

Herding Cats II: Disposal of DoD Personal Property

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The game dramatically changed Dec. 1 when President Barack Obama announced his plan to send 30,000 additional troops to Afghanistan. Now, the priority for the next few months will be to pull serviceable engineer equipment, mine-resistant vehicles and communications equipment out of Iraq and ship it to Afghanistan. "Equipment has already started moving to Afghanistan," Third Army spokesman Col. Jerry O'Hara told Army Times. "Frankly, Third Army had anticipated the increase of forces to Operation Enduring Freedom. I'm not going to say it's not going to be a challenge."¹

I. Introduction

Since 2003, U.S. forces have maintained a continued presence in Iraq, which has resulted in millions of items of Department of Defense (DoD)-owned personal property in Iraq.² The United States and the Government of Iraq (GOI) signed a Bilateral Security Agreement (SA) that took effect on 1 January 2009 and included a provision for the complete withdrawal of U.S. forces from Iraq by 31 December 2011.³ The U.S. military headquarters in Iraq, at the time the Multi-National Force–Iraq (MNF–I), which has since reflagged as United States Forces–Iraq (USF–I),⁴ subsequently increased its focus on enhancing the capabilities of the Iraqi Security Forces (ISF) and drawing down U.S. forces to meet the December 2011 deadline.⁵ As of 21 April 2010, however, approximately 97 bases remain with millions of pieces of

personal property yet to retrograde⁶ to the United States, to be redistributed to U.S. military units in Afghanistan, to be transferred to the GOI, or to be otherwise disposed of.⁷

The purpose of this primer is to provide a comprehensive guide on the statutory authorities and regulatory procedures for the disposal of personal property to foreign governments. Although Iraq is currently the focus of the disposal⁸ of DoD property, the disposal of property also occurs in the continental United States (CONUS) and outside the continental United States (OCONUS). The key to understanding how to dispose of U.S. Government property is to first classify the type of property—real property⁹ or personal property.¹⁰ Second, if property is personal property, determine the type of personal property. Not all types of personal property can be disposed of in the same manner. Once the type of personal property has been identified, determine the correct statutory authorities, regulatory guidance, and DoD policies applicable to that type of personal property.

The first type of DoD personal property discussed in this primer is military-type property, or “green property,” which consists of personal property purchased by the services for a particular military use, such as mine resistant ambush protected (MRAP) vehicles, weapons, and even military-issue canteens. This type of property is generally listed on a unit’s table of organization and equipment (TOE),¹¹ and is normally disposed of through the Defense

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¹ Matthew Cox, *Afghan Surge, Iraq Exit Post Logistic Challenge*, ARMY TIMES, Dec. 21, 2009, available at http://www.armytimes.com/news/2009/12/army_moving_gear_121909w/.

² REPORT ON THE TRANSFER OF DEFENSE ARTICLES AND THE PROVISIONS OF DEFENSE SERVICES TO THE MILITARIES AND SECURITY FORCES OF IRAQ AND AFGHANISTAN 3 (n.d.) [hereinafter TRANSFER REPORT].

³ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.–Iraq, art. 24, Nov. 17, 2008 [hereinafter Security Agreement].

⁴ On 1 January 2010, Multi-National Force–Iraq and its subordinate headquarters were disestablished. These headquarters were merged to form the new military headquarters in Iraq, U.S. Forces–Iraq.

⁵ U.S. GOV. ACCOUNTABILITY OFF., OPERATION IRAQI FREEDOM: PRELIMINARY OBSERVATIONS ON DoD PLANNING FOR THE DRAWDOWN OF U.S. FORCES FROM IRAQ AND AFGHANISTAN, REPORT TO COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN 1 (Nov. 2, 2009).

⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (July 1991) (defining “retrograde” as a defense task involving movement away from the enemy). This term, however, is often used to refer to the property disposition process and sending property located in Iraq back to the United States.

⁷ E-mail from Major Patrick Wiesner, Deputy Chief, Contract and Fiscal Law, Office of the Staff Judge Advocate, to author (21 Apr. 2010, 08:27 EST) (on file with author) [hereinafter Wiesner e-mail].

⁸ DEFENSE REUTILIZATION AND MARKETING SERVICE., INSTR. 4160.14, OPERATING INSTRUCTIONS FOR DISPOSITION MANAGEMENT, at S4S1-15 (May 12, 2008) [hereinafter DRMS INSTRUCTIONS] (defining disposal as the process of reutilizing, transferring, donating, selling, destroying or other ultimate disposition of personal property).

⁹ GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 45.101 (Jan. 10, 2010) [hereinafter FAR] (defining real property as land and rights in land, ground improvements, utility distribution systems and buildings and other structures). Real property is outside the scope of this article. For information regarding the disposal of real property, see Captain Lyndsey M. D. Olson, *Herding Cats I: Disposal of DoD Real Property and Contractor Inventory in Contingency Operations*, ARMY. LAW., Apr. 2010, at 5.

¹⁰ U.S. DEP’T OF DEF., 4160.21-M, DEFENSE MATERIEL DISPOSITION MANUAL, at xxix (Aug. 1997) [hereinafter DoD MANUAL 4160.21-M] (defining personal property as property of any kind, or any interest therein, except real property and records of the U.S. Government).

¹¹ U.S. DEP’T OF ARMY, REG. 71-32, FORCE DEVELOPMENT AND DOCUMENTATION—CONSOLIDATED POLICIES 99 (3 Mar. 1997) (defining a

Reutilization and Marketing Service (DRMS). The second type of personal property discussed in this primer is non-standard equipment. Non-standard equipment is non-military type property that is available commercially. Non-standard equipment may include air conditioners, generators, furniture, and commercial vehicles. The DoD is currently disposing of non-standard equipment in Iraq through the Foreign Excess Personal Property (FEPP)¹² disposal process.¹³ Government-furnished property (GFP)¹⁴ and contractor acquired property (CAP)¹⁵ both refer to government-owned personal property in the possession of a contractor for performance of a U.S. contract. Regardless of the type of personal property, contractors must return GFP and CAP to the U.S. Government for disposal.

First, this article discusses the overarching disposal authority of the DRMS and its policies and procedures for disposing of personal property. Second, this primer focuses on the disposal of two types of personal property: the disposal of excess defense articles (EDA) by providing them to foreign governments, in particular Iraq; and the disposal of non-standard equipment through FEPP, as authorized by title 40, chapter 7, of the U.S. Code. Lastly, this article discusses the disposal authority that Congress provided to DoD in section 1234 of the 2010 National Defense Authorization Act. Section 1234 authorizes the transfer of up to \$750 million of defense articles to Iraq and Afghanistan without reimbursement.¹⁶

In the current operational environment, judge advocates play an increasingly vital role advising commanders on the applicable authorities for the disposal of DoD property. Therefore, it is essential that judge advocates understand the

various disposal procedures, the estimated timelines to dispose of property, and the required approval authorities for each disposal process.

II. Defense Reutilization and Marketing Service (DRMS)

The DRMS disposes of all types of personal property, worldwide, and is the overarching disposal authority for all DoD personal property. The DRMS disposes of the majority of military-type and non-standard equipment. In Fiscal Year 2008 alone, over 56,000 military units and organizations turned in over 3.5 million items to DRMS for disposal.¹⁷ Generally, DRMS disposes of all personal property, unless an exception, such as FEPP, applies.

The U.S. Constitution expressly provides Congress the power to dispose of U.S. property and prescribe all necessary rules and regulations to do so.¹⁸ Congress provided the U.S. Government the statutory authority to dispose of property in the Federal Property and Administrative Services Act of 1949.¹⁹ Section 101 of title 40 authorizes the General Services Administration (GSA) to dispose of surplus real and personal federal government property.²⁰ In accordance with its statutory authority, GSA delegated disposal authority to DRMS,²¹ a subordinate agency of the Defense Logistics Agency (DLA).²²

Defense Reutilization and Marketing Service is responsible for disposal of all DoD excess personal property,²³ surplus personal property,²⁴ and any other personal property that is unserviceable or no longer needed to execute a unit's mission.²⁵ In order to dispose of DoD

Table of Organization and Equipment (TOE) as a document that prescribes the wartime mission, capabilities, organizational structure, and mission-essential personnel and equipment requirements for military units). See generally U.S. DEP'T OF ARMY, REG. 71-9, WARFIGHTING CAPABILITIES DETERMINATION para. 6-1 (28 Dec. 2009) (explaining that units may also obtain new equipment which is added to their property book through an Operational Needs Statement, which is an urgent request by an operational commander to obtain equipment not currently on their TOE in order to increase capability to accomplish a mission).

¹² The acronym "FEPP" will be used throughout this primer to refer to the FEPP disposal authority. The term "foreign excess personal property" will be used throughout this primer to refer to the classification of excess property that is located in a foreign country.

¹³ Memorandum from P. Jackson Bell, Deputy Under Sec'y of Def. for Logistics and Materiel Readiness, to Commanding General, Multi-National Force-Iraq, subject: Authority to Transfer U.S. Property in Iraq (6 June 2008) [hereinafter Bell Memo June 2008].

¹⁴ FAR, *supra* note 9, at 1051 (defining government-furnished property as property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract).

¹⁵ *Id.* (defining contractor-acquired property as property acquired, fabricated, or otherwise provided by the contractor in performance of a contract and to which the government has title); see Olson, *supra* note 9 (discussing contractor-acquired property).

¹⁶ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1234, 123 Stat. 2190.

¹⁷ Defense Reutilization and Marketing Service, <http://www.drms.dla.mil/about.shtml> (last visited Feb. 15, 2010).

¹⁸ U.S. CONST. art. IV, § 3, cl. 2.

¹⁹ 40 U.S.C. ch. 7 (West 2010). In 2002, Pub. L. No. 107-217 revised and codified sections of the Federal Property and Administrative Services Act pertaining to public buildings, property, and works at title 40 of the U.S. Code. The statutory authorities for the disposal of property are now located at title 40, chapter 7, of the U.S. Code.

²⁰ 40 U.S.C. § 101 (Westlaw 2010).

²¹ Defense Reutilization and Marketing Service, Defense Reutilization Marketing Offices, <http://www.drms.dla.mil/drmo/drmo-locations.shtml> (last visited Feb. 22, 2010) (providing that the Defense Reutilization and Marketing Service's primary mission is to reutilize and dispose of excess military equipment and materiel).

²² VALERIE BAILEY GRASS, CONG. RESEARCH SERV. REPORT, DEFENSE SURPLUS EQUIPMENT DISPOSAL: BACKGROUND INFORMATION, RS20549, at CRS-2 (2007).

²³ DRMS INSTRUCTIONS, *supra* note 8, at S4S1-17 (defining excess personal property as property in the possession of, or owned by, the DoD or U.S. Government that is no longer needed by that agency).

²⁴ *Id.* at S4S1-33 (defining surplus personal property as property that is no longer needed by any agency of the U.S. Government).

²⁵ Defense Reutilization and Marketing Service, About DRMS, <http://www.drms.dla.mil/about.shtml> (last visited Feb. 15, 2010).

personal property, the owning military unit must transfer the property to DRMS. Generally, military units physically turn in DoD property, along with a Disposal Turn-In Document (DTID),²⁶ to a Defense Reutilization and Marketing Office (DRMO).²⁷ Defense Reutilization and Marketing Service operates DRMOs worldwide and maintains offices in Iraq, Afghanistan, Qatar, Bahrain, United Arab Emirates, Oman, and Kuwait within the U.S. Central Command (CENTCOM) area of responsibility.²⁸ When regulations restrict DRMS from physically accepting property, DRMOs process property as “receipt in place.”²⁹ Upon receipt of property, DRMOs must ensure that the DTID contains all required information,³⁰ including the proper demilitarization (DEMIL)³¹ code³² or an appropriate accompanying statement.³³ If the property was demilitarized prior to turn-in, it must be accompanied by a DEMIL certificate³⁴ if usable components remain.³⁵ The DRMO must ensure that property with inherent military characteristics is demilitarized prior to donation or sale to the public.³⁶

Additionally, DRMOs must verify the description of property, the quantity of property turned in, and the assignment of a valid Supply Condition Code (SCC) by the owning unit at turn-in.³⁷ The DRMO assigns a Disposal

Condition Code,³⁸ which combined with the SCC, forms the Federal Condition Code (FCC).³⁹ The FCC, which potential recipients view during the screening process, describes the property’s physical condition.⁴⁰ After verifying the property and ensuring proper documentation, the DRMO becomes accountable for the property and processes it in accordance with disposal procedures.⁴¹

Generally, DRMS disposes of DoD property through reutilization, transfer, donation, sale, abandonment, or destruction, in that order of priority.⁴² Reutilization refers to the redistribution and continued use of DRMS property within DoD. Department of Defense components and Special Programs,⁴³ like Foreign Military Sales (FMS), have fourteen days to screen⁴⁴ and claim eligible property.⁴⁵ Defense Reutilization and Marketing Offices allocate property on a first come, first serve basis.⁴⁶ If DoD or Special Programs do not claim the property during the fourteen-day period, the property becomes excess to DoD. Excess property then becomes available for transfer outside DoD. Transfer, the second priority, is the redistribution of excess DoD property to Federal Civil Agencies (FCA).⁴⁷ Federal Civil Agencies have a twenty-one-day screening period to claim the property.⁴⁸ During this period, components of DoD and Special Programs may still requisition property, but they generally do not have priority over FCAs at this stage. If DoD, Special Programs, or FCAs do not claim the excess property, the property becomes surplus to the U.S. Government.⁴⁹ Surplus property is available for donation to eligible non-federal organizations, such as state government agencies and certain charitable and civic organizations.⁵⁰ Donation, the third priority, is limited

²⁶ See app. B (providing U.S. Dep’t of Def., DD Form 1348-1A/2, Disposal Turn-In Document (July 1991)).

²⁷ DRMS INSTRUCTIONS, *supra* note 8, at S2C1-10.

²⁸ Defense Reutilization and Marketing Service, Defense Reutilization Marketing Offices, <http://www.drms.dla.mil/drmo/drmo-locations.shtml> (last visited Feb. 20, 2010).

²⁹ See DOD MANUAL 4160.21-M, *supra* note 10, at 3-3 (detailing the types of property that may not be physically accepted by a DRMO).

³⁰ DRMS INSTRUCTIONS, *supra* note 8, at S2S1-33.

³¹ U.S. DEP’T OF DEF., 4160.21-M-1, DEFENSE DEMILITARIZATION MANUAL, at A2-3 (Oct. 1991) (C1, 14 Feb. 1995) [hereinafter DoD MANUAL 4160.21-M-1] (defining demilitarization as the act of destroying the military offensive and defensive advantages inherent in certain types of equipment or materiel. Demilitarization processes prevent further use of the equipment or materiel for its original intended military or lethal purpose).

³² *Id.* (defining a DEMIL code as a single character letter code assigned by the owning military unit identifying the degree of DEMIL necessary prior to final disposition of the item). See *id.* app. 3, at A3-1 to A3-2 (providing the list of DEMIL codes).

³³ DOD MANUAL 4160.21-M, *supra* note 10, at 3-5.

³⁴ DoD MANUAL 4160.21-M-1, *supra* note 31 (defining a DEMIL certificate as a certificate signed by a technically qualified U.S. Government representative (U.S. citizen) and countersigned by another technically qualified U.S. Government representative who actually witnessed the DEMIL of the material and/or inspected the residue).

³⁵ DRMS INSTRUCTIONS, *supra* note 8, at S2C1-31.

³⁶ Federal Management Regulation, 41 C.F.R. § 102-38 (2009).

³⁷ DRMS INSTRUCTIONS, *supra* note 8, at S4S1-33 (defining a Supply Condition Code as a code that the owning military unit assigns to property to describe the physical condition of the property).

³⁸ *Id.* at S4S1-15 (defining a Disposal Condition Code as a code that DRMO assigns to property to describe the physical condition of the property).

³⁹ *Id.* at S4S1-18 (stating that the Federal Condition Code most accurately describes the materiel’s physical condition. The code is used throughout the screening process to denote the condition of the property); see app. C (providing a list of FCCs and their corresponding fair market value).

⁴⁰ *Id.*

⁴¹ DOD MANUAL 4160.21-M, *supra* note 10, at 3-8.

⁴² DRMS INSTRUCTIONS, *supra* note 8, at S2C5-4, S2C6-5.

⁴³ DOD MANUAL 4160.21-M, *supra* note 10, at 5.1-1 (providing a list of Special Programs).

⁴⁴ DRMS INSTRUCTIONS, *supra* note 8 (providing that screening may be done physically at a DRMO location or electronically at www.drms.dla.mil).

⁴⁵ *Id.* at S2C5-11.

⁴⁶ *Id.*

⁴⁷ *Id.* at S2C5-45 (stating that Federal Civil Agencies are also often referred to as Other Federal Agencies).

⁴⁸ *Id.*

⁴⁹ See *id.* at S2C5-12.

⁵⁰ *Id.* at S2C5-12, S2C5-48.

to a five-day allocation period.⁵¹ Surplus property that remains unclaimed is then eligible for sale to the public, the fourth priority.⁵²

III. Excess Defense Articles (EDA)

Congress has expressly authorized the U.S. Government to transfer EDA to eligible foreign governments.⁵³ Military units may retain physical possession, or physically turn in, EDA to DRMS for disposal in accordance with the procedures described earlier in section II. The following sections will detail the statutory authorities, the regulatory implementation, and the process required to transfer EDA to foreign governments.⁵⁴

A. Statutory Authorities and Regulatory Implementation for EDA Transfers

The Foreign Assistance Act (FAA) of 1961 and the Arms Export Control Act (AECA) of 1976 provide the statutory framework for security assistance programs, including FMS and EDA.⁵⁵ Annual or biennial security assistance authorization acts have amended both the FAA and the AECA since their enactment.⁵⁶ The annual Foreign Operations, Export Financing, and Related Programs Appropriations Act not only funds security assistance programs, but also amends the FAA and AECA in accordance with national policies.⁵⁷

Section 38, AECA, authorizes the President to control the export and import of defense articles and services and provides the statutory authority to promulgate regulations.⁵⁸ The International Traffic in Arms Regulations (ITAR) implements the provisions of the AECA and regulates the import and export of defense articles and services.⁵⁹ In

⁵¹ *Id.* at S2C5-47 (providing that donation screening takes place throughout the screening cycle, although property is only available for donees to claim during the five-day allocation period, after priority one and two).

⁵² *Id.* at S2C6-5 (providing that surplus property may generally be sold to anyone of legal age. However, certain persons or entities are debarred or suspended from purchasing U.S. Government surplus property and, thus, are prohibited from purchasing surplus property through the DRMS process).

⁵³ Arms Export Control Act, 22 U.S.C. § 2761 (Westlaw 2010).

⁵⁴ *See* app. D (providing a flowchart for Excess Defense Article Transfers).

⁵⁵ U.S. DEP'T OF DEF., 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL 36 (3 Oct. 2003) [hereinafter SAMM].

⁵⁶ ANTHONY J. PERFILIO, FOREIGN MILITARY SALES HANDBOOK 20-21 (2009).

⁵⁷ *Id.* at 21.

⁵⁸ Exec. Order No. 11,958, 42 Fed. Reg. 4311 (Nov. 24, 2009) (providing that the President delegated to the Secretary of State the authority to promulgate regulations with respect to defense articles and services).

⁵⁹ International Traffic and Arms Regulations, 22 U.S.C. § 120.1 (WestLaw 2010).

addition to the ITAR, the the Defense Security Cooperation Agency (DSCA),⁶⁰ which promulgates the Security Assistance Management Manual (SAMM), serves as a main source of regulatory guidance.⁶¹ The SAMM delineates the procedures for the transfer of defense articles and the administration of FMS cases, and provides guidance for other security assistance-related activities.⁶²

Congress broadly defined defense articles in section 644 of the FAA. The U.S. Munitions List (USML)⁶³ contains the list of designated⁶⁴ defense articles, which generally include weapons, weapon systems, munitions, aircraft, vessels, boats, and other implements of war, to include any component or part thereof.⁶⁵ Additionally, the USML designates some defense articles as Significant Military Equipment (SME), which is governed by special export and security controls because of its substantial utility or capability for military use.⁶⁶ Examples of SME include M-16 rifles, MRAP vehicles, and High Mobility Multipurpose Wheeled Vehicles (HMMWV).⁶⁷

Furthermore, items of SME that have a nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million are considered Major Defense Equipment (MDE).⁶⁸ Some MDE is subject to even greater export restrictions than SME.⁶⁹ The DSCA must notify Congress prior to any proposed EDA grant or sale to a foreign country that contains SME, including MDE.⁷⁰

B. "Sales from Stock" and Grant Transfers of EDA

Two main authorities allow for the transfer of EDA to foreign countries.⁷¹ The first authority is the FMS authority

⁶⁰ *See* app. E (providing a description of DSCA's responsibilities in the transfer of defense articles).

⁶¹ PERFILIO, *supra* note 56, at 23.

⁶² SAMM, *supra* note 55, at 2.

⁶³ 22 U.S.C. § 121.1 (providing the U.S. Munitions List).

⁶⁴ *Id.* §§ 2778(a), 2794 (providing that Congress authorized the President to designate articles as defense articles. Designations are made by the Department of State with concurrence of the Department of Defense).

⁶⁵ Foreign Assistance Act of 1961, 22 U.S.C. § 2384(a) (Westlaw 2010).

⁶⁶ *Id.* § 121.1

⁶⁷ *Id.*

⁶⁸ SAMM, *supra* note 55, at 109.

⁶⁹ *Id.* at 129, 357.

⁷⁰ *Id.* at 493.

⁷¹ DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT, THE MANAGEMENT OF SECURITY ASSISTANCE 2-27 (27th ed. 2007), available at <http://www.disam.dscamilitary.com/pubs/DR/27th%20Greenbook.pdf> [hereinafter DISAM GREEN BOOK]. (The term EDA program is loosely used to refer to transfers under the FMS program, in accordance with section 21, AECA, and EDA transfers under section 516, FAA. Generally, the EDA program

of section 21(a), AECA, Sales from Stocks.⁷² This section authorizes the sale of defense articles to eligible countries or international organizations from existing DoD or Coast Guard stocks.⁷³ Although FMS is a Department of State (DoS) security assistance program, DoD operates FMS via DSCA.⁷⁴ The owning military department is not required to declare defense articles excess⁷⁵ under section 21(a), since this section authorizes the sale of both excess and non-excess defense articles.⁷⁶ This article, however, focuses on EDA and will not address sales of non-excess defense articles. In accordance with section 21(a), countries are required to pay for EDA in U.S. dollars.⁷⁷ The U.S. Government depreciates EDA in accordance with the DoD Financial Management Regulation, section 070304, and after depreciation, the prices of EDA range from five to fifty percent of the original acquisition value, depending on the condition and age of the article.⁷⁸ Excess Defense Article sales use FMS procedures identified in the SAMM and are processed using formal contracts or agreements between the U.S. Government and the authorized purchaser.⁷⁹

The second EDA transfer authority is section 516, FAA, which provides for grant EDA transfers to eligible⁸⁰ recipients on a no-cost basis.⁸¹ Congress also authorized sales of EDA under section 516; however, EDA rarely

loosely refers to any transfer of EDA, whether through FMS or grant or sale under section 516, FAA).

⁷² E-mail from Lieutenant Colonel Ricou (John) Heaton, Deputy Gen. Counsel, Def. Sec. Cooperation Agency, to author (16 Feb. 2010, 05:11 EST) (on file with author) (explaining “sales from stock” is not defined in the Arms Export Control Act or Foreign Assistance Act; however, sales from stock is typically read broadly to include property owned by the DoD that has not been issued to military units for use and property that has been issued and is on the property books of a military unit).

⁷³ Arms Export Control Act, 22 U.S.C. § 2761 (Westlaw 2010).

⁷⁴ SAMM, *supra* note 55, at 95.

⁷⁵ See app. A (defining the definition of excess defense articles).

⁷⁶ 22 U.S.C. § 2761.

⁷⁷ *Id.*

⁷⁸ U.S. DEP’T OF DEF., FINANCIAL MANAGEMENT REG. 7000.14-R, at 070304 (2002).

⁷⁹ DISAM GREEN BOOK, *supra* note 71, at 1-7.

⁸⁰ E-mail from Joanne B. Hawkins, Assoc. Professor, Logistics Instructor Team Lead, Def. Inst. for Sec. Assistance Mgmt., to author (23 Feb. 2010, 08:22 EST) (on file with author) [hereinafter Hawkins e-mail Feb. 23, 2010] (providing that DoS determines the list of eligible countries to receive grant EDA based on foreign policy needs and notifies Congress for concurrence. Authorizations are per fiscal year; however, since Fiscal Year 2008, the list of eligible countries is no longer published in the annual Congressional Budget Justification. *Id.* Defense Security Cooperation Agency (DSCA) receives the annual list of eligible countries, which is no longer publicly available. Contact DSCA for the list of current grant eligible countries). *Id.*

⁸¹ Foreign Assistance Act of 1961, 22 U.S.C. § 2321j (Westlaw 2010).

executes sales under this authority.⁸² Consequently, this primer will focus on section 516 grant EDA transfers, rather than sales.

In order to qualify as a grant, an EDA transfer must meet the following criteria: defense articles must be drawn from existing DoD or Coast Guard stocks; no DoD funds can be expended in connection with the transfer; the transfer must not have an adverse impact on military readiness; a transfer on a grant basis is preferable to a sale;⁸³ the transfer must not have an adverse impact on the national technology or industrial base and must not reduce the opportunities of these types of entities to sell new or used equipment to the country to which the article is being transferred; and, for EDA grants to Greece or Turkey, the transfer must be consistent with the policy framework for the Eastern Mediterranean.⁸⁴

Unlike section 21, AECA, Sales from Stock, military departments must declare defense articles excess prior to grant transfers under the FAA.⁸⁵ Furthermore, not all countries are eligible to receive grant EDA; DSCA justifies the eligibility of foreign countries annually to Congress.⁸⁶ However, even after Congress has approved a country’s eligibility, the U.S. Government still cannot automatically transfer all EDA in a fiscal year through a grant. Grant EDA transfers must be determined on a case-by-case basis, and the aggregate market value of all grant EDA in a fiscal year is limited to \$425 million.⁸⁷

C. Processing a Request for EDA via a Sale or Grant

Generally, the EDA process entails five basic steps: initiating a request; processing the Letter of Request (LOR); providing Congressional Notification (CN); issuing the Letter of Offer and Acceptance (LOA); and executing the EDA transfer. United States policies and unique circumstances in the region in which an EDA transfer occurs, however, may result in small differences in procedures. Consequently, judge advocates should consult the policies and procedures applicable in their specific

⁸² E-mail from Lieutenant Colonel Paul S. Capes, Chief, Dir.’s Action Group, Iraq Security Assistance Mission, to author (21 Feb. 2010, 05:11 EST) [hereinafter Capes e-mail] (on file with author).

⁸³ 22 U.S.C. § 2321j (providing that a transfer on a grant basis may be preferable to a sale after considering the potential proceeds from, and the likelihood of a sale, and the foreign policy benefits as a result of a grant or sale basis).

⁸⁴ *Id.* § 2347 (providing that defense articles transferred to Greece or Turkey cannot be transferred to Cyprus or used to further the division of Cyprus. The ratio of grant EDA offered to Greece and Turkey must be on a 7 to 10 ratio for a four-year period).

⁸⁵ 22 U.S.C. § 2321j(e).

⁸⁶ SAMM, *supra* note 55, at 492.

⁸⁷ 22 U.S.C. § 2321j(g)(1).

theater of operation before processing a request for EDA. The general procedures described below provide a broad overview of the EDA process.

1. Initiating a Request for EDA

The EDA process formally begins when a foreign country requests information about a defense article it wishes to obtain.⁸⁸ This request is called a Letter of Request (LOR). Although there is no specific format for an LOR, the letter must sufficiently identify the desired defense article; describe the method of financing;⁸⁹ and justify why, and for what purpose, the prospective purchaser wants the defense article.⁹⁰ The interested foreign country must send the LOR to the Security Assistance Organization (SAO), also called the Security Cooperation Organization (SCO),⁹¹ located in its territory.⁹² Only certain U.S. Government organizations, called Implementing Agencies (IA),⁹³ are authorized to respond to LORs.⁹⁴ Accordingly, the SCO must send the LOR to the IA and DSCA for processing.

In Iraq, a typical EDA case is initiated when a GOI ministry identifies a particular defense article located in the country and inquires about its availability. Alternatively, the Iraq Security Assistance Mission (ISAM)⁹⁵ might contact a ministry, inform its officials of EDA in Iraq, and determine whether the GOI might be interested in acquiring the property. However, regardless of who initiates contact, the GOI must submit an LOR identifying the specific asset in order to formally initiate the process.

⁸⁸ *Id.* at 123.

⁸⁹ E-mail from Joanne B. Hawkins, Assoc. Professor, Logistics Instructor Team Lead, Def. Inst. for Sec. Assistance Mgmt., to author (21 Apr. 2010, 09:38 EST) (on file with author) [hereinafter Hawkins e-mail Apr. 2010] (explaining that if a foreign recipient does not have the financing to pay for the defense article and they want to obtain grant EDA, DoS has to approve that country for grant EDA eligibility before a LOR for grant material will be honored. If the eligibility is approved, the recipient must indicate in the LOR that they want to acquire the material under the grant for which they have been approved).

⁹⁰ SAMP, *supra* note 55, at 123.

⁹¹ *See* app. E (providing information on the responsibilities of the Security Cooperation Organization).

⁹² Capes e-mail, *supra* note 82.

⁹³ SAMP, *supra* note 55, at 125–27 (providing a list of authorized Implementing Agencies (IA)). For example, the IA authorized to receive Letters of Request (LOR) for the U.S. Army (other than LORs for training or construction) is the U.S. Army Security Assistance Command (USASAC).

⁹⁴ *Id.* at 125.

⁹⁵ DISAM GREEN BOOK, *supra* note 71, at 4-2 (providing that the Iraq Security Assistance Mission (ISAM), formerly part of Multi-National Security and Transition Command–Iraq, is a “Pseudo Security Cooperation Office” that handles FMS and EDA transfers in Iraq). The ISAM does not fall under the Ambassador, as SCO/SAOs traditionally do. ISAM operates under title 10 of the U.S. Code and reports to the Combatant Commander. *Id.*

2. Processing the Letter of Request (LOR)

The processing of an LOR involves numerous governmental agencies, both in the foreign country and in the United States. Review of the LOR can vary significantly, depending on the type of defense article requested: non-SME, SME, MDE, classified item, or missile-related technology.⁹⁶ Meanwhile, the various agency reviews should occur concurrently to minimize the overall response time.⁹⁷

Upon receipt of the LOR, the IA validates the LOR to ensure that a potential purchaser is an eligible recipient;⁹⁸ the U.S. Government can transfer the requested defense article; and all applicable government agencies have reviewed the LOR.⁹⁹ When the SCO sends the LOR to the IA and DSCA, the SCO also sends notification of the request to the owning military department.¹⁰⁰ Military departments advise on price (if applicable), source, and availability.¹⁰¹ If the EDA transfer will occur via a grant, the military department must also determine whether the article is excess¹⁰² to its own requirements and the requirements of DoD.¹⁰³ Additionally, the military department or DSCA must coordinate with DoS to ensure the transfer is in accordance with foreign policy.¹⁰⁴

In addition to forwarding the LOR to the IA and DSCA, the SCO also reviews the LOR. The SCO traditionally falls under the U.S. Ambassador, who also functions as the chief of mission.¹⁰⁵ The U.S. Ambassador must verify that the foreign country has the ability to operate and sustain the

⁹⁶ *Id.* at 5-5.

⁹⁷ *Id.*

⁹⁸ SAMP, *supra* note 55, at 97 (providing a list of eligible countries for section 21, AECA, sales from stock); Hawkins e-mail Feb. 23, 2010, *supra* note 80 (providing that eligible countries for grant transfers are no longer published and can be found by contacting DSCA).

⁹⁹ *Id.* at 127.

¹⁰⁰ Telephone Interview with Joanne B. Hawkins, Assoc. Professor, Logistics Instructor Team Lead, Def. Inst. for Sec. Assistance Mgmt. (Jan. 29, 2010) [hereinafter Hawkins Interview].

¹⁰¹ DISAM GREEN BOOK, *supra* note 71, at 3-15.

¹⁰² Hawkins e-mail Apr. 2010, *supra* note 89 (providing that the military department that owns the defense article must declare the defense article excess to the needs of the service and determine, based on transportation costs and the condition of the material, that it is more cost effective to leave it in its current location rather than to retrograde it back to the United States. From an FMS perspective, it may be more beneficial to retrograde the defense article back to the United States if other countries are interested in the items. An interested country can buy the item at a reduced cost, thus recouping some of DoD's retrograde expenses).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ DISAM GREEN BOOK, *supra* note 71, at 5-5.

defense article.¹⁰⁶ The SCO provides an assessment for this verification.¹⁰⁷

Excess defense article transfers in Iraq generally follow the process described above. The requesting Iraqi ministry must send an LOR to ISAM, which acts as the pseudo-SCO in Iraq.¹⁰⁸ The ISAM must then forward the LOR to DSCA and the IA, with a notification to the owning military department. Although not officially required, the Commander, USF-I, and the Commander, CENTCOM, normally submit assessments to the IA with a recommendation for transfer.¹⁰⁹

3. Congressional Notification Is Required for Certain EDA Transfers

Prior to any EDA transfer by sale or grant, DSCA must provide a 30-calendar-day CN for all SME transfers and any non-SME transfer with an original acquisition value of \$7 million or more.¹¹⁰ The military department and IA must submit the data¹¹¹ required for CN to DSCA within ten days of receipt of a valid LOR. Upon receipt of the information, DSCA prepares the required notification documents and coordinates with DoS.¹¹² The DoS must provide clearance to DSCA before DSCA forwards the notification to Congress.¹¹³ If Congress objects to the transfer, it must adopt a joint resolution objecting to it.¹¹⁴ Otherwise, once the thirty-day period expires and Congress has not objected, the defense article can be transferred.¹¹⁵

¹⁰⁶ *Id.* For non-SME/MDE defense articles, the U.S. Ambassador verification is generally referred to as an SCO or SAO assessment. *Id.* If defense articles are SME or MDE, the U.S. Embassy must do a country team assessment (CTA), which is more extensive than the SCO assessment and is usually classified. *Id.* The country team consists of those who work for the Ambassador and includes the SCO. *Id.* Ideally, the CTA could be the SCO assessment that is staffed within the country team and signed off on by the Ambassador. *Id.* The CTA must be signed or otherwise approved by the Ambassador. *Id.* See SAMM, *supra* note 55, at 124 (providing the list of criteria included in a CTA).

¹⁰⁷ DISAM GREEN BOOK, *supra* note 71, at 5-5.

¹⁰⁸ Capes e-mail, *supra* note 82.

¹⁰⁹ See DISAM GREEN BOOK, *supra* note 71, at 5-5.

¹¹⁰ SAMM, *supra* note 55, at 493.

¹¹¹ *Id.* at 242–46 (providing required information that is included in the CN).

¹¹² *Id.* at 249.

¹¹³ *Id.* at 235.

¹¹⁴ *Id.* at 249.

¹¹⁵ *Id.*

4. Issuing the Letter of Offer and Acceptance to a Foreign Government

The U.S. Government responds to an LOR with a document called a Letter of Offer and Acceptance (LOA).¹¹⁶ The DSCA drafts the LOA while applicable agencies staff and coordinate the LOR as discussed above.¹¹⁷ If Congress does not object to the proposed transfer, or notification is not required, DSCA will coordinate the LOA with relevant U.S. Government agencies and will send it to the IA for approval.¹¹⁸ Once the IA approves and DSCA countersigns the LOA, it becomes the U.S. Government's official offer to transfer the defense article to the foreign country.¹¹⁹ The IA will then send the LOA to the recipient, via the SCO, for review and acceptance.¹²⁰ Acceptance occurs when an official of the authorized purchaser signs the LOA and, in the case of a sale, provides any required initial deposit to the Defense Finance Accounting Service.¹²¹

5. Executing the EDA Transfer

Foreign countries must agree to certain restrictions prior to physical transfer of defense articles. In accordance with the FAA and AECA, purchasers must agree to use defense articles only for their furnished purpose.¹²² The DSCA includes this restriction in all LOAs. In addition to the LOA, all grant EDA recipients must sign a blanket end-use, security, and retransfer assurances document.¹²³ Once the EDA is transferred, the U.S. Government will scrutinize the recipient's use of the defense articles through an end-use monitoring program.¹²⁴

Additionally, unlike FMS purchases, where new defense articles are sold under a total package approach,¹²⁵ EDA are transferred at reduced or no cost to the recipient and are offered to the foreign country on an "as is, where is" basis.¹²⁶ Once foreign countries accept EDA, the United States is no longer responsible for any maintenance, training,

¹¹⁶ *Id.* at 137. For a sample LOA, see figure C5.F2 in chapter 5 of the SAMM, *supra* note 55.

¹¹⁷ Hawkins Interview, *supra* note 100.

¹¹⁸ *Id.*

¹¹⁹ SAMM, *supra* note 55, at 249.

¹²⁰ *Id.* at 231.

¹²¹ *Id.* at 233.

¹²² *Id.* at 327.

¹²³ *Id.* at 492.

¹²⁴ *Id.* at 327.

¹²⁵ *Id.* at 114 (explaining that the total package approach (TPA) refers to the policy of the United States to sell defense articles with a sustainability package, which includes spare parts, training, maintenance, and other support).

¹²⁶ *Id.* at 490.

or service associated with the defense article.¹²⁷ If a recipient wants to purchase training or other sustainment packages associated with a defense article, they must submit a separate LOR, which is processed as an FMS case.¹²⁸

Furthermore, Congress prohibited the use of DoD funds for the logistics—crating, packing, handling and transportation—of all EDA transfers.¹²⁹ The President, however, may grant an exception in accordance with section 516(e)(2).¹³⁰ Additionally, recipients can pay the United States to arrange the logistics of a transfer.¹³¹ As a result, expenses incurred transporting defense articles can be a limiting factor affecting a country's ability—and decision—to purchase a defense article. In Iraq, the logistics burden is less of a concern because most eligible defense articles are already physically located in Iraq and the majority of EDA transfers are in-place transfers.¹³²

D. Pseudo-Foreign Military Sales (FMS) in Iraq and Afghanistan

Pseudo-FMS cases refer to the purchase of defense articles from existing DoD stocks under the authority of section 21, AECA, Sales from Stock, as discussed in Subsection C above. These purchases are called pseudo-FMS because the defense articles at issue are purchased from Afghanistan Security Forces Fund (ASFF) or Iraqi Security Forces Fund (ISFF). The ASFF and ISFF are U.S. appropriated funds used to train, equip, and maintain the Afghanistan Security Forces and ISF, respectively.¹³³ Defense articles are sold in accordance with their fair market value,¹³⁴ and even though the defense articles are ultimately paid for with U.S. appropriated funds, the EDA transfer approval process remains substantially the same as a grant or sale EDA purchase.

¹²⁷ Hawkins Interview, *supra* note 100.

¹²⁸ *Id.*

¹²⁹ Foreign Assistance Act of 1961, 22 U.S.C. § 2321j(e) (Westlaw 2010).

¹³⁰ *Id.* (providing that the President may grant an exception if he determines that it is in the national interest of the United States to do so; the recipient is a developing country receiving less than \$10 million of international military education and training assistance or Foreign Military Financing in the fiscal year in which the transportation is provided; the total weight of the transfer does not exceed 50,000 pounds; and such transportation is accomplished on a space available basis).

¹³¹ SAMM, *supra* note 55 at 368.

¹³² Hawkins Interview, *supra* note 100.

¹³³ MULTI-NATIONAL CORPS—IRAQ, MONEY AS A WEAPON SYSTEM, at E-1 (Jan. 26, 2009).

¹³⁴ The Security Assistance Act of 2000 states that it is the sense of the Congress that the president should make expanded use of section 21, AECA, to sell EDA by using the flexibility to ascertain the market value of the EDA in accordance with section 47, AECA.

IV. Foreign Excess Personal Property (FEPP)

Foreign Excess Personal Property disposal derives its authority from the Federal Property and Administrative Services Act of 1949.¹³⁵ Congress subsequently amended this Act in 2002, codifying FEPP disposal authorities at title 40, chapter 7, of the U.S. Code. Section 701(b) of title 40 authorizes the head of an executive agency¹³⁶ to dispose of foreign excess property¹³⁷ in a manner that conforms to U.S. foreign policy.¹³⁸ The DoD, as the agency head, has assigned FEPP disposal authority to the Deputy Under Secretary of Defense for Logistics and Materiel Readiness (DUSD (L&MR)).¹³⁹ Ultimate FEPP disposal authority in a particular country, however, rests with the DoS to ensure that all property disposed of conforms to U.S. foreign policy and existing U.S. regulations and international agreements.¹⁴⁰

In accordance with title 40, chapter 7, DoD may return foreign excess property to the United States for disposal as excess or surplus property when DoD or GSA, in consultation with DoD, determines return of the property is in the best interest of the United States.¹⁴¹ Once received in the United States, DRMS screens returned property in the same manner as excess and surplus property within the United States and its territories.¹⁴² If foreign excess property is not returned to the United States for disposal, DoD may dispose of it abroad by sale, lease, exchange, or transfer.¹⁴³ Alternatively, if the property has no commercial value, and care and handling costs exceed estimated proceeds from sale of the property, DoD may authorize abandonment, destruction, or donation.¹⁴⁴ In Iraq, however, U.S. policy regulations prohibit disposal by abandonment.¹⁴⁵

An executive agency head, in accordance with his authority in 40 U.S.C. § 704, must issue further policy

¹³⁵ Federal Services and Property Administrative Act of 1949, 40 U.S.C. ch. 7 (Westlaw 2010).

¹³⁶ 40 U.S.C. § 102(4) (defining executive agency as an executive department or independent establishment in the executive branch of the Government or a wholly-owned Government corporation). For example, the Department of Defense is an executive agency.

¹³⁷ *Id.* § 102(6) (defining foreign excess property as excess property that is not located in the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands).

¹³⁸ *Id.* § 701(b).

¹³⁹ See U.S. DEP'T OF DEF., REG. 4140.1-R, DOD SUPPLY CHAIN MATERIEL MANAGEMENT REGULATION para. C5.10.1.5.4 (May 23, 2003).

¹⁴⁰ DOD MANUAL 4160.21-M, *supra* note 10, at 9-2.

¹⁴¹ 40 U.S.C. § 702.

¹⁴² DOD MANUAL 4160.21-M, *supra* note 10, at 9-2.

¹⁴³ 40 U.S.C. § 704(b)(1) & (2).

¹⁴⁴ *Id.* § 704(b)(3).

¹⁴⁵ Bell Memo June 2008, *supra* note 13.

guidance to implement FEPP in a particular location. Currently, DoD has not authorized disposal of foreign excess property in Afghanistan, but has implemented FEPP procedures in Iraq through several policy memoranda issued by the DUSD (L&MR), which limited disposal to personal property.¹⁴⁶ The DUSD (L&MR) further restricted personal property transfers to fourteen designated non-standard equipment categories.¹⁴⁷ Authorized categories¹⁴⁸ include air conditioning units, furniture, food service equipment, living containers, ablution units, commercial vehicles, and generators.¹⁴⁹ Categories restricted from transfer under FEPP include computers, defense articles on the USML,¹⁵⁰ and items on the Commerce Control List.¹⁵¹

Initially, DoD authorized *donation* of foreign excess personal property to the GOI in accordance with 40 U.S.C. § 704(b)(3), which does not require the U.S. Government receive anything in return.¹⁵² In June 2008, however, in accordance with 40 U.S.C. § 704(b)(2)(B), DUSD (L&MR) determined that it was in the best interest of the United States to *exchange* authorized foreign excess personal property for substantial benefit.¹⁵³ In accordance with DoD policy, USF-I established two separate processes to dispose of foreign excess personal property: transfers in conjunction with a base closure or return; and transfers not in conjunction with base closure or return, commonly referred to as tiered transfer authority (TTA).¹⁵⁴

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* attachment 1, at 1.

¹⁴⁸ See app. F (providing the list of authorized non-standard equipment categories that are eligible for transfer under FEPP procedures).

¹⁴⁹ Bell Memo June 2008, *supra* note 13, attachment 1 at 1.

¹⁵⁰ The U.S. Munitions List is available at <http://www.fas.org/spp/starwars/offdocs/itar/p121.htm> (providing a list of designated defense articles and services in accordance with the Arms Export Control Act).

¹⁵¹ Bureau of Industry and Security, <http://www.bis.doc.gov/licensing/exportingbasics.htm> (last visited Mar. 1, 2010) (providing that the Commerce Control List is a list of commercial and “dual-use” (both commercial and military application) items that are subject to the Bureau of Industry and Security’s export license requirements based on the item’s technical characteristic). For example, categories on the list include electronics, computers, sensors, and lasers.

¹⁵² See Memorandum from P. Jackson Bell, Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Chairman of the Joint Chiefs of Staff et al., subject: Increase in Donation Threshold for Foreign Excess Personal Property (FEPP) in Iraq 1 (Oct. 10, 2007) [hereinafter Bell Memo Oct. 2007].

¹⁵³ Bell Memo June 2008, *supra* note 13, at 1 (providing that in June 2008, DUSD (L&MR) determined that substantial benefits to DoD existed to allow for transfer of foreign excess personal property, vice donation). Specifically, substantial benefits to DoD include a streamlined retrograde process, which allows military units to focus on higher priority aspects of their mission; mitigates the risks of improper dispositions; fosters favorable relations between the United States and Iraq; and alleviates undue burden on DoD transportation assets. *Id.*

¹⁵⁴ *Id.*

A. Foreign Excess Personal Property Transfer in Conjunction with a Base Closure or Return to the Government of Iraq

Under this type of transfer, the transfer of U.S. Government property takes place in conjunction with a base¹⁵⁵ closure or the return of a base to the GOI. However, not all bases slated for return to the GOI automatically qualify for foreign excess personal property transfer in conjunction with a base closure or return. The DoD has limited the number of bases that qualify for foreign excess personal property transfers in Iraq to 417.¹⁵⁶ Because USF-I is the approval authority for base transfers in Iraq, USF-I determines if a particular base return will count against the 417 authorized.¹⁵⁷ If USF-I does not approve a base foreign excess personal property transfer request, military units can only transfer foreign excess personal property under a tiered transfer authority, as discussed in Part III, Section B, of this primer.

The total value of personal property that military units may transfer in conjunction with the closure or return of a single base is limited to \$30 million.¹⁵⁸ Owning units must calculate the value of each piece of personal property based on its depreciated value; units no longer determine property value based on acquisition cost, as was the policy prior to July 2009.¹⁵⁹ Units may determine the fair market value (FMV) of items by using the FMV factors based upon the Supply Condition Code.¹⁶⁰ United States Forces-Iraq must forward all transfer requests for property exceeding \$30 million to DUSD (L&MR) for approval.¹⁶¹

¹⁵⁵ Memorandum from P. Jackson Bell, Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Chairman of the Joint Chiefs of Staff et al., subject: Authority to Transfer Property in Iraq (Nov. 19, 2008) [hereinafter Bell Memo Nov. 2008] (stating that the term “base” includes all forward operating bases (FOB), contingency operating bases (COB), contingency operating sites (COS), contingency operating locations (COL), and all other sites, locations, and training facilities where U.S. forces were physically present, and were formally identified to GOI in accordance with the Security Agreement of 17 November 2008. In all DUSD (L&MR) policy memoranda, the term “FOB” is synonymous with “base”).

¹⁵⁶ *Id.* (increasing the number of base transfers from 79 to 417).

¹⁵⁷ See *id.*

¹⁵⁸ Memorandum from Alan F. Estevez, Acting Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Commanding General, Multi-National Force-Iraq, subject: Authority to Transfer Foreign Excess Personal Property in Iraq 1 (Oct. 9, 2009) [hereinafter Estevez Memo Oct. 9, 2009] (increasing the value of personal property allowed in a base transfer from \$15 million to \$30 million, and providing that real property, barrier and other construction material are excluded from the \$30 million limit).

¹⁵⁹ Memorandum from Alan F. Estevez, Acting Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Commanding General, Multi-National Force-Iraq, subject: Authority to Transfer Property in Iraq 1 (July 7, 2009) [hereinafter Estevez Memo July 2009].

¹⁶⁰ HEADQUARTERS, UNITED STATES FORCES-IRAQ, APP. 8 (FEPP) TO ANNEX D (LOGISTICS) TO OPERATIONS ORDER 10-01 (1 Jan. 2010) [hereinafter USF-I OPOD 10-01].

¹⁶¹ See Estevez Memo Oct. 9, 2009, *supra* note 158, at 1.

Once USF–I authorizes FEPP disposal in conjunction with a closure, the tenant unit must conduct a 100% inventory of all property located on the base.¹⁶² Additionally, contractors must return all contractor inventory property¹⁶³ that is no longer needed for the performance of U.S. contracts to the tenant unit.¹⁶⁴ The tenant unit must then forward a complete property inventory list of all government-owned property to the applicable U.S. division, which must either reallocate property within the division or determine that the division no longer needs the property.¹⁶⁵

1. Screening Property as Excess

Approximately forty-five days from the base closure or transfer date, the U.S. division must forward the inventory spreadsheet of foreign excess personal property to the USF–I J4.¹⁶⁶ United States Forces–Iraq will screen the property to determine whether there is an existing need for the property.¹⁶⁷ United States Forces–Iraq will then distribute the property spreadsheet electronically to the owning military department, military units in Iraq, contractors, CENTCOM, and the U.S. Embassy for review via the theater’s classified computer network.¹⁶⁸

As a result of congressional interests, USF–I implemented an additional screening layer in October 2009.¹⁶⁹ In addition to the various recipients listed above, USF–I must now send the foreign excess personal property listing¹⁷⁰ to GSA and the National Association of State Agencies for Surplus Property (NASASP) as well.¹⁷¹ All recipients have fourteen days to screen and claim property

before USF–I offers it to the GOI.¹⁷² Recipients in theater have priority over state and local agencies¹⁷³ in claiming property from the listings. If the aforementioned entities do not claim the property within fourteen days, the owning military department will declare it excess, and, if not restricted,¹⁷⁴ the property will be eligible for transfer to the GOI.

2. “FOB in a Box” Property Pre-Approved as Excess

United States Forces–Iraq’s policy is to transfer facilities to the GOI in full operating condition to the maximum extent possible.¹⁷⁵ “An effective transfer of functional facilities is critical to enabling our Iraqi partners to assume increased security responsibility.”¹⁷⁶ In furtherance of this policy, in July 2009, then-MNF–I requested that Headquarters, Department of the Army (HQDA), pre-approve certain non-standard equipment as excess.¹⁷⁷ Based on a study of previously transferred bases, MNF–I requested basic life support and force protection items that military departments consistently declared excess in the past.¹⁷⁸ On 20 August 2009, HQDA approved the request and pre-approved designated items¹⁷⁹ as excess.¹⁸⁰ Therefore, military units do not have to screen the approved items in conjunction with other personal property items prior to a base closure or return. This HQDA pre-approval is limited to foreign excess personal property transfers in conjunction with a base closure or return; units must screen all property prior to a tiered authority transfer.¹⁸¹

¹⁷² *Id.*

¹⁷³ Wiesner e-mail, *supra* note 7 (providing that state and local agencies are responsible for the cost of transporting the equipment to their location. To date, state and local agencies have made one claim for generators).

¹⁷⁴ Bell Memo June 2008, *supra* note 13 (detailing personal property that is prohibited from transfer to the GOI).

¹⁷⁵ Base Closure Memo, *supra* note 165, at 1.

¹⁷⁶ *Id.* (quoting General Raymond T. Odierno).

¹⁷⁷ Memorandum from Dir., CJ 1/4/8, to ARCENT G-4, subject: Pre-Approval of Excess Declaration of Non Standard Equipment (16 July 2009) [hereinafter FOB in a Box Memo].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (listing the approved equipment categories as Containerized Housing Units (CHU); force protection equipment (including barrier material); bulk plastic water tanks; bulk plastic and metal fuel tanks; camouflage nets; air conditioner units; generators; porta johns; refrigerators; freezers; beds and mattresses; office equipment; wall lockers; tents; guard shacks; dining facility equipment; washing machines; and dryers).

¹⁸⁰ *Id.* approval endorsement of 20 Aug. 2009.

¹⁸¹ *Id.* (providing that Army Central Command (ARCENT) endorsed MNF–I’s request prior to forwarding to HQDA and DUSD (L&MR). The ARCENT recommended denial because operational concerns are not recognized as a basis for declaring items excess. For example, although generators are required in order to transfer bases that are fully functional, U.S. Forces Afghanistan has requested generators of all types and sizes. Therefore, in accordance with HQDA executive order, it was ARCENT’s position that the requested items were prohibited from being declared excess).

¹⁶² Memorandum from Debra S. Bennett, Acting Assistant Deputy Under Sec’y of Def. for Supply Chain Integration to Alan F. Estevez, Acting Deputy Under Sec’y of Def. for Logistics and Material Readiness, subject: Foreign Excess Personal Property (FEPP) Screening Procedures in Iraq 2 (Oct. 16, 2009) [hereinafter Estevez Memo Oct. 16, 2009]. See app. A (defining contractor inventory).

¹⁶³ FAR, *supra* note 9, at 1051 (defining contractor inventory as all excess contractor-acquired property and government-furnished property that the contractor no longer needs in performance of a contract). See app. A (defining contractor-acquired property and government-furnished property).

¹⁶⁴ See Olson, *supra* note 9 (providing information on contractor responsibilities with contractor-managed, government-owned property).

¹⁶⁵ Memorandum from Commanding General, Multi-National Force–Iraq, to Distribution List, subject: Return or Closure of Bases and Facilities (20 Apr. 2009) [hereinafter Base Closure Memo].

¹⁶⁶ Estevez Memo Oct. 16, 2009, *supra* note 162, at 2.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1.

¹⁷⁰ *Id.* at 2 (providing that prior to sending the list to NASASP all sensitive information is removed; additionally, the list is scrubbed in theater to remove property that is not suitable for state and local agencies). For example, some property may not meet U.S. specification standards.

¹⁷¹ *Id.*

Upon completion of the screening process, USF-I must issue an authorization memorandum¹⁸² for transfer of property in conjunction with a base closure or return. This memorandum includes the USF-I J-4-approved inventory spreadsheet. The tenant unit may only transfer property on the approved inventory spreadsheet, and may only transfer it to the ISF or other Iraqi ministries.¹⁸³

B. Foreign Excess Personal Property Tiered Transfer Authority (TTA)

The TTA is a means for the transfer of foreign excess personal property that is not accomplished in conjunction with the transfer of one of the 417 authorized bases.¹⁸⁴ The DoD delegated the authority to the commanding general, MNF-I (USF-I), to implement a TTA for the disposal of certain designated equipment categories.¹⁸⁵ This TTA gives O-6-level commanders the authority to transfer foreign excess personal property valued at less than \$10,000; the first general officer in the chain of command authority to transfer foreign excess personal property less than \$50,000; and the USF-I J4 authority to transfer foreign excess personal property less than \$1 million.¹⁸⁶ The DUSD (L&MR) is the approval authority for transfers of foreign excess personal property requested by USF-I under the TTA valued at \$1 million or higher.¹⁸⁷

The TTA procedures for transfer are similar to base closure procedures. The DUSD (L&MR), however, delegated the approval authority to lower levels of command rather than withholding the authority at the USF-I headquarters level, as is the case with FEPP in conjunction with a base.¹⁸⁸ Although an O-6 commander has the authority to transfer property under \$10,000, he does not have the authority to declare property excess.¹⁸⁹ This authority remains with the military department that owns the equipment.¹⁹⁰ Therefore, units must submit an inventory spreadsheet, containing personal property and corresponding depreciated value,¹⁹¹ to their chain of command. U.S.

¹⁸² USF-I OPORD 10-01, *supra* note 160, at 3.M.5. See app. G (providing a sample MNF-I authorization memorandum for transfer of foreign excess personal property in conjunction with a base closure or return).

¹⁸³ Bell Memo June 2008, *supra* note 13, at 2.

¹⁸⁴ *Id.*

¹⁸⁵ Estevez Memo Oct. 9, 2009, *supra* note 158, at 1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Bell Memo June 2008, *supra* note 13.

¹⁸⁹ *Id.* attachment 2, at 3.

¹⁹⁰ *Id.*

¹⁹¹ See Estevez Memo July 2009, *supra* note 159, at 1 (providing that the owning military unit calculates the value of property under a Tiered Transfer Authority in the same manner as property transferred in

Forces-Iraq follows the same screening procedures for TTA transfers as base closure transfers.

Once the screening process is complete, USF-I will issue a validation memorandum¹⁹² declaring items excess and eligible for transfer to the GOI.¹⁹³ In a single transaction, the TTA approval authority can only transfer the value of property within his tiered dollar threshold.¹⁹⁴ The dollar threshold applies to individual line items, regardless of whether multiple items are on one list (which may add up to a large FMV in the aggregate).¹⁹⁵ Prior to transfer, the tiered approval authority must sign the inventory spreadsheet, verifying USF-I has screened the property and declared it excess; none of the items are restricted from transfer; and the DoS has approved the recipient.¹⁹⁶ Units may transfer TTA foreign excess personal property to the ISF, other GOI ministries, or any other governmental entity at the federal, provincial, or local level.¹⁹⁷

C. Execution of a Base Transfer or Tiered Authority Transfer

The U.S. military unit that is accountable for the foreign excess personal property must conduct a joint inventory with the gaining ISF unit commander, GOI representative, or other approved entity no later than the date of the return of the base or on the date of a TTA transfer.¹⁹⁸ Units execute transfers via joint memoranda that record the presence and receipt of the foreign excess personal property at the time of the transfer.¹⁹⁹ Personal property is transferred in an "as is" condition, and the United States is not responsible for maintenance, repair, or replacement.²⁰⁰

D. Personal Property Requiring Special Consideration

conjunction with a base closure). The Supply Condition Code, assigned by the unit, establishes the fair market value of the item.

¹⁹² See app. H (providing a sample USF-I validation memorandum for a Tiered Approval Authority transfer).

¹⁹³ USF-I OPORD 10-01, *supra* note 160, at 3.P.

¹⁹⁴ Bell Memo June 2008, *supra* note 13.

¹⁹⁵ *Id.* For example, a 2004 Ford Explorer has a particular line item number assigned to it and a 2005 Ford Explorer has a different line item number assigned to it. An O-6 commander has the authority to transfer up to \$9,999.99 worth of 2004 Explorers and \$9,999.99 of 2005 Explorers in one transfer. All property with the same line item number must be under \$9,999.99 in a single transaction.

¹⁹⁶ USF-I OPORD 10-01, *supra* note 160, at 3.N (providing that military units should coordinate with the Provincial Reconstruction Team or regional embassy office to ensure DoS approves of the recipient prior to transfer).

¹⁹⁷ Bell Memo June 2008, *supra* note 13, at 1.

¹⁹⁸ USF-I OPORD 10-01, *supra* note 160, at 3.R.1.

¹⁹⁹ Bell Memo June 2008, *supra* note 13, at 1.

²⁰⁰ Estevez Memo July 2009, *supra* note 159, attachment 2, at 1.

In July 2009, DUSD (L&MR) authorized the transfer of barrier material (e.g., concertina wire, T-walls, Jersey barriers, HESCO barriers) and other construction material located off a base to any Iraqi government organization or private entity, approved by the DoS.²⁰¹ Prior to transferring such material, USF-I must determine that the property cannot reasonably or cost effectively be moved for use by U.S. forces elsewhere in Iraq.²⁰² USF-I must screen construction and barrier material²⁰³ and designate it as excess prior to transfer.²⁰⁴ Additionally, prior to transferring material located on private property to a private entity, DoS must approve the private entity and the private entity must waive all claims against the U.S. Government related to the property.²⁰⁵ Tiered Transfer Authority thresholds do not apply to barrier and other construction material; therefore, the amount that U.S. forces can leave in place for the GOI or a private entity is unlimited.²⁰⁶

Additionally, DUSD (L&MR) has authorized the transfer of bridges located off a base if the owning military department declares them excess and USF-I concludes that they cannot reasonably or cost effectively move the bridge for use by U.S. forces elsewhere in Iraq.²⁰⁷ The DUSD (L&MR) authorized USF-I to transfer bridges up to a depreciated value of \$5 million per bridge.²⁰⁸

V. Authority to Transfer Defense Articles and Provide Defense Services to the Military and Security Forces of Iraq and Afghanistan (Fiscal Year 2010 National Defense Authorization Act)

When the president confirmed that U.S. forces will withdraw from Iraq by the end of 2011, the Multi-National Security Transition Command-Iraq (MNSTC-I) (now USF-I Advisory and Training) immediately began exploring the minimum essential capabilities the ISF would need to maintain an acceptable level of security after the withdrawal of U.S. forces.²⁰⁹ It identified approximately 53,000 pieces of U.S. Government personal property in Iraq needed for the

maintenance of security and stability after the withdrawal of U.S. forces.²¹⁰

In response, Congress passed section 1234 of the National Defense Authorization Act (NDAA) for Fiscal Year 2010. It provides an additional authority to transfer defense articles to the GOI and the Government of the Islamic Republic of Afghanistan (GIROA).²¹¹ Section 1234 authorizes the Secretary of Defense, with the concurrence of the Secretary of State, to transfer defense articles from the existing stocks of the DoD and provide defense services in connection with these transfers without reimbursement from the GOI or GIROA.²¹² This authority, however, is not as expansive as transfers pursuant to AECA and the FAA.

Defense articles eligible for transfer must be located in Iraq or Kuwait as of 7 October 2009; must be in use to support operations in Iraq immediately before the transfer; and must no longer be needed by U.S. forces in Iraq or Kuwait.²¹³ Unlike grant transfers pursuant to section 516 of the FAA, section 1234 authorizes the transfer of excess and non-excess defense articles, only requiring they are no longer needed in Iraq or Kuwait.²¹⁴ Transfers require a fifteen-day CN prior to transfer, and the aggregate replacement value of non-excess defense articles transferred and services provided is limited to \$750 million.²¹⁵

At the time of this primer, the procedures for implementing this authority were still being drafted.²¹⁶ However, the report to Congress indicates that requests for transfer of excess defense articles will be processed in accordance with section 516 of the FAA.²¹⁷

Additionally, for non-excess transfers, USF-I Advisory and Training in Iraq, or Combined Security Transition Command-Afghanistan (CSTC-A) in Afghanistan, may initiate an excess transfer by first verifying the requirement in theater. Second, the Joint Staff, CENTCOM, and the Office of the Secretary of Defense (OSD) must validate the requirement.²¹⁸ Third, the Defense Technology Security Agency, DSCA, and the military departments must review the requirement.²¹⁹ Defense Security Cooperation Agency will then prepare and staff the CN for Secretary of Defense

²⁰¹ *Id.* at 1–2.

²⁰² *Id.*

²⁰³ Wiesner e-mail, *supra* note 7 (providing that barrier material that is in service must be screened as excess prior to a transfer under a Tiered Transfer Authority. However, barrier material was pre-approved as excess for transfers in conjunction with a base return to GOI and does not require screening as excess). *Supra* note 179.

²⁰⁴ Telephone Interview with Major Patrick Wiesner, Deputy Chief, Contract and Fiscal Law, Office of the Staff Judge Advocate, U.S. Forces-Iraq (Jan. 16, 2010).

²⁰⁵ Estevez Memo July 2009, *supra* note 159, at 2.

²⁰⁶ Bell Memo Nov. 2008, *supra* note 155, at 1.

²⁰⁷ Estevez Memo July 2009, *supra* note 159, at 2.

²⁰⁸ *Id.*

²⁰⁹ TRANSFER REPORT, *supra* note 2, at 3.

²¹⁰ *Id.*

²¹¹ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1234, 123 Stat. 2190.

²¹² *Id.*

²¹³ *Id.* § 1234(b)(2).

²¹⁴ *Id.* § 1234(a).

²¹⁵ *Id.* § 1234(b)(1), (d)(1)–(e)(1).

²¹⁶ TRANSFER REPORT, *supra* note 2, at 7.

²¹⁷ *Id.*

²¹⁸ *Id.* at 7.

²¹⁹ *Id.*

and Secretary of State approval. The OSD will deliver the section 1234 notification to Congress.²²⁰ Once approved, USF-I or CSTC-A will present the defense article to the host nation, which then signs the transfer documents.²²¹

VI. Conclusion

This primer consolidates the statutory authorities, implementing regulations, and DoD policies that authorize the disposal of personal property to Iraq and other foreign governments. In order to determine if DoD can transfer property, the property must first be classified as personal property or real property. Congress has authorized statutory authority to dispose of personal property; however, authorities differ depending on the type of personal property.

The U.S. Government may transfer excess defense articles to eligible foreign governments in accordance with two statutory authorities. First, the U.S. Government can sell EDA from existing stocks pursuant to section 21, AECA, using FMS procedures. Second, foreign countries, approved by Congress, can receive grant EDA in accordance with section 516, FAA. The rules governing the transfer of defense articles are complex and require extensive coordination between several governmental agencies, possible CN, and DoS approval to ensure transfers are consistent with U.S. foreign policy. As a result, EDA transfers can take significantly more time than other personal property disposal authorities such as FEPP.

In accordance with its authority in title 40, DoD authorized transfers of foreign excess personal property to the ISF, other Iraqi ministries, and in some cases, other federal, provincial, and local entities. Specifically, DoD implemented two separate processes in Iraq for FEPP: (1) transfers of foreign excess personal property in conjunction with a base closure or the return of a base to GOI up to \$30 million per base, and (2) a TTA based on the value of property items. Prior to transfer, both procedures require an accounting of property, coordination with USF-I, and a declaration by the owning military department of property as excess.

Disposal authorities are particularly important in Iraq as the U.S. Government focuses on withdrawal while seeking to ensure the ISF have the capability to maintain security once U.S. forces withdraw. Transferring foreign excess personal property and defense articles to Iraq furthers both of these policy goals.

²²⁰ *Id.* at 8.

²²¹ *Id.*

Appendix A

Property Classification Matrix and Definitions

Contingency Operation: A military operation that

- (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
- (2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of title 10, chapter 15, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Contractor Acquired Property: Property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title.

(FAR Part 45.101)

Contractor Inventory:

- (1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;
- (2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereafter or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option for the Government; and
- (3) Government furnished property that exceeds the amounts needed to complete full performance under the entire contract. (FAR Part 45.101).

Contractor Managed Government Owned Property: A non-doctrinal term used to incorporate all items which the contractor manages expressly to perform under the contract, including items given to the contractor by the Government (government-furnished property), or acquired or fabricated by the contractor to which the Government holds title. (U.S. Government Accountability Office, GAO-08-930, Operation Iraqi Freedom: Actions Needed to Enhance DOD Planning for Reposturing of U.S. Forces from Iraq (2008)).

Defense Article: Generally includes, (1) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war; (2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance; (3) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, re-pair, servicing storage, construction, transportation, operation, or use of any article listed in this subsection; or (4) any component or part of any article listed in this sub-section. (section 644(d) of the Foreign Assistance Act of 1961).

Excess Defense Article: The quantity of defense articles—other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors—owned by the USG and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations. (section 644(g) of the Foreign Assistance Act of 1961).

Excess Property: Property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities. This term is not interchangeable with surplus property. (40 U.S.C. § 102(3)).

Foreign Excess Property: Excess property that is not located in the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, or the Virgin Islands. (40 U.S.C. § 102(6)).

Foreign Excess Personal Property (FEPP): Any U.S.-owned excess personal property located outside the United States, American Samoa, Guam, Puerto Rico, Trust Territory of the Pacific Islands, and the Virgin Islands. (DoD 4160.21-M-1, xxi).

Foreign Excess Real Property (FERP): Any U.S.-owned excess real property located outside the United States, American Samoa, Guam, Puerto Rico, Trust Territory of the Pacific Islands, and the Virgin Islands.

Government-Furnished Property: Property in the possession of, or directly acquired by, the Government and subsequently furnished to a contractor for performance of a contract. (FAR Part 45.101). There are two types of government-furnished property: equipment and material.

- (1) Government-Furnished Equipment: Consists of equipment, special tooling, or special test equipment that is provided to a contractor for use on a government contract that does not lose its identity or become a component part of another article when put into use. (FAR Part 45.101).
- (2) Government-Furnished Material: Property provided by the Government for the performance of a contract that is consumed or expended by the contractor during the performance of a contract, such as component parts of a higher assembly or items that lose their individual identity through incorporation into an end item.

Government Property: All property owned or leased by the Government, including both government-furnished property and contractor-acquired property. (FAR Part 45.101).

Fixture: An item that was personal property affixed to or is otherwise adapted to real property that loses its character as personal property and becomes a part of the real property. (35A Am. Jur. 2d Fixtures § 1(2010)).

Major Defense Equipment: Any item of significant military equipment on the United States Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000. (22 U.S.C. 2794(6). *See also infra* app. F).

Military-Type Property (also referred to as “Green Property”): Personal property of the types that are unique and peculiar to DoD and that have limited commercial application. (DoD 4160.21-M-1, app. 2)

Non-Standard Equipment: A commercially procured item requiring property book accounting. (Chief Warrant Officer (W-5) David A. Dickson, Centralization of Cataloging Procedures for Non-Standard Material, PB 700-06-01, Army Logician, Vol. 38, Issue 1, Jan./Feb. 2006).

Property: Any Government interest in property, except the public domain; national forest or park lands; land for public land mining or mineral leasing; land withdrawn from public domain not suitable for return to public domain due to changes in character; records of the government; naval battleships, cruisers, aircraft carriers, destroyers, or submarines.

Personal Property: Property of any kind or any interest except real property and records of the Federal Government (DoD 4160.21-M, at xxix).

Real Property:

- (1) Any interest in land, together with the improvements, structures, and fixtures located thereon (including prefabricated movable structures, such as Butler-type storage warehouses and Quonset huts, and house trailers with or without undercarriages), and appurtenances thereto, under the control of any Federal agency, except (i) The public domain; (ii) Lands reserved or dedicated for national forest or national park purposes; (iii) Minerals in lands or portions of lands withdrawn or reserved from the public domain that the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; (iv) Lands withdrawn or reserved from the public domain but not including lands or portions of lands so withdrawn or reserved that the Secretary of the Interior, with the concurrence of the Administrator of General Services, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; and (v) Crops when designated by such agency for disposition by severance and removal from the land.
- (2) Improvements of any kind, structures, and fixtures under the control of any Federal agency when designated by such agency for disposition without the underlying land (including such as may be located on the public domain, on lands withdrawn or reserved from the public domain, on lands reserved or dedicated for national forest or national park purposes, or on lands that are not owned by the United States) excluding, however, prefabricated movable

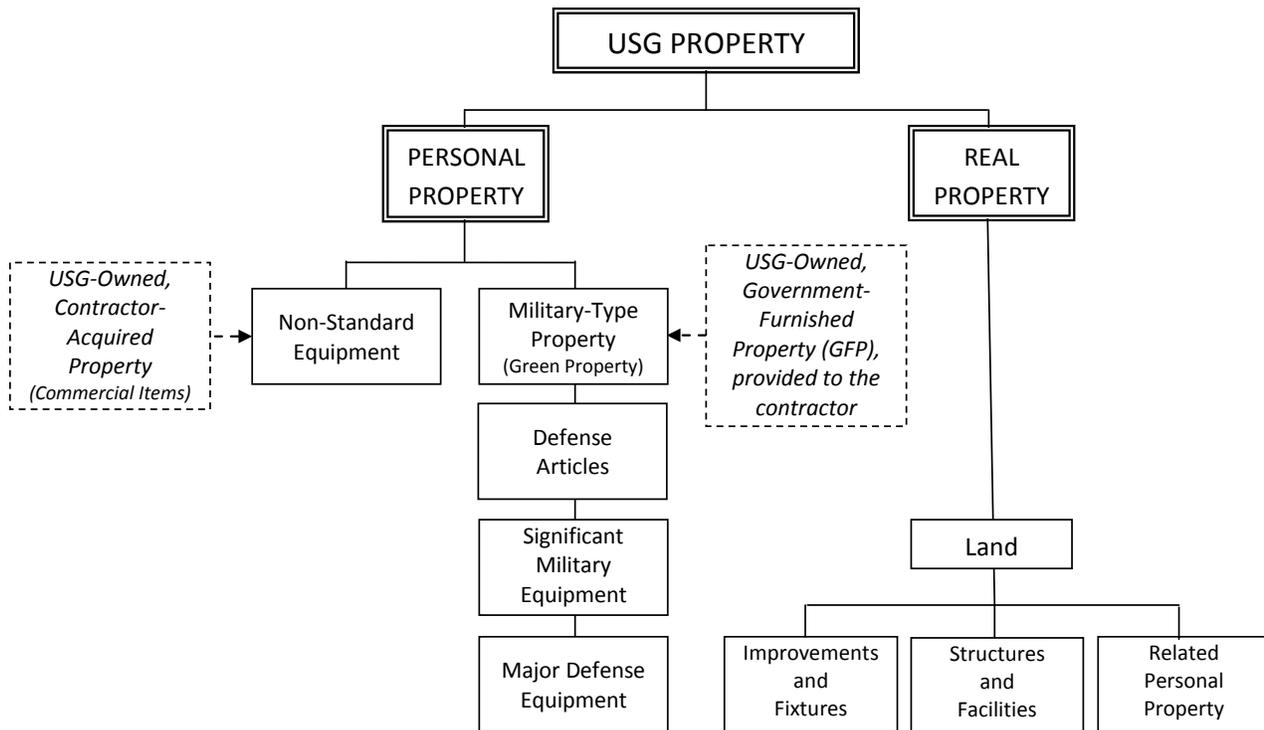
structures, such as Butler-type storage warehouses and Quonset huts, and house trailers (with or without undercarriages).

- (3) Standing timber and embedded gravel, sand, or stone under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition. (Public Contracts and Property Management, 41 C.F.R. § 102-71-20).

Related Personal Property: Any personal property that is an integral part of real property or is related to, designed for, or specially adapted to the functional or productive capacity of the real property and the removal of which would significantly diminish the economic value of the real property (normally common use items, including but not limited to general-purpose furniture, utensils, office machines, office supplies, or general-purpose vehicles, are not considered to be related personal property). (Public Contracts and Property Management, 41 C.F.R. § 102-71-20).

Significant Military Equipment (SME): Those articles for which special export controls are warranted because of their capacity for substantial military utility or capability. Significant military equipment are those items preceded by an asterisk on the United States Munitions List. (ITAR § 120.7).

Surplus Property: Excess property that the Administrator of General Services determines is not required to meet the needs or responsibilities of all federal agencies. 40 U.S.C. § 102(10).



Appendix C

Federal Condition Codes and Fair Market Value Rates

(DRMS-I 4160.14 section 4, Supplement 3 Codes and Terms)
(DoD 4160.21-M, Defense Materiel Disposition Manual, Ch. 9)
(DoD 7000.14-R, Federal Management Regulation, Vol 15, Ch. 7, Sect. 070304)

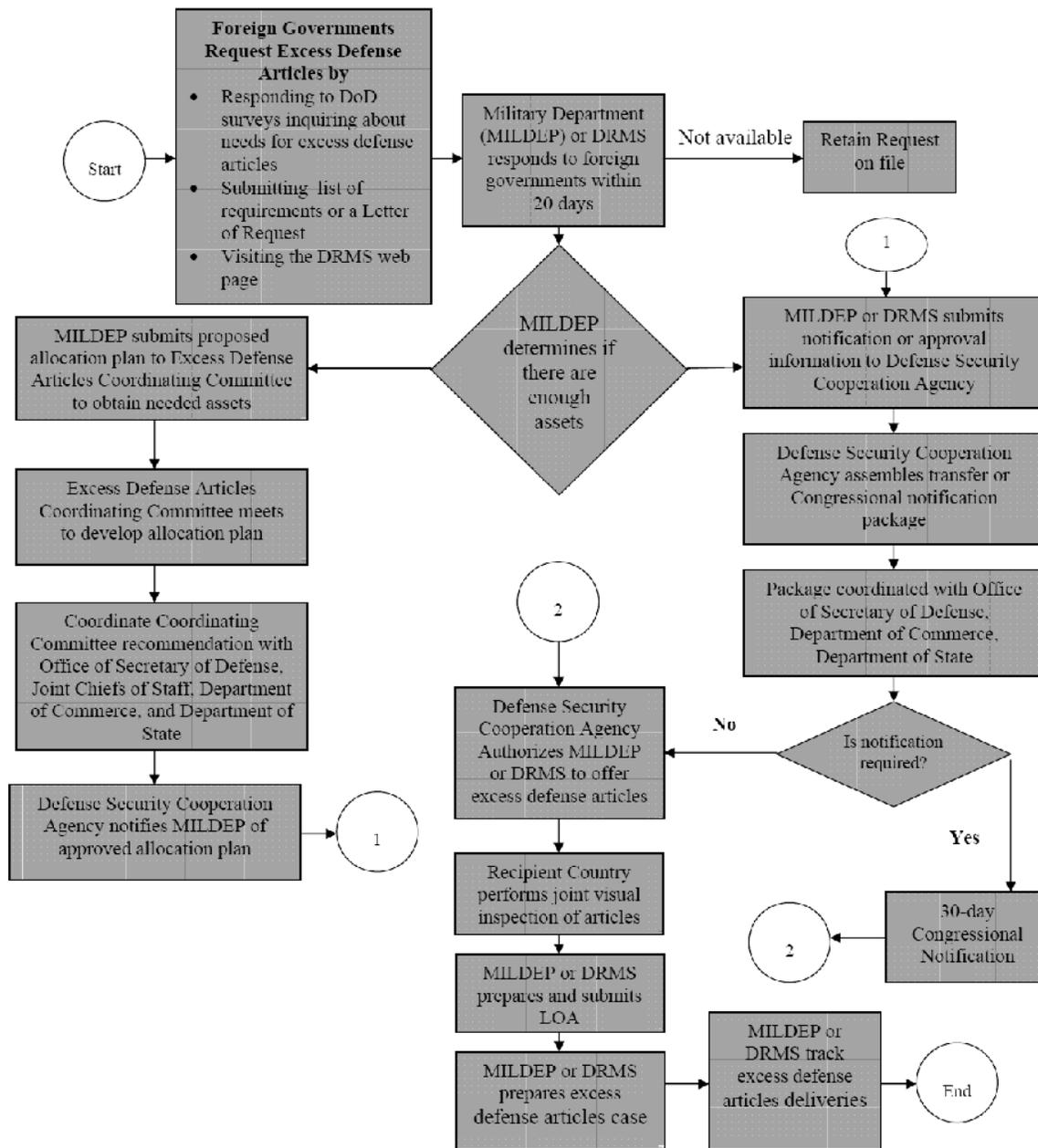
Definition: A Federal Condition Code consists of a two-digit code comprised of an alpha Supply Condition Code and a numeric or alpha Disposal Condition Code. The Federal Condition Code is used for reutilization program screening and review purposes.

CODE	DESCRIPTION	FAIR VALUE RATES
A1	Serviceable – unused-good	50
A4	Serviceable – used-good	40
A2, A5, B1, C1 D1, B4, C4, D4	Serviceable, with qualifications; materiel is either unused in fair condition or used in good condition	30
B2, C2, D2, B5 C5, D5, D7, E7 F7, G7	Serviceable with qualifications; if unused in fair condition; if used in good condition. Also includes unserviceable items, which are in good condition but Require minor repairs	20
A3, B3, C3, D3 A6, B6, C6, H7 F8	Serviceable, in poor condition; unserviceable, in poor condition; or, unserviceable because item requires minor repairs	10
D8, H8, D9, F9 FX, FX, HX	Unserviceable, requiring major repairs	5

Appendix D

Excess Defense Articles (EDA) Matrix

(DoD Inspector General Report, Controls Over Excess Defense Articles Provided to Foreign Governments, of February 13, 2009)



Appendix E

Key Agencies and Organizations for the Transfer of EDA

Combined Security Transition Command–Afghanistan (CSTC–A). CSTC–A reports to the Commander, U.S. Forces–Afghanistan (USFOR–A), which is under the command and control of CENTCOM. “CSTC–A can loosely be termed a “pseudo–SCO” for a variety of reasons. First, its mission, including operational advice and training, exceeds that of a normal SAO under U.S. law. Secondly, the organization is an operational command, rather than an administrative office. As such, it does not officially report to the U.S. ambassador, but only to the combatant command through channels. Finally, CSTC–A has authority to train and equip the local police forces which, while permitted by the Arms Export Control Act, is severely constrained under normal circumstances.” *Defense Institute of Security Assistance Management (DISAM) Online Green Book, page 4-2.*

Defense Logistics Agency (DLA). DLA assists the Defense Reutilization and Marketing Service (DRMS) with processing Foreign Military Sales cases and Excess Defense Articles (EDA) for defense articles at a Defense Reutilization and Marketing Office. *Security Assistance Management Manual (SAMM), page 47.*

Defense Reutilization and Marketing Service (DRMS). The DRMS is a component of DLA. DRMS maintains an inventory of excess defense articles received from the military services that are available to eligible foreign governments via Foreign Military Sales or Excess Defense Articles. DRMS is an Implementing Agency and is authorized to respond to Letters of Request (LOR) from foreign governments. The DRMS assigns case managers to process LORs and coordinate with applicable governmental agencies. *Security Assistance Management Manual.*

Defense Security Cooperation Agency (DSCA). DSCA is an agency of DoD that directs, administers, and supervises the execution of all Security Assistance programs for DoD. “DSCA conducts international logistics and sales negotiations with foreign countries, provides financial management, develops and implements Security Assistance policies, and assists U.S. industry in exporting military equipment and services. All authorities conferred on the Secretary of Defense by the FAA and AECA pertaining to Security Assistance and all authorities under those acts delegated by the President to the Secretary of Defense are redelegated to the Director, DSCA.” *See DoD Directive 5105.65 and SAMM, page 46.*

Department of State (DoS). Under Executive Order 1195, the Secretary of State is responsible for continuous supervision and general direction of the Security Assistance program. This includes determining whether (and when) there will be a program or sale for a particular country or activity and, if so, its size and scope. The DoS also reviews and approves third party transfers. The DoS ensures Foreign Assistance Act (FAA), section 503, eligibility and obtains FAA, section 505, assurances from recipient countries and organizations. The DoS prepares the SCO Mission Program Plan and reviews and submits FMS projections (the Javits report) required under the Arms Export Control Act (AECA), section 25, to Congress and the Congressional Budget Justification. *SAMM, page 45.*

Implementing Agency (IA). IAs prepare and execute FMS and EDA cases to provide defense articles and services to meet Security Assistance requirements. IAs ensure that all applicable agencies review the LOR and LOA prior to approval. Every military department has at least one designated IA. For example, the primary IA for the Army is the commander, U.S. Army Security Assistance Command (USASAC). However, the Army has decentralized the preparation of LOAs. Cases involving material or services are prepared by the applicable life-cycle management command vice USASAC. Even though the preparation of LOAs is decentralized for the Army, USASAC maintains overall control in that all cases are forwarded to USASAC for review and signature before going to DSCA and the purchaser. *SAMM, pages 46, 125 and DISAM Online Green Book, pages 3-16.*

Iraq Security Assistance Mission (ISAM). ISAM is a "Pseudo-Security Cooperation Office." ISAM does not fall under the Ambassador, as SCOs generally do. ISAM operates under title 10 of the U.S. Code and reports to the combatant commander. ISAM does handle the three core duties of a traditional Security Assistance Office: facilitating Iraqi FMS; administering Iraq's International Military Education and Training program (funded by DoS); and End-Use Monitoring of sensitive articles transferred to Iraq. *DISAM Online Green Book, page 4-2 and e-mail from Lieutenant Colonel Paul Capes, Chief, Director's Action Group, Iraq Security Assistance Mission (22 Feb. 2010, 05:11 EST).*

Military Departments. The military departments and other IAs prepare and execute FMS and EDA cases to provide defense articles and services to meet approved security assistance requirements. They provide data to IAs and DSCA pertaining to price, source, and availability for use in processing FMS and EDA cases. *SAMM, page 46 and DISAM Online Green Book, page 3-15.*

Security Cooperation Organization (SCO). The term “SCO” is the general name for the DoD organization overseas with the primary responsibility for interfacing with the host nation on security assistance and security cooperation programs. The SCO, also referred to as the SAO, is normally co-located with the U.S. Embassy in the country and is a part of the ambassador’s country team. The chief of the SCO is responsible to three authorities: the ambassador, the commander of the Combatant Command (COCOM), and the director of DSCA. The pseudo-SCO in Iraq is ISAM and in Afghanistan is CSTC–A. *DISAM Online Green Book, page 3-12.*

Appendix F

Non-Standard Equipment Categories Eligible for FEPP in Iraq

Memorandum from DUSD (L&MR) to CG, MNF-I, subject: Authority to Transfer U.S. Property in Iraq (June 6, 2008).

Equipment Categories Authorized for Transfer:

1. Hand Shop and Industrial Tools
2. Air Conditioning Units
3. Personal Protective Equipment, Fire, Safety, Medical (except Psycho diagnostic test sets) and Spill Response Items and Equipment (restrictions apply)
4. Communication Equipment (restrictions apply)
5. Furniture
6. Food Service Equipment
7. Morale, Welfare, and Recreational Equipment not purchased with non-appropriated funds.
8. Base Support Equipment, Incinerators, Tanks, Pumps, Fuel Bladders, Washers/Dryers, Dumpsters (Water Purification Units are *not* authorized under Tiered Transfer Authority)
9. Containers, Shipping Storage, Refrigeration Units, and Material Handling Equipment
10. Power Distribution Equipment, Light Sets, Transformers, Substations, Distribution Panels
11. Vehicles and Trailers (restrictions apply)
12. Structures, Living Containers, Ablution Units, Chain Shelters, Building Modules, and Other Building Equipment
13. Generators (restrictions apply)
14. Construction, Material Handling, and Excavating Equipment, and Sweepers

Appendix G

Sample Authorization Base Transfer

USF-I J4

11 January 2010

MEMORANDUM FOR USF-W G4

SUBJECT: Authorization to Transfer Foreign Excess Personal Property (FEPP) to the Government of Iraq with POE WALEED (USF-W)

1. References:

a. TAB I to APPENDIX 2 to ANNEX D to MNF-I FRAMEWORK OPORD, 19 AUG 06

b. Memorandum, Deputy Under Secretary of Defense, Logistics & Materiel Readiness (DUSD L&MR), Subject: Authority to Transfer U.S. Property to Iraqi Ministries, dated 15 JUN 05 and amended 2 DEC 05, 14 MAR 06, 22 DEC 06, 6 JUN 08, 19 NOV 08, 7 JUL 09, 9 OCT 09.

2. USF-I J4 reviewed your inventory request to transfer non-mission essential equipment on POE WALEED. The equipment on the attached list is excess to USF-I units in the Iraq Theater of Operations. The items identified in the enclosed Property Inventory (enclosure 1) meet the criteria for the transfer of FEPP to an approved entity of the Government of Iraq (GoI) in exchange for substantial benefits in accordance with the references and 40 U.S.C. § 704. Per reference (a), provide copies of the transfer memorandum and a final inventory of FEPP transferred to the Office of the Prime Minister with POE WALEED following completion of the transaction.

3. FEPP not transferred with POE WALEED is eligible for transfer to another approved entity of the GoI using the tiered approval authority outlined in the references. Department of State approval of items and recipients must be obtained through U.S. Mission Iraq (USM-I) or Regional Embassy Offices (REOs) prior to executing a transfer using the tiered approval authority. Per reference (a), provide copies of USM-I/REO item/recipient approval transfer memorandum and a final inventory of any FEPP transferred using the tiered approval authority to USF-I J4 following completion of the transaction(s).

4. Points of Contract at USF-I J4 is MAJ _____ at 318 _____.

1 Encl
1. Property Inventory

BG, USA
USF-I J4

Appendix H

Sample Validation Memorandum for Tiered Transfer Authority

USF-I J4

11 December 2009

MEMORANDUM FOR Multi-National Corps-Iraq , Chief of Staff

SUBJECT: Disposition of Excess Personal Property Located at [Location Name (USD)] Tiered Authority

1. References:

a. TAB I to APPENDIX 2 to ANNEX D to MNF-I FRAMEWORK OPORD, 19 AUG 06

b. Memorandum, Deputy Under Secretary of Defense, Logistics & Materiel Readiness (DUSD L&MR), Subject: Authority to Transfer U.S. Property to Iraqi Ministries, dated 6 JUN 08, 19 NOV 08, 7 JUL 09, and 9 OCT 09.

2. Per request of [USD], USF-I reviewed an inventory of excess personal property (enclosure 1) for potential classification as Foreign Excess Personal Property (FEPP). The equipment on the attached list is excess to USF-I units in the Iraq Theater of Operations.

3. The items identified in enclosure 1 meet the criteria for transfer of FEPP to an approved entity of the GoI using the tiered approval authority outlined in the references in exchange for substantial benefits in accordance with the references and in exchange for substantial benefits in accordance with the references and 40 U.S.C. § 704. Per reference (a), provide copies of the transfer memorandum and a final inventory of FEPP transferred to the OFFICE OF THE PRIME MINISTER from [USD] following the completion of the transaction.

4. Points of Contract at USF-I J4 is MAJ _____ at 318 _____ .

1 Encl

1. Property Inventory

BG, USA

USF-I J4

Appendix I

Disposal of Personal Property Resources

1. Title 40 United States Code, chapter 7 (Public Buildings, Property, and Works)
2. Arms Export Control Act (AECA) of 1976, as amended, 22 U.S.C. § 2761, et al.
3. Foreign Assistance Act (FAA) of 1961, as amended
4. Security Assistance Acts of 2000 and 2002 (amended AECA and FAA)
5. National Defense Authorization Act for Fiscal Year 2010 (section 1234)
6. Security Assistance Management Manual (SAMM), DoD 5105.38-M
7. Defense Institute of Security Assistance Management
Online Green Book (<http://www.disam.dsca.mil/pubs/DR/greenbook.htm>)
8. International Traffic in Arms Regulations (ITAR), 22 U.S.C. § 120, et al.
9. Defense Reutilization and Marketing Service Instruction, DRMS-I 4160.14
10. Defense Materiel Disposition Manual, DoD 4160.21-M
11. Defense Demilitarization Manual, DoD 4160.21-M-1
12. Federal Acquisition Regulation, Part 45, Government Property
13. DoD Financial Management Regulation, DoD 7000.14R
14. Army Regulation 735-5, Policies and Procedures for Property Accountability
15. Deputy Under Secretary of Defense, Logistics and Materiel Readiness (DUSD L&MR), MNF-I Foreign Excess Personal Property Delegation Memoranda (Jun 08; Nov 08; Jul 09; and Oct 09)

(This is not intended to be an exhaustive list)