
Draft Revision of ITAR 126.4(a) Exemption Creates Uncertainty About Defense Services Exports in Support of U.S. Activities Overseas

by Joshua D. Fitzhugh

DDTC recently proposed a wholesale revision of the exemption provided in ITAR § 126.4(a) for exports by or on behalf of the U.S. Government. That exemption is important to contractor support of U.S. Government activities overseas because it is one of the few exemptions that allow defense services exports without a license, but its complex and opaque requirements make it difficult for contractors to implement. The proposed revisions resolve some uncertainty in the current exemption, but also raise doubts about the scope of the exemption.

As currently drafted, ITAR 126.4(a) allows temporary export of defense articles and defense services on behalf of a U.S. Government agency or for carrying out any foreign assistance program authorized by law and subject to Presidential control by other means. The exemption currently requires that "all aspects of [the] transaction (export, carriage, and delivery abroad) [be] effected by" a U.S. Government agency or conducted under a Government Bill of Lading. The requirement that the Government "effect" all aspects of the export has been a source of uncertainty.

The proposed amendment attempts to address that uncertainty by breaking 126.4(a) into eight distinct exemptions:

Hardware and Technical Data Exemptions

1. 126.4(a)—Hardware and technical data exports that are: (a) by the Government itself; (b) for official Government end use; and (c) provided solely to U.S. persons.
2. 126.4(b)—Hardware and technical data exports that are: (a) by a Government contractor; (b) for official Government end use; and (c) provided solely to U.S. persons.

3. 126.4(g)—Hardware and technical data exports that are: (a) by an entity subcontracted to a Government contractor; (b) for official Government end use; and (c) provided solely to U.S. persons.
4. 126.4(h)—Hardware and technical data exports that are: (a) by any registered entity; (b) to a Government contractor; (c) for use by that contractor in providing intelligence, operational or other support to Government operations overseas; and (d) provided solely to U.S. persons.
5. 126.4(d)—Hardware and technical data exports that are: (a) by a Government contractor; and (b) on behalf of the Government under a cooperative project agreement.

Defense Services Exemptions

1. 126.4(c)—Defense services exports that are: (a) by a Government contractor; (b) for official Government end use; and (c) provided solely to U.S. persons.
2. 126.4(e)—Defense services exports that are: (a) by a Government contractor; (b) on behalf of the Government; and (c) provided in support of "any foreign assistance authorized by law" and subject to Presidential control by other means.
3. 126.4(f)—Defense articles, technical data and defense services exports that are: (a) by any registered entity; (b) at the written direction of the Defense Department; and (c) in support of a Cross Servicing Agreement. However, no training of foreign persons may be conducted under this exemption, and defense services exports are limited to those performed on defense articles owned by a foreign government.

The conditions clarify the scope of the 126.4 exemption for defense article exports, and confirm that contractors can use 126.4 to support U.S. Government activities in certain circumstances.

Significant uncertainty remains in the proposal's approach to defense services, however. The draft covers defense services exports in three places—126.4(c), (e) and (f). Proposed Sections 126.4(c) and (f) largely prohibit exports of defense services to foreign persons. This both limits the usefulness of the exemptions and appears to conflict with Section 120.9(a)'s definition of defense services as "the furnishing of assistance... to foreign persons."

The remaining defense services provision, proposed Section 126.4(e), appears more promising. It requires that exporters have a contract with the Government and obtain a certifying letter from the relevant contracting agency, but is otherwise similar to the existing 126.4(a) exemption in allowing Government contractors to export defense services to foreign persons in support of any foreign assistance authorized by law and subject to Presidential control by other means.

Unfortunately, neither proposed Section 126.4(e) nor the ITAR define "foreign assistance authorized by law and subject to control by the President by other means." The recently proposed brokering rules provide a definition, but not one that would encourage use of the exemption. Section 129.7(b)(2) of the draft brokering rules states that absent written approval from DDTC, contract activities will not qualify as foreign assistance under the brokering rules unless a specific clause attesting to that fact is included in the Government contract. Although this restriction in the proposed brokering rules does not apply directly to the 126.4(e) exemption, it would nonetheless provide the ITAR's only operable definition of "foreign assistance... subject to control by the President." That fact could inadvertently limit contractor use of the 126.4(e) exemption, to the detriment of both the contractors and the Government activities being

supported, unless and until the Defense Department agreed to amend its services contracts to add the required clause.

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