DATES: Submission of Comments:
Submit written comments to the address shown below on or before December 2, 2011. Comments received will be considered by DoD in the formation of a recommendation to the Secretary of Defense if a revision to the regulation or policy is necessary and appropriate.

ADRESSES: Submit comments to:
Director, Defense Procurement and Acquisition Policy, 3060 Defense Pentagon, Washington, DC 20301–3060, or e-mail to jeffrey.grover@osd.mil.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Grover, telephone 703–697–9352.

SUPPLEMENTARY INFORMATION: The Foreign Military Sales (FMS) Program is authorized under the Arms Export Control Act (AECA). The FMS program is an important instrument of U.S. foreign policy. It allows the United States to provide defense articles and defense services to friendly countries and international organizations in order to deter and defend against aggression, facilitate a common defense, address security issues of mutual strategic concern, and to strengthen the security of the United States. The sales agreement between the United States and a foreign country or international organization is executed via a Letter of Offer and Acceptance (LOA). Security Assistance Management Manual, DoD 5105.38–M, found at http://www.dsca.osd.mil/samm/, provides guidance for the administration and implementation of Security Assistance and related activities. The articles and services acquired via FMS sales are procured through the Department of Defense Acquisition System. In the LOA, the Department of Defense (DoD) promises that when procuring for the purchaser, DoD will, in general, employ the same contract clauses, the same contract administration, and the same quality and audit inspection procedures as would be used in DoD procurements. Pricing for FMS contracts typically use the same principles used in pricing of other defense contracts. However, the application of the pricing principles in Federal Acquisition Regulation (FAR) parts 15 and 31 to an FMS contract may result in prices that differ from other defense contract prices for the same item. Direct costs associated with meeting a foreign customer’s additional or unique requirements are allowable under such contracts. Indirect burden rates applicable to such direct costs are permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use. If the foreign government has conducted a competition resulting in adequate price competition as identified in FAR part 15, the contracting officer shall not require the submission of cost or pricing data. The contracting officer should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred. In accordance with the Presidential policy statement of April 16, 1990, DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved. Relating to offset costs, a U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA is financed wholly with customer cash or repayable Foreign Military Financing (FMF) credits. The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs. Typically, costs not authorized under FAR part 31 are not allowable in pricing FMS contracts. On November 22, 2002, the Defense Federal Acquisition Regulation Supplement (DFARS) was amended to increase FMS customer participation and acquisition transparency in DoD contracts awarded on behalf of FMS customers. DFARS subpart 225.73 provides authorization for FMS customers to participate in specifications development, delivery schedule planning, identification of warranties and other contractual requirements unique to the customer, as well as the review of pricing needed to make price-performance tradeoffs. This DFARS change encourages customer participation in both the acquisition process and industry discussions. Customers also are allowed to participate in the contract negotiation process within the limitations of DFARS subpart 225.73, to the degree authorized by the contracting officer (CO). This section specifically protects against unauthorized release of proprietary data and improper influence on the contracting process.

Mary Overstreet,
Editor, Defense Acquisition Regulations System.

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