

tive project agreement under section 27 of the Arms Export Control Act (22 U.S.C. 2767) which includes provisions that—

(1) for development phases describe the technical data to be transferred and for the production phase prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement;

(2) require that at least the United States production of the defense item to which the technical data package or assistance relates be carried out by the arsenal concerned; and

(3) require the Secretary of Defense to monitor compliance with the agreement.

(e) LICENSING FEES AND ROYALTIES.—The limitation in subsection (b)(2)(B) shall not apply if the technology (or production technique) transferred is subject to nonexclusive license and payment of any negotiated licensing fee or royalty that reflects the cost of development, implementation, and prove-out of the technology or production technique. Any negotiated license fee or royalty shall be placed in the operating fund of the arsenal concerned for the purpose of capital investment and technology development at that arsenal.

(f) TRANSFERS TO THIRD PARTIES.—A transfer described in subsection (c)(3) may be made if—

(1) the defense article, technical data package, or technology to be transferred is a product of a cooperative research and development program or a cooperative project in which the United States and the participating foreign country were partners; or

(2) the President—

(A) complies with all requirements of section 3(d) of the Arms Export Control Act (22 U.S.C. 2753(d)) with respect to such transfer; and

(B) certifies to Congress, before the transfer, that the transfer would provide a clear benefit to the production base of the United States for large-caliber cannon.

(g) NOTICE AND REPORTS TO CONGRESS.—(1) The Secretary of the Army shall submit to Congress a notice of each agreement entered into under this section.

(2) The Secretary shall submit to Congress a semi-annual report on the operation of this section and of agreements entered into under this section.

(h) ARSENAL DEFINED.—In this section, the term “arsenal” means a Government-owned, Government-operated defense plant that manufactures large-caliber cannon.

(Added Pub. L. 99-500, §101(c) [title IX, §9036(b)(1)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-107, and Pub. L. 99-591, §101(c) [title IX, §9036(b)(1)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-107; Pub. L. 99-661, div. A, title XII, §1203(a)(1), Nov. 14, 1986, 100 Stat. 3968; amended Pub. L. 101-189, div. A, title VIII, §806, Nov. 29, 1989, 103 Stat. 1489; Pub. L. 102-190, div. A, title X, §§1061(a)(24), 1086, Dec. 5, 1991, 105 Stat. 1473, 1483.)

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500. Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 added identical sections.

AMENDMENTS

1991—Subsec. (b)(1). Pub. L. 102-190, §1086(a), substituted “friendly foreign country” for “member nation of the North Atlantic Treaty Organization or a country designated as a major non-NATO ally”.

Subsec. (c)(3). Pub. L. 102-190, §§1061(a)(24)(A), 1086(b)(1), amended par. (3) identically, substituting “subsection (f)” for “subsection (d)” in introductory provisions.

Subsec. (f). Pub. L. 102-190, §§1061(a)(24)(B), 1086(b)(2), amended subsec. identically, substituting “subsection (c)(3)” for “subsection (b)(3)” in introductory provisions.

1989—Subsec. (b)(1). Pub. L. 101-189, §806(a)(1), substituted “a member nation of the North Atlantic Treaty Organization or a country designated as a major non-NATO ally” for “a friendly foreign country”.

Subsec. (b)(2)(B). Pub. L. 101-189, §806(a)(2), inserted “, except as provided in subsection (e)” after “arsenal concerned”.

Subsec. (b)(3). Pub. L. 101-189, §806(a)(3), inserted “or (d)” after “subsection (c)”.

Subsecs. (d), (e). Pub. L. 101-189, §806(b)(2), added subsecs. (d) and (e). Former subsecs. (d) and (e) redesignated (f) and (g), respectively.

Subsec. (f). Pub. L. 101-189, §806(b)(1), redesignated subsec. (d) as (f). Former subsec. (f) redesignated (h).

Subsec. (f)(1). Pub. L. 101-189, §806(c), inserted “or a cooperative project” after “cooperative research and development program”.

Subsecs. (g), (h). Pub. L. 101-189, §806(b)(1), redesignated subsecs. (e) and (f) as (g) and (h), respectively.

EFFECTIVE DATE

Section 101(c) [title IX, §9036(c)] of Pub. L. 99-500 and Pub. L. 99-591, and section 1203(b) of Pub. L. 99-661 provided that: “Section 4542 of title 10, United States Code, as added by subsection (a), shall apply with respect to funds appropriated for fiscal years after fiscal year 1986.”

RULE OF CONSTRUCTION FOR DUPLICATE AUTHORIZATION AND APPROPRIATION PROVISIONS OF PUBLIC LAWS 99-500, 99-591, AND 99-661

For rule of construction for certain duplicate provisions of Public Laws 99-500, 99-591, and 99-661, see Pub. L. 100-26, §6, Apr. 21, 1987, 101 Stat. 274, set out as a note under section 2302 of this title.

§ 4543. Army industrial facilities: sales of manufactured articles or services outside Department of Defense

(a) AUTHORITY TO SELL OUTSIDE DOD.—Regulations under section 2208(h) of this title shall authorize a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof to sell manufactured articles or services to a person outside the Department of Defense if—

(1) in the case of an article, the article is sold to a United States manufacturer, assembler, developer, or other concern—

(A) for use in developing new products;

(B) for incorporation into items to be sold to, or to be used in a contract with, an agency of the United States;

(C) for incorporation into items to be sold to, or to be used in a contract with, or to be used for purposes of soliciting a contract with, a friendly foreign government; or

(D) for use in commercial products;

(2) in the case of an article, the purchaser is determined by the Department of Defense to

be qualified to carry out the proposed work involving the article to be purchased;

(3) the sale is to be made on a basis that does not interfere with performance of work by the facility for the Department of Defense or for a contractor of the Department of Defense;

(4) in the case of services, the services are related to an article authorized to be sold under this section and are to be performed in the United States for the purchaser;

(5) the Secretary of the Army determines that the articles or services are not available from a commercial source located in the United States;

(6) the purchaser of an article or service agrees to hold harmless and indemnify the United States, except in a case of willful misconduct or gross negligence, from any claim for damages or injury to any person or property arising out of the article or service;

(7) the article to be sold can be manufactured, or the service to be sold can be substantially performed, by the industrial facility with only incidental subcontracting;

(8) it is in the public interest to manufacture such article or perform such service; and

(9) the sale will not interfere with performance of the military mission of the industrial facility.

(b) **ADDITIONAL REQUIREMENTS.**—The regulations shall also—

(1) require that the authority to sell articles or services under the regulations be exercised at the level of the commander of the major subordinate command of the Army with responsibility over the facility concerned;

(2) authorize a purchaser of articles or services to use advance incremental funding to pay for the articles or services; and

(3) in the case of a sale of commercial articles or commercial services in accordance with subsection (a) by a facility that manufactures large caliber cannons, gun mounts, or recoil mechanisms, or components thereof, authorize such facility—

(A) to charge the buyer, at a minimum, the variable costs that are associated with the commercial articles or commercial services sold;

(B) to enter into a firm, fixed-price contract or, if agreed by the buyer, a cost reimbursement contract for the sale; and

(C) to develop and maintain (from sources other than appropriated funds) working capital to be available for paying design costs, planning costs, procurement costs, and other costs associated with the commercial articles or commercial services sold.

(c) **RELATIONSHIP TO ARMS EXPORT CONTROL ACT.**—Nothing in this section shall be construed to affect the application of the export controls provided for in section 38 of the Arms Export Control Act (22 U.S.C. 2778) to items which incorporate or are produced through the use of an article sold under this section.

(d) **DEFINITIONS.**—In this section:

(1) The term “commercial article” means an article that is usable for a nondefense purpose.

(2) The term “commercial service” means a service that is usable for a nondefense purpose.

(3) The term “advance incremental funding”, with respect to a sale of articles or services, means a series of partial payments for the articles or services that includes—

(A) one or more partial payments before the commencement of work or the incurring of costs in connection with the production of the articles or the performance of the services, as the case may be; and

(B) subsequent progress payments that result in full payment being completed as the required work is being completed.

(4) The term “variable costs”, with respect to sales of articles or services, means the costs that are expected to fluctuate directly with the volume of sales and—

(A) in the case of articles, the volume of production necessary to satisfy the sales orders; or

(B) in the case of services, the extent of the services sold.

(Added Pub. L. 103-160, div. A, title I, §158(a)(1), Nov. 30, 1993, 107 Stat. 1581; amended Pub. L. 103-337, div. A, title I, §141, Oct. 5, 1994, 108 Stat. 2688.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103-337 struck out “non-defense-related commercial” after “sell manufactured” in introductory provisions and added pars. (5) to (9).

REGULATIONS

Section 158(c) of Pub. L. 103-160 provided that: “Regulations under subsection (b) of section 4543 of title 10, United States Code, as added by subsection (a), shall be prescribed not later than 30 days after the date of the enactment of this Act [Nov. 30, 1993].”

PILOT PROGRAM ON SALES OF MANUFACTURED ARTICLES AND SERVICES OF CERTAIN ARMY INDUSTRIAL FACILITIES WITHOUT REGARD TO AVAILABILITY FROM DOMESTIC SOURCES

Pub. L. 107-314, div. A, title I, §111(c), Dec. 2, 2002, 116 Stat. 2473, provided that: “The Inspector General of the Department of Defense shall review the experience under the pilot program carried out under such section 141 [section 141 of Pub. L. 105-85, set out as a note below] and, not later than July 1, 2003, submit to Congress a report on the results of the review. The report shall contain the views, information, and recommendations called for under subsection (d) of such section (as redesignated by subsection (b)(2)). In carrying out the review and preparing the report, the Inspector General shall take into consideration the report submitted to Congress under such subsection (as so redesignated).”

Pub. L. 105-85, div. A, title I, §141, Nov. 18, 1997, 111 Stat. 1652, as amended by Pub. L. 106-65, div. A, title I, §115, Oct. 5, 1999, 113 Stat. 533; Pub. L. 107-107, div. A, title I, §112, Dec. 28, 2001, 115 Stat. 1029; Pub. L. 107-314, div. A, title I, §111(a), (b), Dec. 2, 2002, 116 Stat. 2473; Pub. L. 108-375, div. A, title VIII, §844, Oct. 28, 2004, 118 Stat. 2019, provided that:

“(a) **PILOT PROGRAM REQUIRED.**—During fiscal years 1998 through 2009, the Secretary of the Army shall carry out a pilot program to test the efficacy and appropriateness of selling manufactured articles and services of Army industrial facilities under section 4543 of title 10, United States Code, without regard to the availability of the articles and services from United States commercial sources. In carrying out the pilot program, the Secretary may use articles manufactured at, and services provided by, not more than three Army industrial facilities, except that during fiscal year 2002 the Secretary may only use articles manufactured at, and services provided by, not more than one Army industrial facility.

“(b) TEMPORARY WAIVER OF REQUIREMENT FOR DETERMINATION OF UNAVAILABILITY FROM DOMESTIC SOURCE.—Under the pilot program, the Secretary of the Army is not required under section 4543(a)(5) of title 10, United States Code, to determine whether an article or service is available from a commercial source located in the United States in the case of any of the following sales for which a solicitation of offers is issued during the period during which the pilot program is being conducted:

“(1) A sale of articles to be incorporated into a weapon system being procured by the Department of Defense.

“(2) A sale of services to be used in the manufacture of a weapon system being procured by the Department of Defense.

“(c) TRANSFER OF CERTAIN SUMS.—For each Army industrial facility participating in the pilot program that sells manufactured articles and services in a total amount in excess of \$20,000,000 in any fiscal year, the amount equal to one-half of one percent of such total amount shall be transferred from the sums in the Army Working Capital Fund for unutilized plant capacity to appropriations available for the following fiscal year for the demilitarization of conventional ammunition by the Army.

“(d) REVIEW BY INSPECTOR GENERAL.—The Inspector General of the Department of Defense shall review the experience under the pilot program under this section and, not later than July 1, 1999, submit to Congress a report on the results of the review. The report shall contain the following:

“(1) The Inspector General’s views regarding the extent to which the waiver under subsection (b) enhances the opportunity for United States manufacturers, assemblers, developers, and other concerns to enter into or participate in contracts and teaming arrangements with Army industrial facilities under weapon system programs of the Department of Defense.

“(2) The Inspector General’s views regarding the extent to which the waiver under subsection (b) enhances the opportunity for Army industrial facilities referred to in section 4543(a) of title 10, United States Code, to enter into or participate in contracts and teaming arrangements with United States manufacturers, assemblers, developers, and other concerns under weapon system programs of the Department of Defense.

“(3) The Inspector General’s views regarding the effect of the waiver under subsection (b) on the ability of small businesses to compete for the sale of manufactured articles or services in the United States in competitions to enter into or participate in contracts and teaming arrangements under weapon system programs of the Department of Defense.

“(4) Specific examples under the pilot program that support the Inspector General’s views.

“(5) Any other information that the Inspector General considers pertinent regarding the effects of the waiver of section 4543(a)(5) of title 10, United States Code, under the pilot program on opportunities for United States manufacturers, assemblers, developers, or other concerns, and for Army industrial facilities, to enter into or participate in contracts and teaming arrangements under weapon system programs of the Department of Defense.

“(6) Any recommendations that the Inspector General considers appropriate regarding continuation or modification of the policy set forth in section 4543(a)(5) of title 10, United States Code.”

§ 4544. Army industrial facilities: cooperative activities with non-Army entities

(a) COOPERATIVE ARRANGEMENTS AUTHORIZED.—A working-capital funded Army industrial facility may enter into a contract or other cooperative arrangement with a non-Army entity to carry out with the non-Army entity a

military or commercial project described in subsection (b), subject to the conditions prescribed in subsection (c).

(b) AUTHORIZED ACTIVITIES.—A cooperative arrangement entered into by an Army industrial facility under subsection (a) may provide for any of the following activities:

(1) The sale of articles manufactured by the facility or services performed by the facility to persons outside the Department of the Army.

(2) The performance of work by a non-Army entity at the facility.

(3) The performance of work by the facility for a non-Army entity.

(4) The sharing of work by the facility and a non-Army entity.

(5) The leasing, or use under a facilities use contract or otherwise, of the facility (including excess capacity) or equipment (including excess equipment) of the facility by a non-Army entity.

(6) The preparation and submission of joint offers by the facility and a non-Army entity for competitive procurements entered into with Federal agency.

(c) CONDITIONS.—An activity authorized by subsection (b) may be carried out at an Army industrial facility under a cooperative arrangement entered into under subsection (a) only under the following conditions:

(1) In the case of an article to be manufactured or services to be performed by the facility, the articles can be substantially manufactured, or the services can be substantially performed, by the facility without subcontracting for more than incidental performance.

(2) The activity does not interfere with performance of—

(A) work by the facility for the Department of Defense; or

(B) a military mission of the facility.

(3) The activity meets one of the following objectives:

(A) Maximized utilization of the capacity of the facility.

(B) Reduction or elimination of the cost of ownership of the facility.

(C) Reduction in the cost of manufacturing or maintaining Department of Defense products at the facility.

(D) Preservation of skills or equipment related to a core competency of the facility.

(4) The non-Army entity agrees to hold harmless and indemnify the United States from any liability or claim for damages or injury to any person or property arising out of the activity, including any damages or injury arising out of a decision by the Secretary of the Army or the Secretary of Defense to suspend or terminate an activity, or any portion thereof, during a war or national emergency or to require the facility to perform other work or provide other services on a priority basis, except—

(A) in any case of willful misconduct or gross negligence; and

(B) in the case of a claim by a purchaser of articles or services under this section that damages or injury arose from the failure of