

of any existing or proposed memorandum of understanding, or any existing or proposed agreement related to a memorandum of understanding, between the Secretary of Defense, acting on behalf of the United States, and one or more foreign countries (or any instrumentality of a foreign country) relating to research, development, or production of defense equipment, or to the reciprocal procurement of defense items, the Secretary of Defense shall—

(1) consider the effects of such existing or proposed memorandum of understanding or related agreement on the defense technology and industrial base of the United States; and

(2) regularly solicit and consider comments and recommendations from the Secretary of Commerce with respect to the commercial implications of such memorandum of understanding or related agreement and the potential effects of such memorandum of understanding or related agreement on the international competitive position of United States industry.

(b) INTER-AGENCY REVIEW OF EFFECTS ON UNITED STATES INDUSTRY.—Whenever the Secretary of Commerce has reason to believe that an existing or proposed memorandum of understanding or related agreement has, or threatens to have, a significant adverse effect on the international competitive position of United States industry, the Secretary may request an inter-agency review of the memorandum of understanding or related agreement. If, as a result of the review, the Secretary determines that the commercial interests of the United States are not being served or would not be served by adhering to the terms of such existing memorandum or related agreement or agreeing to such proposed memorandum or related agreement, as the case may be, the Secretary shall recommend to the President the renegotiation of the existing memorandum or related agreement or any modification to the proposed memorandum of understanding or related agreement that he considers necessary to ensure an appropriate balance of interests.

(c) LIMITATION ON ENTERING INTO MOUS AND RELATED AGREEMENTS.—A memorandum of understanding or related agreement referred to in subsection (a) may not be entered into or implemented if the President, taking into consideration the results of the inter-agency review, determines that such memorandum of understanding or related agreement has or is likely to have a significant adverse effect on United States industry that outweighs the benefits of entering into or implementing such memorandum or agreement.

(Added Pub. L. 100-456, div. A, title VIII, § 824, Sept. 29, 1988, 102 Stat. 2019, § 2504; amended Pub. L. 101-189, div. A, title VIII, § 815(a), Nov. 29, 1989, 103 Stat. 1500; Pub. L. 101-510, div. A, title XIV, § 1453, Nov. 5, 1990, 104 Stat. 1694; renumbered § 2531 and amended Pub. L. 102-484, div. D, title XLII, §§ 4202(a), 4271(c), Oct. 23, 1992, 106 Stat. 2659, 2696.)

AMENDMENTS

1992—Pub. L. 102-484, § 4202(a), renumbered section 2504 of this title as this section.

Subsec. (a)(1). Pub. L. 102-484, § 4271(c), substituted “defense technology and industrial base” for “defense industrial base”.

1990—Subsec. (a). Pub. L. 101-510 inserted “or to the reciprocal procurement of defense items,” after “defense equipment,” in introductory provisions.

1989—Pub. L. 101-189 inserted “and related agreements” after “understanding” in section catchline and amended text generally. Prior to amendment, text read as follows: “In the negotiation and renegotiation of each memorandum of understanding between the Secretary of Defense, acting on behalf of the United States, and one or more foreign countries (or any instrumentality of a foreign country) relating to research, development, or production of defense equipment, the Secretary of Defense shall—

“(1) consider the effect of such proposed memorandum of understanding on the defense industrial base of the United States; and

“(2) regularly solicit and consider information or recommendations from the Secretary of Commerce with respect to the effect on the United States industrial base of such memorandum of understanding.”

DEFENSE TRADE RECIPROCIITY

Pub. L. 108-375, div. A, title VIII, § 831, Oct. 28, 2004, 118 Stat. 2017, provided that:

“(a) POLICY.—It is the policy of Congress that procurement regulations used in the conduct of trade in defense articles and defense services should be based on the principle of fair trade and reciprocity consistent with United States national security, including the need to ensure comprehensive manufacturing capability in the United States defense industrial base.

“(b) REQUIREMENT.—The Secretary of Defense shall make every effort to ensure that the policies and practices of the Department of Defense reflect the goal of establishing an equitable trading relationship between the United States and its foreign defense trade partners, including ensuring that United States firms and United States employment in the defense sector are not disadvantaged by unilateral procurement practices by foreign governments, such as the imposition of offset agreements in a manner that undermines the United States defense industrial base. In pursuing this goal, the Secretary shall—

“(1) develop a comprehensive defense acquisition trade policy that provides the necessary guidance and incentives for the elimination of any adverse effects of offset agreements in defense trade; and

“(2) review and make necessary modifications to existing acquisition policies and strategies, and review and seek to make necessary modifications to existing memoranda of understanding, cooperative project agreements, or related agreements with foreign defense trade partners, to reflect this goal.

“(c) REGULATIONS.—The Secretary shall prescribe regulations to implement this section in the Department of Defense supplement to the Federal Acquisition Regulation.

“(d) DEFINITIONS.—In this section:

“(1) The term ‘foreign defense trade partner’ means a foreign country with respect to which there is—

“(A) a memorandum of understanding or related agreement described in section 2531(a) of title 10, United States Code; or

“(B) a cooperative project agreement described in section 27 of the Arms Export Control Act (22 U.S.C. 2767).

“(2) The term ‘offset agreement’ has the meaning provided that term by section 36(e) of the Arms Export Control Act (22 U.S.C. 2776(e)).

“(3) The terms ‘defense article’ and ‘defense service’ have the meanings provided those terms by section 47(7) of the Arms Export Control Act (22 U.S.C. 2794(7)).”

§ 2532. Offset policy; notification

(a) ESTABLISHMENT OF OFFSET POLICY.—The President shall establish, consistent with the re-

quirements of this section, a comprehensive policy with respect to contractual offset arrangements in connection with the purchase of defense equipment or supplies which addresses the following:

(1) Transfer of technology in connection with offset arrangements.

(2) Application of offset arrangements, including cases in which United States funds are used to finance the purchase by a foreign government.

(3) Effects of offset arrangements on specific subsectors of the industrial base of the United States and for preventing or ameliorating any serious adverse effects on such subsectors.

(b) TECHNOLOGY TRANSFER.—(1) No official of the United States may enter into a memorandum of understanding or other agreement with a foreign government that would require the transfer of United States defense technology to a foreign country or a foreign firm in connection with a contract that is subject to an offset arrangement if the implementation of such memorandum or agreement would significantly and adversely affect the defense industrial base of the United States and would result in a substantial financial loss to a United States firm.

(2) Paragraph (1) shall not apply in the case of a memorandum of understanding or agreement described in paragraph (1) if the Secretary of Defense, in consultation with the Secretary of Commerce and the Secretary of State, determines that a transfer of United States defense technology pursuant to such understanding or agreement will result in strengthening the national security of the United States and so certifies to Congress.

(3) If a United States firm is required under the terms of a memorandum of understanding, or other agreement entered into by the United States with a foreign country, to transfer defense technology to a foreign country, the United States firm may protest the determination to the Secretary of Defense on the grounds that the transfer of such technology would adversely affect the defense industrial base of the United States and would result in substantial financial loss to the protesting firm. The Secretary of Defense, in consultation with the Secretary of Commerce and the Secretary of State, shall make the final determination of the validity of the protesting firm's claim.

(c) NOTIFICATION REGARDING OFFSETS.—If at any time a United States firm enters into a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm and such contract is subject to an offset arrangement exceeding \$50,000,000 in value, such firm shall notify the Secretary of Defense of the proposed sale. Notification shall be made under this subsection in accordance with regulations prescribed by the Secretary of Defense in consultation with the Secretary of Commerce.

(d) DEFINITIONS.—In this section:

(1) The term “United States firm” means a business entity that performs substantially all of its manufacturing, production, and research and development activities in the United States.

(2) The term “foreign firm” means a business entity other than a United States firm.

(Added Pub. L. 100-456, div. A, title VIII, § 825(b), Sept. 29, 1988, 102 Stat. 2020, § 2505; renumbered § 2532, Pub. L. 102-484, div. D, title XLII, § 4202(a), Oct. 23, 1992, 106 Stat. 2659.)

AMENDMENTS

1992—Pub. L. 102-484 renumbered section 2505 of this title as this section.

REVIEW OF OFFSET ARRANGEMENTS BY SECRETARY OF DEFENSE

Pub. L. 108-87, title VIII, § 8138, Sept. 30, 2003, 117 Stat. 1106, directed the Secretary of Defense to review contractual offset arrangements to which the policy established under this section applied, memoranda of understanding and related agreements to which the limitation in section 2531(c) of this title applied that had been entered into with a country with respect to which such contractual offset arrangements had been entered into, and waivers granted with respect to a foreign country under section 2534(d)(3) of this title; determine the effects of the use of such arrangements, memoranda of understanding, agreements, and waivers on the national technology and industrial base; and submit a report on the results of the review to Congress not later than Mar. 1, 2005.

CONTRACTUAL OFFSET ARRANGEMENTS; CONGRESSIONAL STATEMENT OF FINDINGS

Pub. L. 100-456, div. A, title VIII, § 825(a), Sept. 29, 1988, 102 Stat. 2019, provided that: “Congress makes the following findings:

“(1) Many contracts entered into by United States firms for the supply of weapon systems or defense-related items to foreign countries and foreign firms are subject to contractual arrangements under which United States firms must agree—

“(A) to have a specified percentage of work under, or monetary amount of, the contract performed by one or more foreign firms;

“(B) to purchase a specified amount or quantity of unrelated goods or services from domestic sources of such foreign countries; or

“(C) to invest a specified amount in domestic businesses of such foreign countries.

Such contractual arrangements, known as ‘offsets’, are a component of international trade and could have an impact on United States defense industry opportunities in domestic and foreign markets.

“(2) Some United States contractors and subcontractors may be adversely affected by such contractual arrangements.

“(3) Many contracts which provide for or are subject to offset arrangements require, in connection with such arrangements, the transfer of United States technology to foreign firms.

“(4) The use of such transferred technology by foreign firms in conjunction with foreign trade practices permitted under the trade policies of the countries of such firms can give foreign firms a competitive advantage against United States firms in world markets for products using such technology.

“(5) A purchase of defense equipment pursuant to an offset arrangement may increase the cost of the defense equipment to the purchasing country and may reduce the amount of defense equipment that a country may purchase.

“(6) The exporting of defense equipment produced in the United States is important to maintain the defense industrial base of the United States, lower the unit cost of such equipment to the Department of Defense, and encourage the standardized utilization of United States equipment by the allies of the United States.”

NEGOTIATIONS WITH COUNTRIES REQUIRING OFFSET ARRANGEMENTS

Section 825(c) of Pub. L. 100-456, as amended by Pub. L. 101-189, div. A, title VIII, § 816, Nov. 29, 1989, 103 Stat. 1501, provided that:

“(1) The President shall enter into negotiations with foreign countries that have a policy of requiring an offset arrangement in connection with the purchase of defense equipment or supplies from the United States. The negotiations should be conducted with a view to achieving an agreement with the countries concerned that would limit the adverse effects that such arrangements have on the defense industrial base of each such country. Every effort shall be made to achieve such agreements within two years after September 29, 1988.

“(2) In the negotiation or renegotiation of any memorandum of understanding between the United States and one or more foreign countries relating to the reciprocal procurement of defense equipment and supplies or research and development, the President shall make every effort to achieve an agreement with the country or countries concerned that would limit the adverse effects that offset arrangements have on the defense industrial base of the United States.”

[For delegation of functions of President under section 825(c) of Pub. L. 100-456 to Secretary of Defense and United States Trade Representative, see section 5-201 of Ex. Ord. No. 12661, 54 F.R. 779, set out as a note under section 2901 of Title 19, Customs Duties.]

REPORT TO CONGRESS ON OFFSET ARRANGEMENTS REQUIRED BY FOREIGN COUNTRIES AND FIRMS; DISCUSSION OF POLICY OPTIONS

Pub. L. 100-456, div. A, title VIII, §825(d), Sept. 29, 1988, 102 Stat. 2021, provided that, not later than Nov. 15, 1988, the President was to submit to Congress a comprehensive report on contractual offset arrangements required of United States firms for the supply of weapon systems or defense-related items to foreign countries or foreign firms, and, not later than Mar. 15, 1990, the President was to transmit to Congress a report containing a discussion of appropriate actions to be taken by the United States with respect to purchases from United States firms by a foreign country (or a firm of that country) when that country or firm required an offset arrangement in connection with the purchase of defense equipment or supplies in favor of such country.

§ 2533. Determinations of public interest under chapter 83 of title 41

(a) In determining under section 8302 of title 41 whether application of chapter 83 of such title is inconsistent with the public interest, the Secretary of Defense shall consider the following:

- (1) The bids or proposals of small business firms in the United States which have offered to furnish American goods.
- (2) The bids or proposals of all other firms in the United States which have offered to furnish American goods.
- (3) The United States balance of payments.
- (4) The cost of shipping goods which are other than American goods.
- (5) Any duty, tariff, or surcharge which may enter into the cost of using goods which are other than American goods.
- (6) A need to ensure that the Department of Defense has access to advanced, state-of-the-art commercial technology.
- (7) The need to protect the national technology and industrial base, to preserve and enhance the national technology employment base, and to provide for a defense mobilization base.
- (8) A need to ensure that application of different rules of origin for United States end items and foreign end items does not result in an award to a firm other than a firm providing a product produced in the United States.
- (9) Any need—

(A) to maintain the same source of supply for spare and replacement parts for an end item that qualifies as an American good; or

(B) to maintain the same source of supply for spare and replacement parts in order not to impair integration of the military and commercial industrial base.

(10) The national security interests of the United States.

(b) In this section, the term “goods which are other than American goods” means—

(1) an end product that is not mined, produced, or manufactured in the United States; or

(2) an end product that is manufactured in the United States but which includes components mined, produced, or manufactured outside the United States the aggregate cost of which exceeds the aggregate cost of the components of such end product that are mined, produced, or manufactured in the United States.

(Added Pub. L. 100-370, §3(a)(1), July 19, 1988, 102 Stat. 855, §2501; renumbered §2506, Pub. L. 100-456, div. A, title VIII, §821(b)(1)(A), Sept. 29, 1988, 102 Stat. 2014; renumbered §2533, Pub. L. 102-484, div. D, title XLII, §4202(a), Oct. 23, 1992, 106 Stat. 2659; amended Pub. L. 103-337, div. A, title VIII, §812(a), (b)(1), Oct. 5, 1994, 108 Stat. 2815, 2816; Pub. L. 104-106, div. D, title XLIII, §4321(b)(20), Feb. 10, 1996, 110 Stat. 673; Pub. L. 105-85, div. A, title X, §1073(a)(54), Nov. 18, 1997, 111 Stat. 1903; Pub. L. 111-350, §5(b)(37), Jan. 4, 2011, 124 Stat. 3845; Pub. L. 113-291, div. A, title X, §1071(a)(9), Dec. 19, 2014, 128 Stat. 3505.)

HISTORICAL AND REVISION NOTES

Section is based on Pub. L. 93-365, title VII, §707, Aug. 5, 1974, 88 Stat. 406.

AMENDMENTS

2014—Subsec. (a). Pub. L. 113-291 substituted “chapter 83 of such title” for “such Act” in introductory provisions.

2011—Pub. L. 111-350, §5(b)(37)(A), substituted “chapter 83 of title 41” for “the Buy American Act” in section catchline.

Subsec. (a). Pub. L. 111-350, §5(b)(37)(B), substituted “section 8302 of title 41” for “section 2 of the Buy American Act (41 U.S.C. 10a)” in introductory provisions.

1997—Subsec. (a). Pub. L. 105-85 substituted “(41 U.S.C. 10a)” for “(41 U.S.C. 10a)”.

1996—Subsec. (a). Pub. L. 104-106 substituted “the Buy American Act (41 U.S.C. 10a) whether application of such Act” for “title III of the Act of March 3, 1993 (41 U.S.C. 10a), popularly known as the ‘Buy American Act’, whether application of title III of such Act”.

1994—Pub. L. 103-337, §812(b)(1), substituted “Determinations of public interest under the Buy American Act” for “Limitation on use of funds: procurement of goods which are other than American goods” as section catchline.

Subsec. (a). Pub. L. 103-337, §812(a)(1), added subsec. (a) and struck out former subsec. (a) which read as follows: “Funds appropriated to the Department of Defense may not be obligated under a contract for procurement of goods which are other than American goods (as defined in subsection (c)) unless adequate consideration is given to the following:

“(1) The bids or proposals of firms located in labor surplus areas in the United States (as designated by the Department of Labor) which have offered to furnish American goods.