

# A Primer on International Government Contracting

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# Agenda

- I. U.S. Government's Role as an Exporter and Financier of Defense Articles
- II. Security Cooperation
- III. The Foreign Military Sales (FMS) Program
- IV. The FMS Process
- V. Executing an FMS
- VI. Other FMS Issues
- VII. FMS – Enforcement and Corruption
- VIII. Direct Commercial Sales
- IX. FMS vs. DCS – What's Right for You?

# I. U.S. Government – Exporter and Financier



# Security of Supply Arrangements

- National security and foreign policy tool
- Establishes a framework for the signatories to follow in order to assure supply
- Allows DoD to request priority delivery of goods, via contracts, subcontracts, or orders, from companies in signatory country, and vice versa

# Security of Supply Arrangements

- Reciprocal Procurement Agreements (RPA)
  - 32 Countries – “Qualifying Countries” (DFARS 225.872-1)
  - Each country affords the other country certain benefits on a reciprocal basis consistent with national laws and regulations
  - Authority based on “public interest” exception to Buy American Act

# Security of Supply Arrangements

- Defense Priorities & Allocations System (DPAS)
  - Title I of the Defense Production Act of 1950
  - Foreign defense contractors can voluntarily participate in DPAS and accept rated orders from U.S. defense contractors
  - Not enforceable outside the U.S., but baked into RPAs

# I. Security Cooperation/Security Assistance

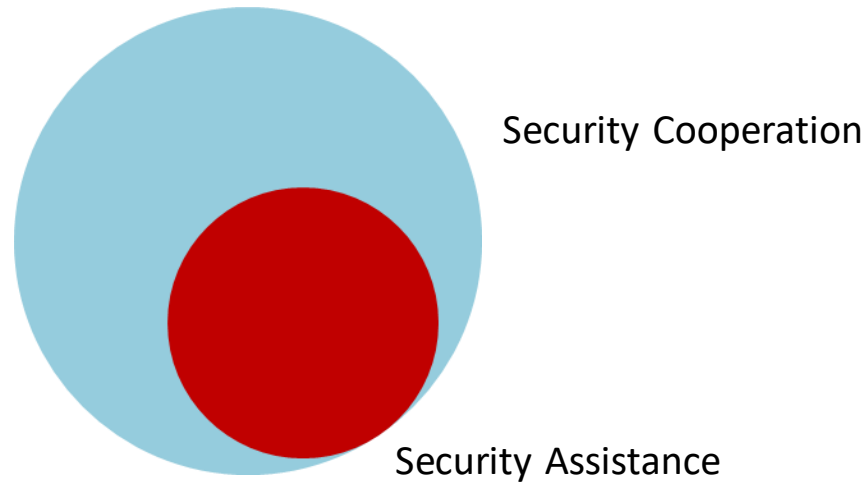
# What is Security Cooperation?

- 10 USC Section 301: Security Cooperation Programs and Activities of the Department of Defense
- Any program, activity (including an exercise), or interaction of the Department of Defense with the security establishment of a foreign country to achieve a purpose as follows:
  - To build and develop allied and friendly security capabilities for self-defense and multinational operations.
  - To provide the armed forces with access to the foreign country during peacetime or a contingency operation.
  - To build relationships that promote specific United States security interests.



# What is Security Cooperation?

- Security Assistance is a sub-set of Security Cooperation

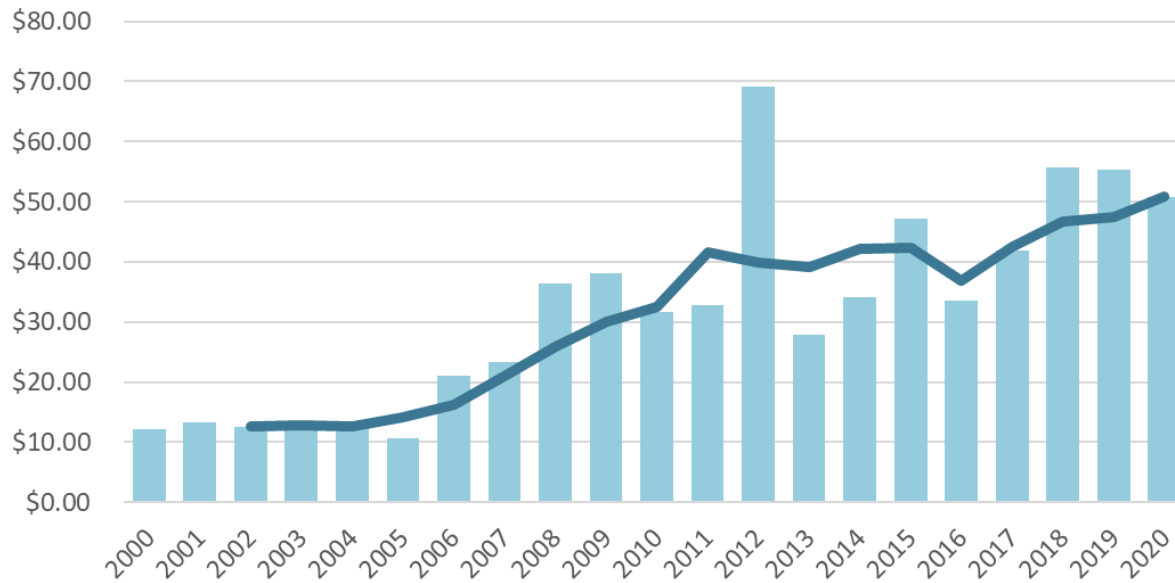


# Security Assistance

- **Security Assistance** — Group of programs authorized by the Foreign Assistance Act of 1961, as amended; the Arms Export Control Act of 1976, as amended; or other related statutes by which the United States provides defense articles, military training, and other defense-related services by grant, lease, loan, credit, or cash sales in furtherance of national policies and objectives, and those that are funded and authorized through the Department of State to be administered by Department of Defense/Defense Security Cooperation Agency are considered part of security cooperation. Also called “SA.”
- Joint Pub 1-02 DOD Dictionary of Military and Associated Terms (August 2017)

# FY 2000-2021 Security Cooperation Sales

Security Cooperation Sales: Three-Year Rolling Average  
(Billions)



*FY 2021*

FMS: \$28.67B

FMF: \$3.80B

BPC: \$2.34B

**Total: \$34.81B**

**3-Year  
Average: \$47.00B**

***FY 2021 totals driven by a 36 percent fall in foreign government-funded transactions.***

***Data Source: 1200 System/DSAMS***

# III. Foreign Military Sales Overview

# What is FMS?

- The Foreign Military Sales program (FMS) utilizes the DoD procurement system to support government-to-government sales of defense articles or services.



## Overseen by the Department of State

- Supervises and determines which sales, leases and transfers will be made
- Reviews and approves export license requests for direct commercial sales



## Executed by the Department of Defense

- Establishes military requirements and determines what is available for sale or lease
- Implements the FMS Program

# What is FMS? – Key FMS Stakeholders



## Department of the Army

- Deputy Assistant Secretary of the Army for Defense Exports and Cooperation (DASA/DE&C)



## Department of the Navy

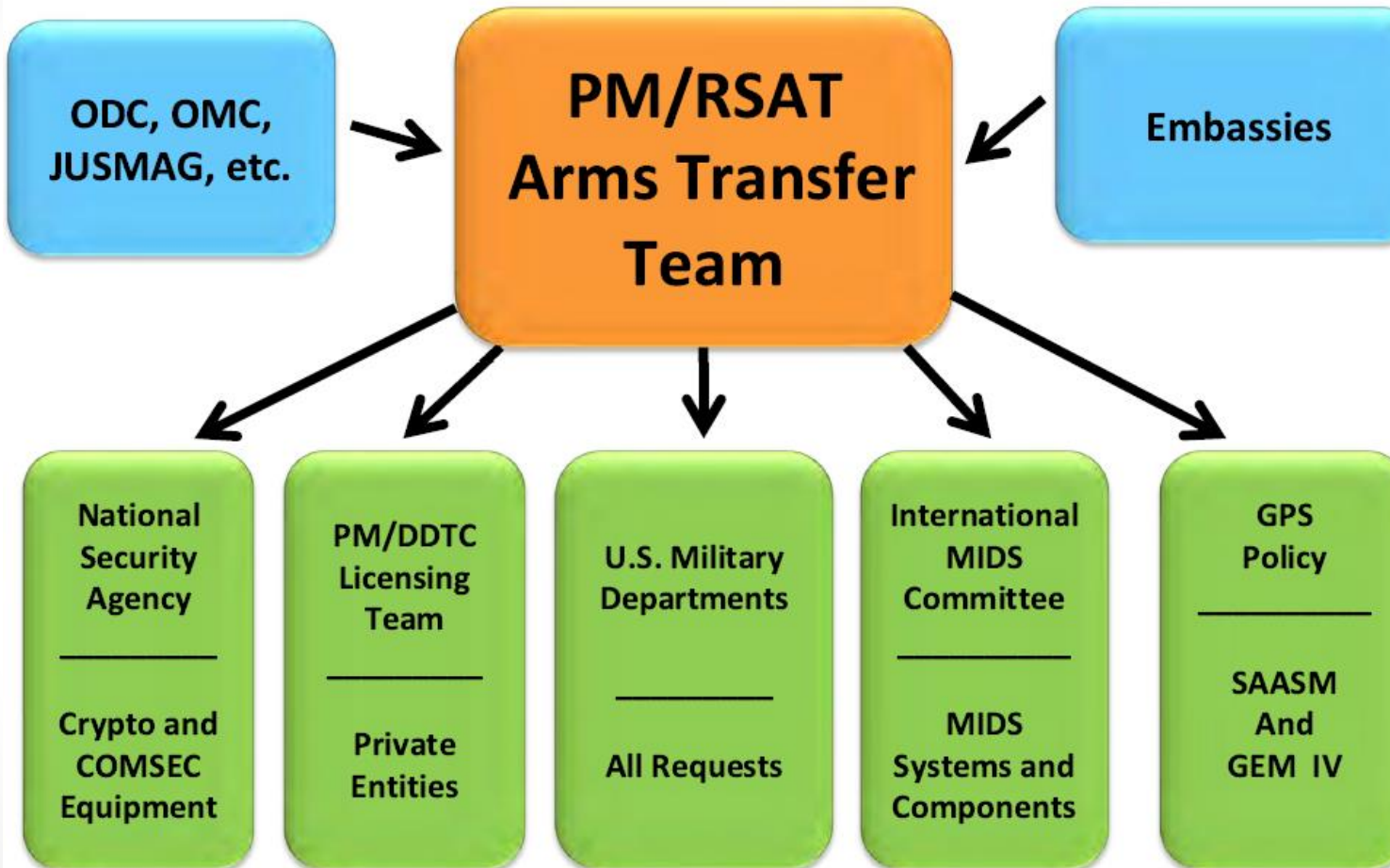
- Navy International Program Office (IPO)



## Department of the Air Force

- Deputy Undersecretary for Air Force International Affairs (SAF/IA)

# Key Player: Office of Regional Security and Arms Transfers (PM/RSAT)



# Role of PM/RSAT

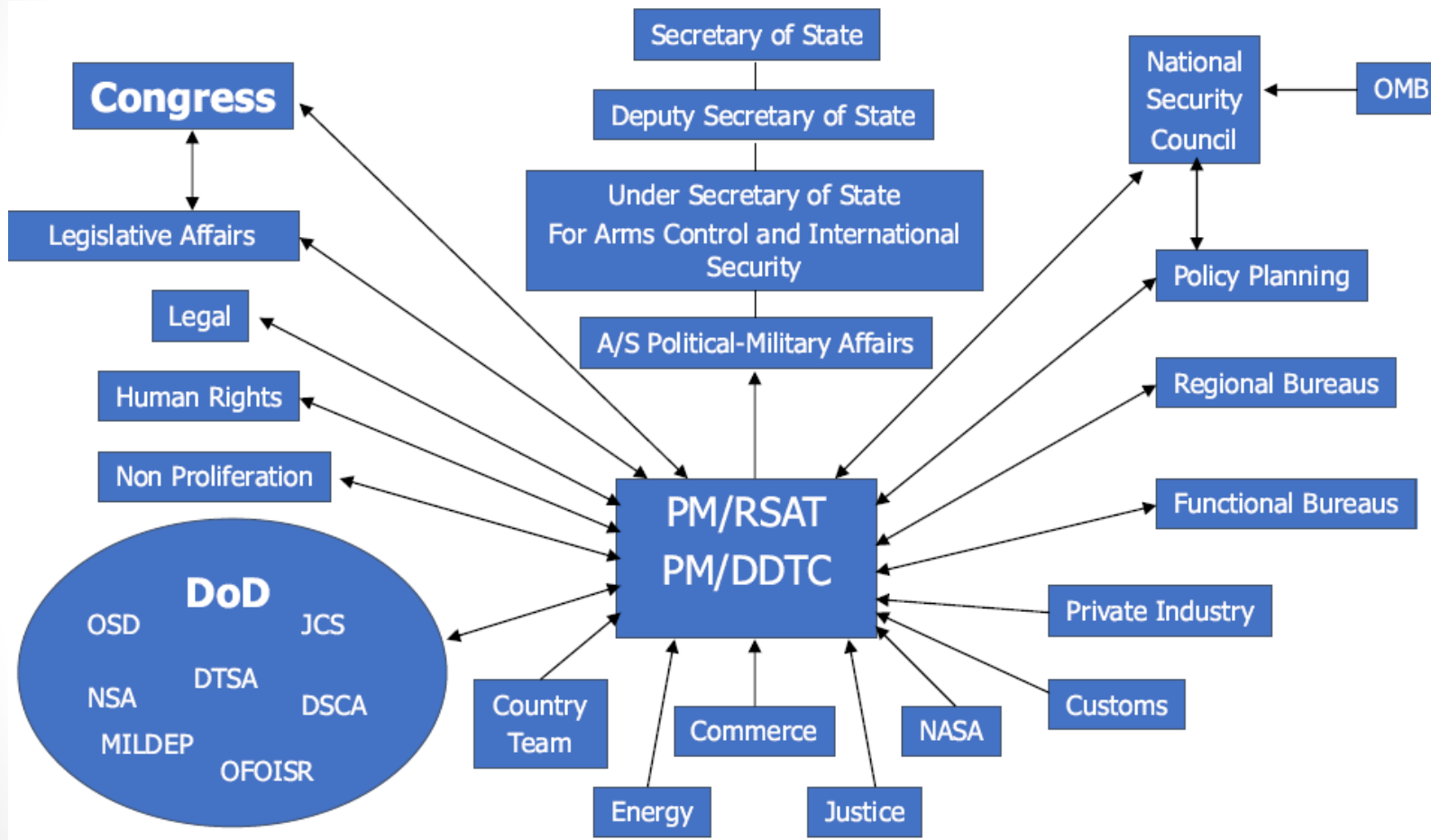
- PM/RSAT is the Department of State's principal entry point for bilateral and regional political-military questions from the U.S. Government interagency and foreign governments.
- PM/RSAT is the link between the Departments of State and Defense, interfacing with the Office of the Secretary of Defense, Joint Staff, and the Combatant Commands on regional security issues.



# Control of FMS: PM/RSAT vs. DDTC

- Origin of Acquisition:
  - FMS → PM/RSAT
    - Responsible for ensuring that all FMS cases are properly reviewed within the State Department for consistency with U.S. foreign policy and national security objectives.
    - PM/RSAT handles Third-Party Transfer Requests
  - Direct Commercial Sales → DDTC
    - Responsible for ensuring that commercial exports of defense articles and defense services advance U.S. national security objectives.
    - DDTC and PM/RSAT handle ITAR Authorization Requests

# Arms Transfer Policy Making Tree



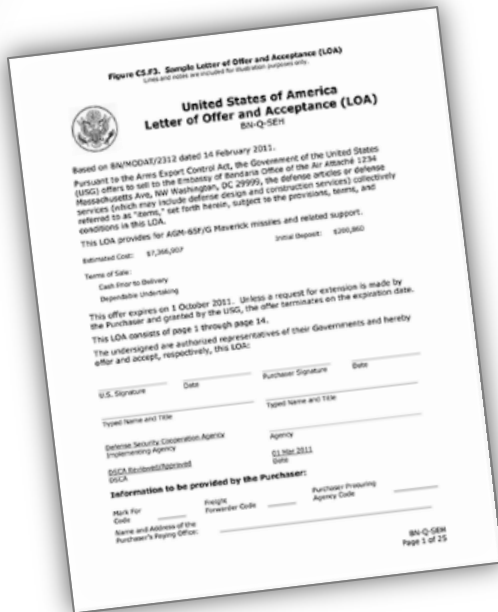
# FMS Laws and Regulations

- Arms Export Control Act (22 U.S.C.A. §§ 2171 et seq.) and Foreign Assistance Act (22 U.S.C.A. §§ 2151 et seq.)
- 10 USC Chapter 16, Security Cooperation, P.L. 114-328, Division A (2016)
- National Defense Authorization Acts (annual) and other legislation
- Executive Order 13637 (March 8, 2013)(AECA); Executive Order 12163 (September 29, 1979)(FAA)
- Security Assistance Management Manual, DOD 5105.38-M

# FMS Laws and Regulations

- Federal Acquisition Regulation (FAR part 25) and Defense Federal Acquisition Regulation Supplement (DFARS subpart 225)
- International Traffic in Arms Regulation, 22 C.F.R. §§ 120 *et seq.*
- National Security Presidential Memorandum (NSPM) -10, *U.S. Conventional Arms Transfer Policy*, April 19, 2018. (CAT Policy) and Implementation Plan
- Buy American Act (41 U.S.C.A. §§ 10a to 10d)

# FMS Requirements



- Conducted through Letters of Offer and Acceptance (LOA) between the USG and an eligible foreign government or international organization.
- Partner must agree to:
  - not transfer title or possession to anyone not an officer, employee, or agent of the partner or change end-use without prior USG consent
  - provide substantially the same degree of security that the USG would provide
  - permit monitoring/verification of end-use

# FMS Requirements

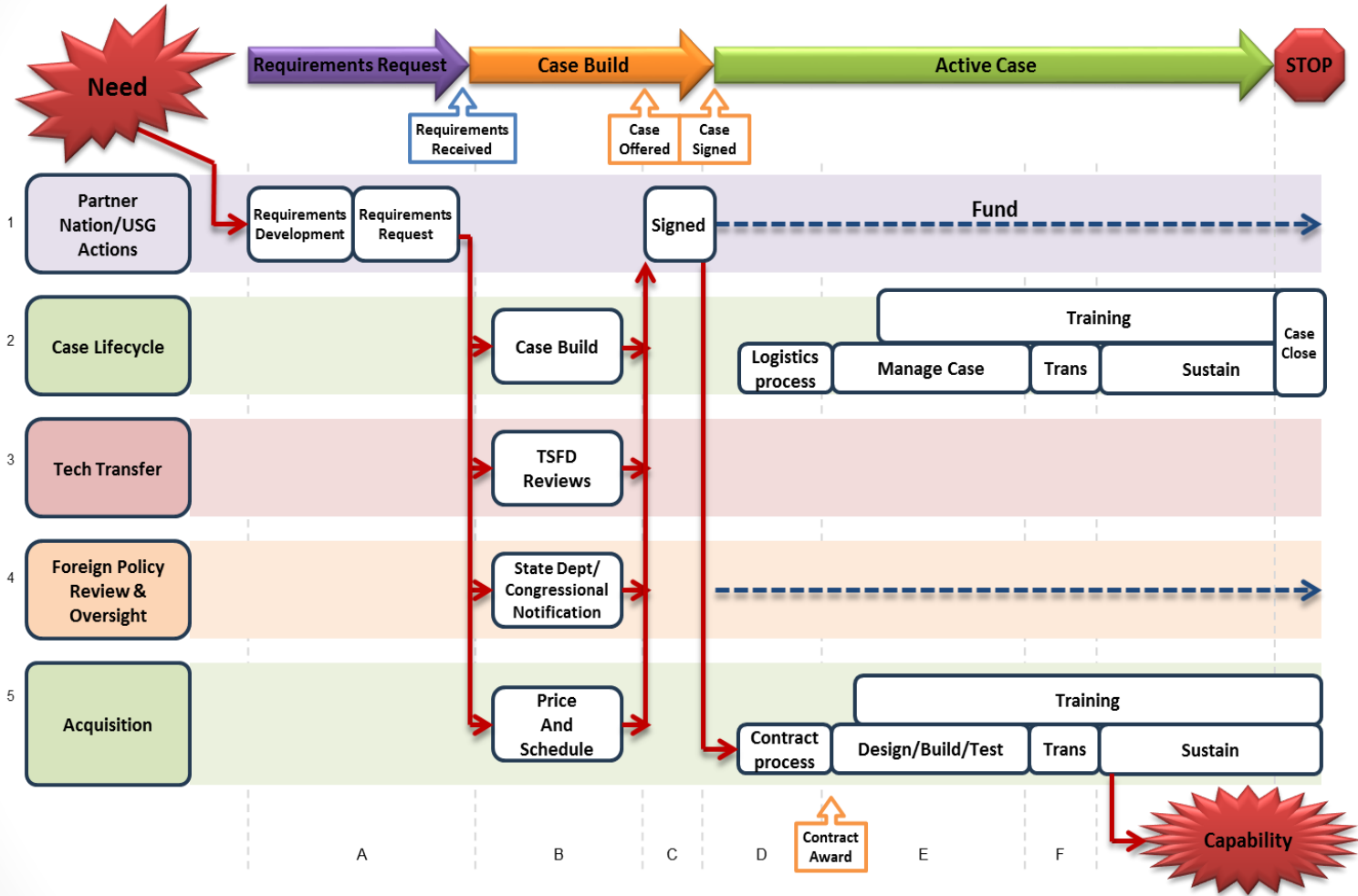


- Authorized by the AECA, the FMS program must be conducted at no cost to the U.S. Government and may not be supported by appropriated funds.
  - An administrative surcharge is applied to every LOA to support the FMS program and the personnel required to run it (3.2% recently reduced from 3.5%).

# IV. The Foreign Military Sales Process



# FMS Process





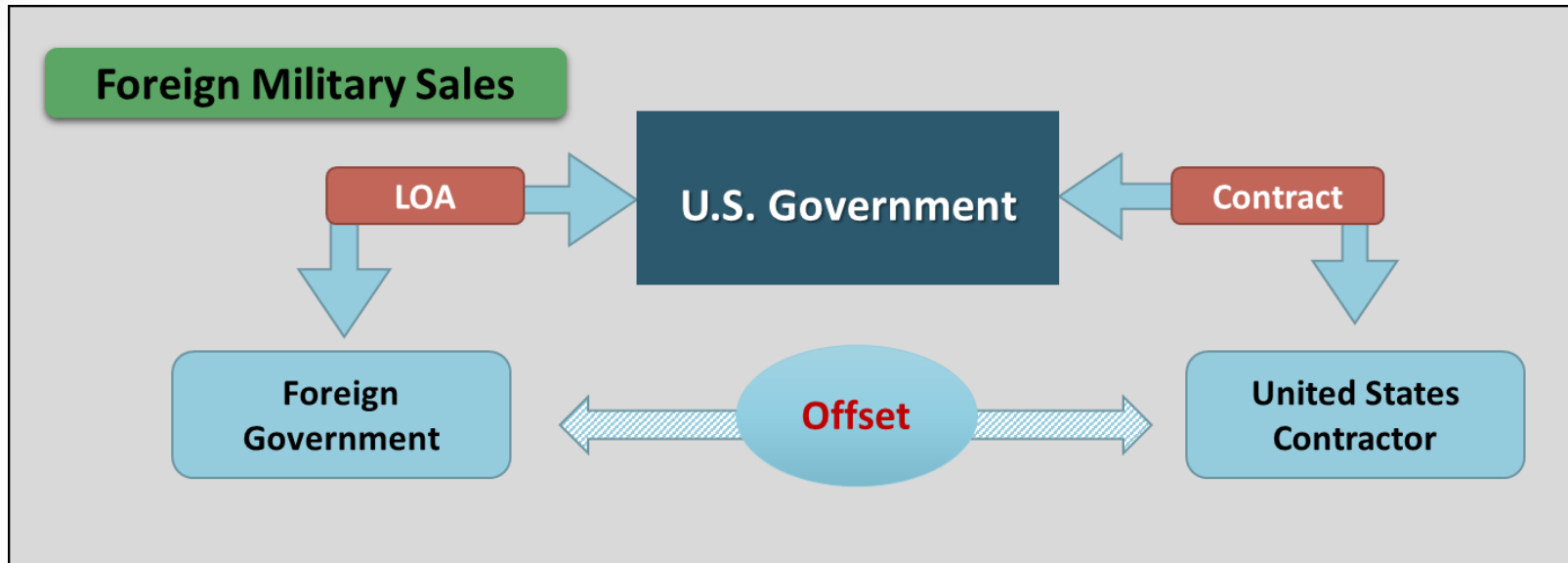
# FMS Process

## FMS “Total Package Approach” includes:

- Identification of requirements
- Initial support requirements
- Operational concept
- Training
- Configuration management
- Services
- Follow-on support



# FMS Process



# FMS Process

- Customer Eligibility
  - Defense articles and/or services may be sold to a country or international organization only if the President, in accordance with the AECA, makes a determination that the prospective purchase is eligible. *See* 22 U.S.C.A. § 2751 *et seq.*
- Four criteria in the AECA and the Security Assistance Management Manual (SAMM):
  - 1) Strengthens the security of the U.S. and promotes world peace;
  - 2) Country/international organization agrees not to transfer title to, or possession of, any defense article, service or related training without the consent of the President;
  - 3) Country/international organization agrees to maintain the security of such article or service and provide substantially the same degree of security protection as the U.S.; and
  - 4) Country/international organization is otherwise eligible to purchase or lease defense articles or defense services

# FMS Process

- Item Eligibility Criteria
  - FMS may include dual-use items defined under the Export Administration Regulations and those controlled under the U.S. Munitions List
  - Re-exports, retransfers, and changes in end use are controlled by PM/RSAT—not by the State Department/DDTC or the Department of Commerce/BIS.

# FMS Process

- Item Eligibility Criteria

- Defense Articles

- Any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war;
    - Any property, installation, commodity, material, equipment, supply, or goods used for the purposes of making military sales;
    - Any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article listed in this paragraph; and
    - Any component or part of any articles listed above.

# FMS Process

- Item Eligibility Criteria

- Defense Services

- Any service, test, inspection, repair, training, publication, technical or other assistance, or defense information, used for the purpose of making military sales

- Design and Construction

- The design and construction of real property facilities, including necessary construction equipment and materials, engineering services, construction contract management services relating thereto, and technical advisory assistance in the operation and maintenance of real property facilities provided or performed by any department or agency of the DoD or by a contractor pursuant to a contract with such department or agency

# FMS Process

- Ineligible Items
  - Items not made in the U.S.
  - Items procured from foreign countries
  - Administrative expenses of foreign government representatives
  - Police and riot-control articles
  - Counter-terrorism
  - Military intelligence programs
  - Napalm and related chemical weapons
  - Riot control agents
  - Defense articles also do not include merchant vessels or source material, byproduct material, specialized nuclear material, production facilities, utilization facilities, or atomic weapons or articles involving Restricted Data

# FMS Process

- FMS Acquisition
  - Uses FAR and DoD FAR Supplement
  - Can be awarded sole source on customer's direction.
    - 10 USC 2304(c)(4); FAR 6.302-4 / DFARS 206.304-4
  - Firm-fixed price unless customer directs otherwise. Section 830, PL 114-328
    - Guidance from DoD supports consolidated requirements
  - Offset costs recoverable. DFARS Subpart 225.73
  - Indemnification and hold-harmless clauses. LOA Standard Terms and Conditions



# FMS Process

- FMS Acquisition

- Disputes:

- Foreign party cannot sue USG for violating LOA.  
BAE Systems Technical Solutions and Services v. Republic of Korea,  
884 F3d 463 (4th Cir 2018)
    - Foreign party cannot sue contractor on FMS contract.  
Secretary of State for Defence v. Trimble Navigation, Ltd.,  
484 F3d 700 (4th Cir 2007) Trimble II
    - Contractor cannot sue foreign party.  
Heroth v. Kingdom of Saudi Arabia, 565 F. Supp 2nd 59 (D DC 2008)

# V. Executing a Foreign Military Sale

# FMS Program: Case Initiation

- Development of the FMS Case
  - Definition Stage
    - Security Cooperation Organization (SCO) and customer discussions to define requirement
      - SCO acts as the primary interface with the host nation
      - Discussions often include U.S. contractors, Implementing Agencies (IAs) and other DoD organizations
      - Discussions identify required security agreements, training plans, methods of financing, support needed, acquisition alternatives, etc.
      - Customer may request DCC vs. FMS

# FMS Program: Case Initiation

- Letter of Request (LOR) - initiation of the FMS transaction

- 1) Price & Availability Request:

- Rough Order of Magnitude and estimate reflecting the projected cost and availability of the defense articles or services
- Required information: (1) description of the defense articles/services and (2) the proposed method of financing
- Must be addressed to proper USG agencies and be complete
- SME vs. non-SME
- Total Package Approach

- 2) Letter of Offer and Acceptance (LOA)

# FMS Program: Case Initiation

- Congressional Notification
  - LOR - Major Defense Equipment (MDE)
    - MDE are items of SME having a nonrecurring R&D cost of more than \$50M or a total production cost of more than \$200M
- Congressional Notification Thresholds
  - NATO countries, Japan, Australia, New Zealand, Israel, and South Korea
    - \$25M MDE
    - \$100M total case value (defense articles or services)
    - \$300M design and construction services
  - All other countries
    - \$14M MDE
    - \$50M total case value (defense articles or services)
    - \$200M design and construction services

# FMS Program: Case Initiation

- Congressional Review Period
  - NATO, NATO countries, Japan, Australia, New Zealand, Israel, and South Korea
    - 15 days' statutory (formal) notification
  - All other countries
    - 30 days' statutory notification, preceded by 20 days' advance (informal) notification
- Country Team Assessment
  - Evaluation and official position of the LOR by senior U.S. Embassy personnel required in certain circumstances (see SAMM C5.1.4 and Table C5.T1)

# FMS Program: Case Initiation

- Letter of Request
  - Significant Military Equipment (SME) vs. Non-SME
    - SME are articles in which special export controls are warranted because of their capacity for substantial military utility. They are marked by an asterisk on the United States Munitions List (USML)
- Formal LOA Prepared
  - Concurrent LOA development with congressional notification (if required)

# VI. Other FMS Issues



# Transporting FMS Defense Articles

- Defense articles sold through the FMS program are transported one of three ways:
  - U.S. Defense Transportation System (DTS)
    - The prime movers within the DTS are the U.S. Air Force Air Mobility Command (AMC), the U.S. Navy Military Sealift Command (MSC), and the U.S. Army Surface Deployment and Distribution Command (SDDC)
    - DTS costs are charged to the foreign purchaser as part of the FMS agreement
  - Foreign Purchaser's Military Transport System
  - Foreign Contracted Freight Forwarder

# Shipper's Responsibility

- DSP-94
  - Freight forwarder must be registered with DDTC
  - Designated as Freight Forwarder on the LOA by the Foreign Purchaser
- Where to File DSP-94
  - Copy 1: Port of Export
  - Copy 2: DDTC
  - Copy 3: Retained by Shipper (at least five years)

# Relevant ITAR Exemptions

- 22 CFR § 123.4 *Temporary Import License Exemptions*
  - (a) CBP will permit the temporary import (and subsequent export) without a license, for up to 4 years, of unclassified U.S.-origin defense items (including any items manufactured abroad pursuant to U.S. Government approval) if the item temporarily imported:
    - (5) Is approved for such import under FMS program pursuant to an executed LOA

# Relevant ITAR Exemptions

- 22 CFR § 126.6 *Foreign-owned Military Aircraft and Naval Vessels – FMS Program*
  - A license from DDTC is not required if:
    - The article or technical data was sold, leased, or loaned by DoD to a foreign country or international organization under the FMS program;
    - Delivered to representatives of such a country or organization in the U.S.; and
    - Exported from the U.S. on a military aircraft or naval vessel of that government or organization or via the Defense Transportation Service
  - To ship an FMS article commercially:
    - The U.S. person identified in the FMS contract and any subcontractors must be registered with DDTC; and
    - All requirements in 22 CFR section 126.6(c) must be met

# Relevant ITAR Exemptions

- 22 CFR § 123.26 *Recordkeeping*
  - Must record the following information:
    - Description of the defense article or service
    - Name and address of the end-user
    - Name of the person responsible for the transaction
    - Stated end-use of the defense article or service
    - Date of the transaction
    - EEI Internal Transaction Number (ITN) and the method of transmission

# FMS ITAR References

- Application of Export Licenses: 123.1(c)(4)
- Destination Control Statement: 126.6(c)(6)(ii)
- DSP-94: 120.28(a)(7)
- Export License Exemption: 126.6(c)
- Letters of Transmittal: 124.12(a)(7)
- Temporary Import License Exemption: 123.4(a)(5)
- Transportation Plan: 126.6(a)(5)(iii)

# VII. Foreign Military Sales - Violations

# FMS Violations

- The transfer, sale, disposal, or change in end use of any U.S.-origin item without prior USG authorization is a violation.
- Reporting FMS Violations
  - PM/RSAT is required to inform Congress
  - Violations are forwarded to DDTC for review
  - Dual-use article violations are forwarded to the BIS Office of Export Enforcement
  - Violations may be excused if minor, and if corrective action is taken



# FMS Violations

- Penalties for FMS Violations
  - The USG cannot impose fines on foreign governments, but diplomatic penalties may result:
  - Démarches (complaints) by U.S. ambassador
  - Reductions of aid or trade
  - Reductions on export authorizations
  - Restriction on visas to citizens of purchases countries
  - Reduction in military cooperation Reduced supplies and maintenance

# FMS Violations

- U.S. Extraterritorial Jurisdiction for Export Violations
  - U.S. export control laws assert jurisdiction over U.S. persons wherever they are and over foreign persons who handle U.S.-origin controlled goods
  - Most European authorities consider U.S. extraterritorial jurisdiction unenforceable against non-U.S. parties
  - But many non-U.S. companies voluntarily consent to penalties for violations to avoid harsher penalties

# FMS Violations

- How the USG learns of export law violations?
  - U.S. State Department’s “Golden Sentry” or Blue Lantern” end-use monitoring programs
    - Agents visit end-user locations
  - U.S. and foreign law enforcement agencies
  - U.S. and foreign customs inspections
  - Reports from competitors
  - Whistleblowers
  - Voluntary disclosures

# FMS Violations

- Can U.S. exporters be penalized for violations by persons in the E.U.?
  - The DDTC considers the exporter to be in control of the export article, data, or service
    - Foreign third parties (customers, resellers, distributors, etc.) are generally subject to ITAR jurisdiction or prosecution
    - However, the U.S. exporter that provided the items to foreign persons is subject to prosecution, **IF** the U.S. exporter permitted an unauthorized re-export
  - DDTC may find a U.S. exporter at fault if it knew, or should have known, a violation could occur, but permitted the violation to occur by failing to take “reasonable measures” to prevent it

# VIII. Direct Commercial Sales

# Direct Commercial Sales (DCS)

- U.S. Contractor sale of U.S. defense articles and services to Non-U.S Purchasers without the direct involvement of the U.S. Government.



## Department of State

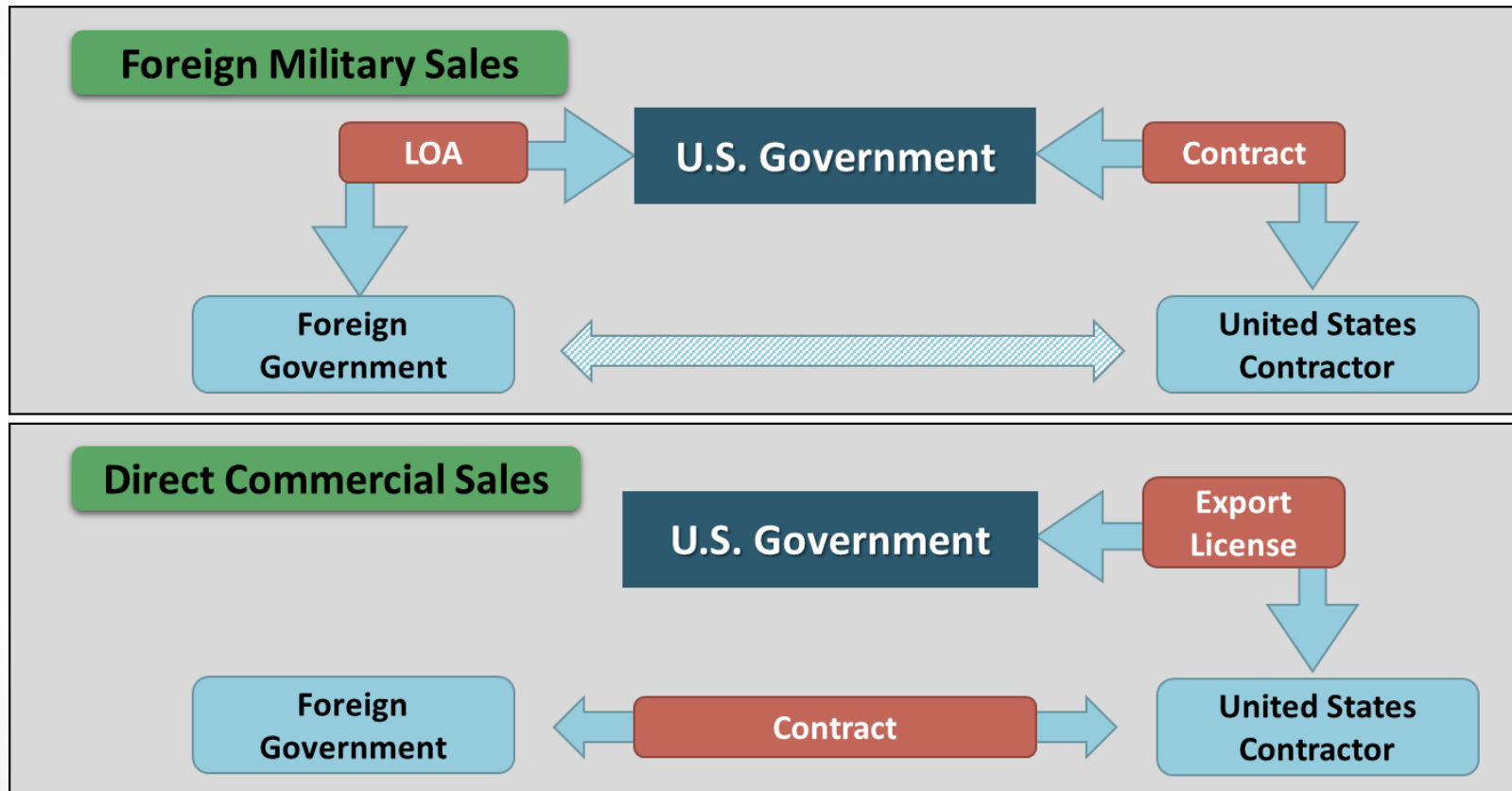
- Through the Directorate of Defense Trade Controls (DDTC), reviews and approves export license requests for direct commercial sales.



## Department of Defense

- Through the Defense Technology Security Administration (DTSA), reviews and coordinates export license requests for the DoD for direct commercial sales.

# Differing Contractual Relationships



# FMS/DCS Comparison

|                               | Foreign Military Sales   | Direct Commercial Sales   |
|-------------------------------|--|---|
| <b>Nature of Relationship</b> | DoD will negotiate with the Customer on behalf of the Vendor. Government-to-Government LOA.                                      | Customer negotiates directly with the Vendor.   |
| <b>USG Involvement</b>        | DoD assumes contracting risk and is responsible for ensuring Vendor meets cost, schedule, and performance requirements.          | USG not involved in the transaction and does not act on behalf of Customer or Vendor should complications arise.  |
| <b>Export Licenses</b>        | This is a government-to-government transfer, so the export process is managed the DoD. No involvement by the Vendor is required. | Contractor must obtain export approval from the U.S. State Department.  |
| <b>Notifying Congress</b>     | Any required notifications to Congress are jointly sponsored by the State Department and DoD.                                    | Congress must be notified by the State Department of a decision to issue an export license if sale includes significant defense equipment valued at \$14 million or more. |



# FMS/DCS Comparison

|                                   | Foreign Military Sales  | Direct Commercial Sales  |
|-----------------------------------|---|--|
| <b>Contract Issues</b>            | DoD procures the defense articles under the same contractual provisions used for all DoD procurement. The Customer pays an additional 3.5% of the total price to cover the contracting and administrative services provided by DoD. | The Vendor negotiates with the Customer. The Customer assumes management responsibility. These activities represent overhead management costs to the Customer. The size and skill of the Customer contracting staff may be a limiting factor during procurement. |
| <b>Cash Flow Requirements</b>     | The initial deposit required is usually somewhat lower than commercial contract down payments. This facilitates payment by the Customer.  | Direct commercial contracts generally require a relatively large down payment, payable at the time of contract signature. This may create difficulties for the Customer.   |
| <b>Foreign Military Financing</b> | U.S. financial assistance, through the Foreign Military Financing Program may be available to the Customer. If FMF funds are available, they must be processed through FMS (except for the ten countries granted an exception).     | If the Customer wishes to use FMF funding, DCS is not an option. Ten countries are granted an exception that allows them to use FMF funding to pay for DCS contracts: Israel, Egypt, Jordan, Morocco, Tunisia, Turkey, Portugal, Pakistan, Yemen, and Greece.    |

# IX. What's Right For You?



# What's Right for You? - Common FMS/DCS Considerations

**Define Requirements**

**Technology Releases/Export Licenses**

**Congressional Notifications**

**Contracts**



**Procurement**

**End-Use Monitoring**

**Third Party Transfers**

**Disposal**



# Does FMS Compete with DCS?

- **DoD is generally neutral on FMS or DCS**
  - Some items are “FMS-Only”
  - U.S. Contractors may request DCS preference
- **MILDEPs do not normally conduct comparison studies**
  - If a purchaser obtains FMS data and wants a commercial quote, the purchaser should cancel the LOR prior to requesting commercial data
  - If an LOA has been offered and the purchaser then solicits formal bids, the IA should ask the country its intent and the LOA may be withdrawn
  - If the purchaser requests FMS data after soliciting bids, the purchaser must demonstrate to the IA that commercial acquisition efforts have ceased before any FMS data is provided

# Questions?



# Speaker Biographies



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**Marques Peterson** is the managing partner of the firm's Washington, DC office. His practice focuses on counseling and representing aerospace/defense and civil contractors in both federal procurement and international defense sales. Marques has significant experience in bid protests and contract performance disputes before the GAO, the Court of Federal Claims and the Boards of Contract Appeals.

An important aspect of Marques' practice is helping clients navigate the intersection of government contracting and international defense sales processes. He represents and advises clients on foreign military sales, direct commercial sales and contracts, and the complex regulatory compliance requirements associated with such international defense sales. Clients seek Marques' counsel on their international business sales on topics including compliance with anti-bribery/anti-corruption laws, export control laws, national security issues and economic sanctions.



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**Dinesh Dharmadasa** focuses on a broad range of government contract law, including contract formation and compliance matters, bid protests, and claims.

Dinesh has worked to resolve multimillion-dollar claims for defense contractors, prepared requests for equitable adjustment, and successfully litigated bid protests at the Court of Federal Claims and Government Accountability Office. Dinesh has also advised clients on foreign military sales, conducted internal investigations, and resolved adverse CPARS ratings.