



GOVERNMENT CONTRACTS

update

Intersection of Government Contracts and International Trade

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May 14, 2013

Items Specifically Designed for a Military Application are Suspect

- Items include:
 - Equipment
 - Parts, components and accessories
 - Software
 - Technology
 - Services
- International Traffic in Arms Regulations (“ITAR”)
- Export Administration Regulations (“EAR”)

Comparison of ITAR and EAR

ITAR

- Arms Export Control Act
- Defense articles, defense services, technical data
- U.S. Munitions List
- Department of State, Directorate of Defense Trade Controls
- Few & narrow exemptions

EAR

- Export Administration Act
- Commercial or “dual use” goods and technology
- Commerce Control List
- Department of Commerce, Bureau of Industry and Security
- Many & broad exceptions

Common Principles

- Export controls are based on:
 - Nature of the product/technology/information
 - End user
 - End use
 - Destination
 - Method of exchange
- Look for nexus with the United States
 - U.S. persons
 - U.S. technology
 - U.S. products
- Know your customer
- No “head in the sand” – no “self blinding”

Defense Article

- Any item on the U.S. Munitions List (USML)
 - Items specifically designed or modified for military applications
- Technical data
 - Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles
- Most commercial satellites and related technology
- Generally includes specifically designed or modified parts, accessories and components

Determination of “Specifically Designed” is Changing – Old Rule

- The following are subject to the ITAR
 - An article or service specifically designed, developed, configured adapted, or modified for a military application; and
 - Does not have predominant civil applications; and
 - Does not have a performance equivalent (defined by form, fit and function) to those used for civil applications
- Significant military or intelligence capability
- Look for design intent
- Problem: The bolt that is specifically designed for the F-18 is subject to the same controls as the F-18, itself

Determination of “Specifically Designed” is Changing – NEW Rule

Catch...

- Properties peculiarly responsible for achieving or exceeding performance levels of items on the CCL or USML
- A part, component, accessory, attachment or software for use in or with a commodity or defense article “enumerated” or otherwise described in the USML or CCL

Determination of “Specifically Designed” is Changing – NEW Rule

... and Release

- Previously determined to be classified elsewhere
- Fasteners, regardless of form or fit
- Has the same function, performance capabilities, and the same or equivalent form and fit, as a commodity or software used in or with:
 - Item in production; and
 - Not “enumerated” or is controlled for AT reasons only
- Developed with knowledge for use in items
 - Described on the CCL; and
 - Items not “enumerated” or items controlled for AT only
- No knowledge of particular commodity
- Knowledge of EAR99 and AT or only EAR99

What is an export?

- **ITAR**

- Removal from U.S. of defense articles, service or technical data from the United States
- Transfer registration, control or ownership of a controlled aircraft, vessel or satellite
- Disclosing or transferring controlled technical data to a foreign person in the United States or abroad

- **EAR**

- An actual shipment or transmission of items out of the United States

Export Includes Deemed Export and Reexport

- Deemed Export
 - **ITAR** – The transfer of a defense article, defense service or technical data to a foreign person within the United States
 - **EAR** – The release of technology or source code subject to the EAR to a foreign national
 - Definitions of foreign person/foreign national differ
- Reexport
 - **ITAR** – The transfer of defense articles, technical data or defense services to an end use, end user or destination not previously authorized
 - **EAR** – the actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country

What to Do?

- Classification
 - Determine which, if any, products are controlled and by which agency
 - Look to component parts for controls
- Identify potential exports
 - Foreign nationals?
 - Export to a U.S. Military Base?
- Application
 - Is registration with the Department of State needed?
 - Licenses and what type
- Compliance Program
 - Responsible person
 - Decisions early in the process

Thank You

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