



The Voice of the Government Services Industry

January 25, 2010

Director Charles B. Shotwell
Department of State
Directorate of Defense Trade Controls
Office of Defense Trade Controls Policy
ATTN: Regulatory Change
2401 E Street N.W., Suite 1200 (SA-1)
Washington, D.C. 20522-0112

Via Email: DDTCResponseTeam@state.gov

Subject: Comments on Proposed Regulatory Changes to ITAR §126.6

Dear Mr. Shotwell:

The Professional Services Council (PSC) is pleased to submit comments on the proposed changes to ITAR §126.6 published in the Federal Register on November 25, 2009 (74 Fed. Reg. 61586). PSC is the leading national trade association of the government professional and technical services industry. PSC's more than 330 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. Many of our member companies are active in the defense trade arena.

This letter requests conforming changes to the newly proposed exemption in ITAR §126.6(d), "Other USG Programs," to be comparable in nature and scope to the exemptions described in ITAR §126.6(c) for the Foreign Military Sales (FMS) Program. The FMS Program exemption includes both defense articles and defense services, while the proposed "Other USG Programs" is limited to defense articles only. This request is particularly relevant for defense trade programs authorized by §1206 of the fiscal year 2006 National Defense Authorization Act (NDAA), as amended or extended, and by §1206 of the fiscal year 2008 National Defense Authorization Act (hereafter collectively the "NDAAs").

Background on FMS and NDAA Foreign Assistance Programs

The FMS Program is promulgated under the Arms Export Control Act (AECA). This program is the government-to-government method for selling defense equipment, services and training to foreign militaries. Such cooperation supports U.S. foreign policy by strengthening bilateral

defense relations, supporting coalition building, and enhancing interoperability between U.S. forces and militaries of friends and allied nations.¹

ITAR §126.6(c), Foreign Military Sales Program, provides:

A license from the Directorate of Defense Trade Controls is not required if the defense article or technical data or a defense service to be transferred was sold, leased or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales (FMS) Program of the Arms Export Control Act pursuant to a Letter of Offer and Acceptance (LOA) authorizing such transfer which meets the criteria stated below. (Emphasis added.)

ITAR §126.6(c) enumerates several criteria including:

- i) transfers taking place only during the FMS period;
- ii) an LOA must be in place which identifies the defense article, technical data or services to be transferred;
- iii) the executed LOA must be signed by an authorized Department of Defense representative and authorized representative of the foreign government; and
- iv) contracts for defense services must exist between the U.S. government and U.S. person contractor or subcontractor which specifically defines the scope of the defense services transferred, the FMS case identifier and foreign recipients.

Similarly, §1206 of the fiscal year 2006 NDAA came into existence to build-up coalition and other foreign allies' capabilities as a means to increase U.S. support to foreign military and security forces in order to disrupt terrorist networks. It provides the Secretary of Defense with new authority to train and equip foreign military and maritime forces to support counterterrorism efforts and authorizes annual U.S. funding from a DoD operations and maintenance account. *This is the first major DoD authority to be used expressly for the purpose of training the national military forces of foreign countries.* Military training is defined as a defense service in ITAR §120.9(a)(3). Since training of foreign forces or units is one of the primary activities under the NDAAs, it should be allowed to be eligible for the same ITAR exemption as defense articles to equip foreign forces.

Furthermore, the fiscal year 2006 NDAA, as amended in 2007, permits the Secretary of Defense to provide such support only with the "concurrence" of the Secretary of State, which has been interpreted to mean the "approval" of the Secretary of State.² Thus, both the Departments of State and Defense must jointly develop and approve any NDAA program and coordinate its implementation.

The §1206 interagency review involves the Combatant Commands, U.S. in-country embassies, and the Joint Staff. The Defense Security Cooperation Agency (DSCA) supports FMS with

¹ See <http://www.dscamilitarysales.com>, the Foreign Military Sales portion of the website for the Defense Security Cooperation Agency, last visited January 11, 2010.

² Serafino, Nina M., *Section 1206 of the National Defense Authorization Act for FY 2006: A Fact Sheet on Department of Defense Authority to Train and Equip Foreign Military Forces*, Congressional Research Service, RS22855, April 27, 2009, p.6.

complete coordination and transparency with the Department of State Political-Military Affairs Bureau. Similarly, under §1206 cases, the DSCA security officers at U.S. embassies implement §1206 assistance using the same process established for other traditional Department of State funded security assistance programs.³ Furthermore, the Departments of Defense and State coordinated vetting process requires that all §1206 proposals be reviewed to ensure that no country participates in a project if it is ineligible to receive security assistance under other U.S laws.⁴

Finally, DSCA has recognized the importance of such collaboration for non-FMS cases, and for those foreign assistance programs under the auspices of §1206. The DSCA May 2009 Fiscal Year 2010 Budget Estimates provides further support for our recommendation that the ITAR FMS exemption for defense services should be available for all §1206 cases. In describing the operations financed and the funding overviews for Global Training and Equipment, the DSCA Budget Report states:

Global Train and Equip programs are:

- Co-formulated, reviewed, and vetted by Defense and State, both by CoCOMs and ambassadors in the field, and in Washington D.C.;
- Approved by the Secretaries of Defense and State;
- Notified to Congressional oversight committees;
- **Compliant with Foreign Assistance Act (FAA) and Arms Export Control Act (AECA) security, end-use, and retransfer agreements** [emphasis added]; and
- Directed toward partner nations that uphold human rights, attendant fundamental freedoms, and the rule of law.⁵

Thus, all NDAA §1206 cases mirror the FMS cases under the AECA in terms of coordinating, processing, vetting and obtaining State Department approvals for such programs.

DDTC has recognized the need to expand export license exemption eligibility to defense missions similar to coalition and allies support under FMS, and promulgated this new proposed exemption to be similar to its FMS coverage. While the proposed §126.6 exemption explicitly recognizes and provides procedures for NDAA §1206 “defense articles” to be eligible for an export license exemption in the new §126.6(d)(1), it is silent on “defense services.” We do not believe that such omission is intentional. However, since all §1206 task orders are only funded for one year, to require an export license or short term technical assistance agreement needlessly reduces the time available to accomplish the needed mission, as determined by the Secretaries of Defense and State.

Conclusion

³ GAO Report to The Honorable Richard G. Lugar, *Section 1206 Security Assistance Program – Findings on Criteria, Coordination and Implementation*, February 28, 2007, GAO-07-416R page 2, available at: <http://www.gao.gov/new.items/d07416r.pdf>.

⁴ *Ibid.*

⁵ Fiscal Year 2010 Budget Estimates for the Defense Security Cooperation Agency, May 2009, p. DSCA 401.

Since a major proportion of §1206 activities involve training of foreign forces or other services, the proposed exemption provides only partial relief from an unnecessary export licensing burden and impedes accomplishing U.S. military missions by not providing eligibility for “defense services.” Therefore, in order to avoid impairing the primary intent of the NDAA’s by discriminating against training friendly foreign militaries, DDTC should extend the proposed §126.6(d) “Other USG Programs” exemption to include “defense services” as is provided for under the FMS program.

Thank you for your attention to these comments. If you have any questions or need any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at Chvotkin@pscouncil.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with a large initial "A" and "C".

Alan Chvotkin, Esq.
Executive Vice President and Counsel