Accountability Office criticism, and in February 2007 was added to GAO's list of high-risk programs. GAO questioned the effectiveness of the complex system of agencies and laws that protect technologies critical to U.S. national security interests. The current system creates too many loopholes and too little coordination, causing U.S. military technologies to be "targets for theft, espionage, reverse engineering and illegal export," GAO said. Congress and the administration should "examine existing programs, evaluate alternative approaches, and develop a comprehensive framework with clear responsibilities and accountability for identifying critical technologies." See 49 GC ¶ 59.

In August 2007, GAO repeated its call for a comprehensive review of the export control system, this time focusing on the unclear jurisdictional boundaries between the DDTC and the Commerce Department Bureau of Industry and Security. DDTC regulates arms exports under the Arms Export Control Act, 22 USCA § 2751 et seq., and the International Traffic in Arms

Regulations. BIS regulates “dual-use” items, those having military and commercial applications, under the Export Administration Act of 1979, 50 USCA App. § 2401 et seq., the Export Administration Regulations and executive orders. GAO said that jurisdictional disputes force exporters to determine for themselves which restrictions apply. This creates an uneven playing field, with some exporters gaining access to markets not available to others, depending on which export control system the exporter chooses. Jurisdictional disputes also increase the risk of exporting sensitive items without appropriate review, GAO said. See 4 IGC ¶ 61.

GAO’s August 2007 report also said licensing inefficiencies at State hinder the export control system. GAO attributed the growing backlog of license applications to staffing shortfalls at State, a problem addressed in the new presidential directive.

Most recently, a November 2007 GAO report said that key trends indicate that State’s arms-export licensing process is “under stress.” Arms export cases increased 20 percent between 2003 and 2006, while median processing times doubled. Finally, the number of open arms export cases increased from about

5,000 in October 2002 to about 7,500 in April 2007. Although State reduced the number of open cases by using “extraordinary measures,” including “canceling staff training, meetings, and industry outreach, and pulling available staff from other duties,” those measures are “not sustainable in the long term, do not address underlying inefficiencies and problems, and may have negative unintended consequences for the mission,” GAO said.

Andrew Irwin, a Washington, D.C.-based attorney specializing in export controls, said that controls often involve a difficult balance: “being mindful of the crucial need to be able to work collaboratively with allied business partners and field important technical innovations so that they can get into the hands of the warfighter, while at the same time managing risks associated with information or equipment falling into the hands of wrong countries, entities or persons.” He added that any support to regulatory agencies “that will speed processing of approvals but not diminish the care with which submissions are reviewed is a good thing and will bolster the national security imperatives that are the foundation of export control rules.”

