



# Government Procurement & Export UPDATE

LAW OFFICES

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## *GAO faults State Department's export licensing foul-ups, delays*

U.S. exporters have long complained that the State Department takes too long in approving license applications and that the process is overly burdensome. Now, a new General Accounting Office ("GAO") report finds that the State Department during fiscal year 2000 lost or misplaced hundreds of export license applications and needlessly delayed thousands of others by referring them to other federal agencies for unnecessary review.

If a license application presents questions better addressed by another agency, the State Department will refer that application to that agency for assistance. The GAO, however, faulted the State Department for not establishing a clear review process to decide whether applications should be referred to other agencies. GAO found that too many applications were being referred. This is an important criticism because oftentimes the State Department refers the most routine applications. It would seem unnecessary to

request, for example, DoD review for a proposed export to an end-user already approved to receive the item in the past.

The GAO found that the average processing time for export license applications not referred was 23 days, while the average processing time for applications that were referred to other agencies was 91 days. The GAO recommended that criteria be established for determining when applications should be referred to other agencies. ❖

## *Protest Granted where Agency mis-evaluated Past Performance*

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Past performance ratings have become increasingly important in evaluating proposals to perform government contracts. In a recent case, the GAO granted a protest filed by a disappointed bidder whose past performance was evaluated unfavorably by the procuring agency.

This was a procurement for the award of a contract to provide guard services at government facilities. The solicitation advised prospective offerors that award would be based on a best value determination and that past performance would be afforded twice the weight as other technical

factors. The solicitation also stated that technical was more important than proposed price. The agency awarded the contract to a firm whose proposed price was substantially higher than the protester's price. The winning bidder's past performance rating was 536 out of a possible 670 points, whereas the protester's was only 268 points.

The GAO granted the protest finding that the agency mis-evaluated the protester's past performance. The GAO concluded that the protester's lower score was not the result of an actual evaluation of the past performance references

that were submitted by the protester or anything else contained in his proposal, but rather the low score was the result of the agency's own negative views about the protester based on site visits made by the agency's evaluators with regard to one specific contract that the protester had with that agency. Although it was appropriate to evaluate that contract, it was not appropriate to base the negative evaluation almost entirely on that one contract to the exclusion of all other information in the evaluation file. On that basis, the GAO granted the protest. ❖

## ***Operation Shield America***

The U.S. Customs Service announced the launch of *Operation Shield America*, a new initiative to keep sensitive weapons systems out of the hands of terrorists. The Customs Service intends to make voluntary visits to U.S. businesses who are licenced exporters in an attempt to educate them as to the kinds of items that are in demand by terrorists. Customs stated that while it is not asking American businesses to investigate their customers, “We are asking them to be alert, to pay attention as to who their customers are.” ❖

## ***Aircraft Cannibalization***

A recent GAO study found that all of the military services are excessively relying on cannibalization to keep aircraft in operation. Cannibalization is the practice of removing parts from one aircraft to replace a defective part on another aircraft in order to keep the second aircraft operational. During the last 5 years, the GAO found that the Navy and Air Force committed in excess of 850,000 separate acts of cannibalization. According to GAO, cannibalization is not an effective or economical repair method. It is extremely labor intensive requiring 5.3 million addition-

al hours of maintenance work. The services report that cannibalization is necessary in order to meet readiness requirements in the face of spare parts shortages. ❖

## ***GAO clarifies “best value” standard***

Award decisions in negotiated procurements are typically guided by which proposal offers the best value to the government. A recent GAO bid protest decision clarified that standard by holding that agencies are afforded broad discretion in making trade-offs between proposals that offer different price and technical advantages. In the protest at issue, the Air Force sought proposals to provide mess services. The solicitation provided that past performance was the most important evaluation criteria and that price was the least important. Despite that, the Air Force awarded the contract based primarily on price. Award was made to the firm whose price was 22 percent lower, even though its past performance score — albeit acceptable — was significantly lower than the past performance scores achieved by other offerors. In denying a protest filed by a higher-rated, higher-priced offeror, the GAO found that “even where price is the least important factor, an agency may award to an offeror with a lower-priced, lower-scored proposal if it determines that the price premium involved in awarding to an

offeror with a higher-rated, higher-priced proposal is not justified.” ❖

## ***Munitions List Update***

In our January 2002 *Government Procurement & Export Update*, we reported that a proposal was under consideration to reduce significantly the number of parts included on the U.S. Munitions List. Once removed from the List, export licences would no longer be needed to export these parts. Officials at the State Department recently advised that the proposal was still under consideration, but that no action is expected for at least a few months. The items under consideration for deletion include parts from the Army’s Black Hawk helicopter, the UH-1 Huey helicopter, the C-130 aircraft and other military transport aircraft. ❖

## ***www.fedbizopps.gov replaces CBD notice***

Agencies are no longer required to publish solicitations and acquisitions in the *Commerce Business Daily* (“CBD”). Effective this past January 1st, agencies must use the FedBizOpps website to provide notices of new acquisitions valued at more than \$25,000. The web address is [www.fedbizopps.gov](http://www.fedbizopps.gov) ❖

## ***Steps for Identifying Illegal Exports***

In soliciting the assistance of private industry to prevent illegal exports, the Customs Service’s Office of Investigations issued the following list of indicators to help U.S. companies in identifying possible illegal exports or diversions:

- : The customer is willing to pay cash for a high value order
- : The customer is willing to pay well in excess of market value
- : The purchaser is reluctant to provide information about end-use or the end-user
- : The final consignee is a trading company, freight forwarder, export company, or other entity with no apparent connection to the purchaser
- : The customer appears to be unfamiliar with the product
- : The customer orders products that do not correspond to the customer’s line of business
- : The customer has little business background
- : The order is to be shipped via an economically illogical routing, such as through Canada to a non-Canadian end-user ❖