

ALERT

FMS Modernization: Major Changes Could Be Coming to DOD's Outdated Weapons Transfer Program

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WHAT: Concerned about competition with China and Russia's invasion of Ukraine, the U.S. Department of Defense (DOD) in August 2022 established a task force or "Tiger Team" of senior officials to look at ways DOD can streamline the Foreign Military Sales (FMS) program to process and complete weapons deals more efficiently. To accomplish its task, the FMS Tiger Team sought industry input on how the FMS program could be improved. On February 23, 2023, the Aerospace Industries Association (AIA), National Defense Industrial Association (NDIA), and Professional Services Council (PSC) publicly released their report to the FMS Tiger Team on modernizing the FMS system.

According to the report, the current FMS system is misaligned with the National Security Strategy (NSS) and National Defense Strategy (NDS), transactional in nature, and presents significant barriers to entry internationally for the U.S. defense industry. The report also noted that defense trade should not be looked at as only FMS but as also including Direct Commercial Sales (DCS) and industrial participation. Following a comprehensive data collection of industry feedback, the report identified seven core themes of modernizing the FMS program and provided modernization recommendations. The following provides a summary of the core themes and highlights key recommendations. For a complete explanation of the themes and list of the recommendations, view the report [here](#).

Accessible and Transparent Communication

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Practice Areas

Government Contracts

The FMS process is opaque, inconsistent, and lengthy. Restricted access to working-level officials limits accountability as cases sit without action and industry representatives tend to elevate issues to the highest political level, resulting in worse relationships with working-level officials and slower case processing. Recommendations to improve communications between DOD and industry include establishing an FMS advisory group comprised of senior DOD officials and industry representatives and increasing engagement between working-level officials, Security Cooperation Officers (SCOs), and industry representatives.

Tracking case progress is difficult and the information regarding DOD's FMS organizational structure and points of contact is hard to find and often incomplete. Recommendations to improve FMS transparency include establishing a central, public-facing FMS tracking system with standard operating procedures (SOPs) and publishing organizational charts for FMS organizations with information on who contractors can contact with FMS questions.

A Strategic and Creative FMS Process

The FMS system is misaligned with the NSS and NDS because of its transactional focus. Recommendations to improve the strategic alignment of the FMS system include replacing the Arms Transfer Release Senior Steering Group with an interagency working group led by a Senior Acquisition Executive and Office of the Under Secretary of Defense for Policy (OUSDP) to ensure consistency of major arms transfers with NSS and NDS and formally include a Combatant Command assessment of the impacts on the warfighter and the foreign partner's capability to contribute to warfighter objectives when evaluating proposed sales.

The timeline for processing FMS cases negatively impacts U.S. competitiveness, sales, production schedules, and defense partnership objectives. Recommendations to improve FMS case processing include establishing an escalatory process led by the Office of the Secretary of Defense (OSD) that holds FMS stakeholders accountable for Letters of Request (LORs), creating opportunities for the contractor to participate in creating the Letter of Offer and Acceptance (LOA) and requiring LOA signatures within thirty days to maintain accurate supply data and active production capacity.

A Resourced and Flexible Acquisition Process

The acquisition community, next generation research and development contracts, and partner and ally FMS needs are strategically misaligned with the NSS and NDS, which prioritize cooperation. Recommendations to correct this misalignment include having military departments issue semi-annual guidance reflecting DOD's global priorities and incentivizing U.S. officials to seek innovative approaches to expediting programs and a requirement to identify a standard acquisition path and a fastest acquisition path for strategic priority countries.

The understaffed DOD contracting community prioritizes resources on contracts supporting U.S. service personnel over FMS programs. Recommendations to improve resource allocation and procedure include having the Office of the Under Secretary of Defense for Acquisition & Sustainment (OUSDA&S) review each military department's FMS contracting SOPs to identify and implement best practices and creating a Research & Development (R&D) LOR and use R&D LOR funding for anticipatory policy development, technology release

reviews, exportability, and industrial participation.

Prolonged FMS contract negotiations inhibit the delivery of capabilities in a timely manner. Recommendations to speed up the FMS process include developing a new FMS process with flexibility to account for risk a partner is willing to accept for earlier capability delivery, establishing a Defense Security Cooperation Agency (DSCA) contracting entity specifically for FMS and assign it foreign partner contracting authority, and employing all contracting authorities available, such as undefinitized contract actions (UCAs) and other transaction authority (OTA), to meet FMS needs.

Defense Export Financing and Expansion of DOD's Special Defense Acquisition Fund

Apart from pilot programs, partners and allies lack the ability to easily finance U.S. defense products in support of their national defense. Recommendations to improve financing options include implementing the defense export financing authority the U.S. Department of State has for Ukraine and the North Atlantic Treaty Organization (NATO) and expanding the use of the Special Defense Acquisition Fund (SDAF) to allow DOD to be prepared for future industry base production challenges.

The Export-Import Bank of the United States (Ex-Im Bank) is the only major export credit agency in the world to prohibit defense-related transactions despite the urgent need for an FMS financing mechanism. The report recommends seeking authorization from Congress to expand the Ex-Im Bank's authority to provide FMS financing or create a similar financing program in another agency.

A Modern Technology Release Process

DOD lacks a coordinated technology transfer decision allied with the NDS. Recommendations for structuring and streamlining technology release including aligning all DOD technology release offices under a single DOD office with the responsibility for all technology release decisions, establishing an official forum where technology release decisions can be appealed, creating a fast track for countries in the U.S. National Technology and Industrial Base or AUKUS, establishing a Technology Release Industry Group (TRIG) as a corollary to the SCIG, and establishing co-product and co-development guidelines that would allow U.S. exporters to support already approved U.S. cooperative agreements.

Improved Exportability

DOD lacks a centralized mechanism to track the lifecycle of exportability and there is no formal dispute process for a final exportability determination. Recommendations to improve exportability and the exportability process include aligning all exportability-related functions under OUSD A&S so that exportability requirements and solutions can be tracked effectively throughout the program lifecycle, developing an equitable cost-sharing mechanism to allocate resources to exportability and incentivize exportability features, promoting design for exportability in performance metrics for OSD and program executive offices to drive organizations towards exportability goals, and establishing Critical Program Information (CPI) expiration when military intelligence or business intelligence demonstrates a capability or technology is available internationally.

Enhanced Support of Non-Program of Record Systems

The FMS system currently favors Programs of Record (POR) while the Non-POR (NPOR) system faces barriers to entry. Recommendations to improve support of NPOR systems include allowing DSCA's Community of Interest office to establish a mechanism for industry to understand what export policy review may be required for its NPOR products, developing an interagency inventory of available NPOR product options and establish a transparent review process by the U.S. Government security cooperation enterprise as the options are considered for partner requirements, and establishing NPOR specific program offices and related guidance for NPOR Systems and a designated Export Program Office.

WHAT IT MEANS FOR INDUSTRY: As the report makes clear, the current FMS system is outdated and due for an overhaul to bring it up to speed with the current defense acquisition landscape. Given DOD has established an FMS Tiger Team that is actively seeking feedback and input on the FMS system from industry, changes to the current FMS system may be on the horizon. Considering the recommendations of the AIA, NDIA, and PSC, contractors currently involved in FMS should be on the lookout for proposed changes that increase the efficiency and flexibility of the FMS process, and contractors seeking to get in on FMS should be on the lookout for proposed changes that remove some of the current barriers to entry.