

Government Contracting by John W. Chierichella

Eight things to know before a contractor goes global

Increased sales volume is, not surprisingly, the continuing objective of every manufacturer. As we inhabit an increasingly interdependent global economy whose participants grow closer with every advance in communications technology, suppliers look abroad increasingly to identify commercial targets of opportunity.

For companies that produce defense articles or provide defense services and struggle with the maze of requirements imposed by the Federal Acquisition Regulation and its many supplements, the government adds yet another regulatory overlay for potential exports, the International Traffic in Arms Regulation (ITAR).

While the issues that arise under the ITAR are varied and can be complex, every supplier of defense articles and services should be aware of certain core principles.

1. Manufacturers of defense articles are required to register with the Department of Defense Trade Controls and the Department of State. This obligation applies to all manufacturers of defense articles, not merely to those that propose to export the articles.

2. With limited exceptions, exports of ITAR-controlled items require export licenses from the Department of State.

3. The ITAR controls and the requirements for licenses apply to defense articles, defense services and technical data.

4. To be considered an export, a controlled item does not physically have to cross the U.S. border.

Transfer to a non-U.S. person in the United States constitutes a deemed export. This has an obvious impact on product deliveries in connection with sales agreements.

However, it can impose significant



burdens on a company to maintain records relating to the nationality and green card status of its 'employees and their ability (or inability) to access controlled technology. The company also has to ensure that foreign persons are denied access to controlled information.

5. ITAR restrictions are not limited to exports made for the purposes of transporting sold goods. Items and technical data taken out of the country to support sales presentations are equally subject to the licensing requirements.

6. For companies trying to determine whether an item constitutes a defense article, the ITAR incorporates a munitions list with various categories of products, many of which are described in fairly general terms.

Generally, an item that falls into one of those enumerated categories will qualify as a "defense article" if (a) it has been specifically designed, developed, configured, adapted or modified for military

applications and either (b) it has such military intelligence capability as to warrant ITAR control or (c) it has no predominant civil applications and its performance is not equivalent to an article that is used for civil applications.

7. Penalties for unauthorized exports can seizure/and forfeiture of goods and interim suspension are all arrows to be found in the government's enforcement quiver.

8. A determination that your product is not a defense article does not end your export-licensing concerns. You may yet need a license from the Commerce Department under the Export Administration Regulations. 'That discussion, however, is for another day.

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