ETHICS IN INTERNATIONAL DEFENSE ACQUISITION PROGRAMS

Different Framework than for Domestic

Richard Kwatnoski

International cooperative acquisition programs are the most preferred materiel development approach according to DoD Directive 5000.1 on defense acquisition. Yet our acquisition personnel, after fulfilling all mandatory requirements to attain the highest acquisition training level, obtain no information regarding ethics in international programs. Acquisition personnel entering an international acquisition program will be confronted with a different legal, administrative and ethical framework than found in domestic programs.* While the primary focus of this article is ethics in an international acquisition program, the ethical considerations often cannot be separated completely from the legal and administrative aspects.

* This article addresses considerations in an international acquisition program. Personnel engaged in foreign military sales will find that some of the legal and administrative framework is different under Security Assistance.

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The author thanks his wife, Ellen, and Jerry A. Cooke of Jerry A. Cooke & Associates for their helpful comments on this article.

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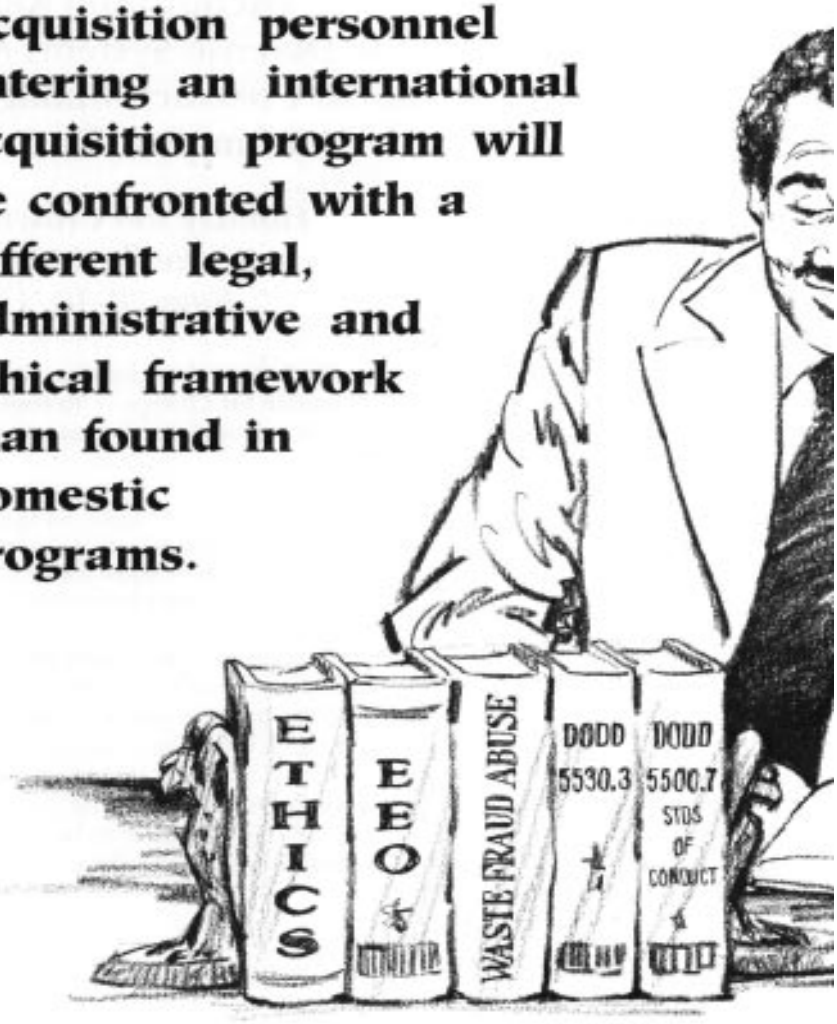

Legal and Administrative Framework

The Constitution of the United States (Article I, Section 9, Clause (8)) explicitly prohibits federal officials from accepting any office, title, gift or compensation from a foreign ruler or government without congressional consent. Virtually every activity of a federal official conducted with foreign representatives must be authorized by appropriate legal and administrative authority (directives, instructions, regulations and policy memoranda). Table 1 shows some of the broad activities associated with international acquisition programs, and a general reference. These are listed in the most probable order in which they would be encountered in the evolution of an international acquisition program.

General Principles of Ethical Conduct

"Ethical Conduct for Department of Defense Personnel," as contained in an Under Secretary of Defense (Acquisition) Memorandum of September 26, 1991, provides no specific guidance on ethical conduct of defense acquisition personnel in international situations. Presumably, the basic ethical principles of *integrity, honesty* and *fairness* should apply. However, we should be aware that these principles may have different meaning in other cultures. This make our definitions not better or worse, only *different*.

For example, take the first principle of integrity. In many cultures, especially those which are religion-based, the end does justify the means. The second principle of honesty can be misinterpreted. Certain cultures, especially in the Far East, place such a high emphasis on politeness and avoiding offense, that normal American candidness could be found offensive. The third principle of fairness may be the most difficult ethical principle to uphold in the international environment. Fair play is culturally American, and evolved primarily out of English culture. It has no meaning in many cultures. Fairness, compromise, and split-the-difference are very American. Compromise can be considered as a sign of weakness in some cultures. Split-the-difference may really mean that you are now halfway closer to the correct solution in the foreigner's point of view. One thing is certain — the American will be the most conscious of the ethical considerations in the program in a virtual checklist mentality.[12]

Specific Principles of Ethical Conduct

I conducted a thorough review of the 14 "Principles of Ethical Conduct for Government Officers and Employees" from Executive Order 12674 (April 12, 1989) for potential international implications. Nothing in the 14 principles applied specifically to international acquisition programs; however, many of the principles should be highlighted for special international implications. *Significantly*, more than half of the 14 ethical principles have international implications. Those principles follow with a general discussion of the international implications. To the reader, I point out that this is a discussion of where issues are likely to arise, not final legal solutions to every possible contingency. The

TABLE 1. Activities Associated with International Acquisition Programs

Broad Activities	Legal and Administrative Authorities
Social Events and Receptions Visits	DoD Directive 5500.7[1] Country Clearance Procedures[2] Data Exchange Agreement[3] Memorandum of Agreement[4]
Exchange of Technical Information	DoD Instruction 2015.4[5] DoD Directive 2000.9 - draft[6] DoD Directive 5230.11[7]
Negotiation	DoD Directive 5530.3[8]
Cooperative Acquisition	General R&D Authority[9] Quayle Authority[10] Cooperative R&D Authority[11]

remaining principles with no distinguishing international implications are shown for sake of completeness in Table 2.

— *"Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain."*

Loyalty to the Constitution, and specifically Article I, Section 9, Clause (8), prohibits federal officials from accepting any office, title, gift or compensation from foreign rulers or governments, unless authorized by the Congress.

— *"An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties."*

Gifts from foreign governments are treated differently than gifts from contractors. Unsolicited, promotional items of nominal value (not exceeding $20 per item, or $50 per company per calendar year) are generally acceptable from a contractor, domestic or foreign. An unsolicited gift from a foreign government valued at less than $200 is generally acceptable in accordance with the DoD directive on gifts from foreign governments.[13] If the gift is greater than $200 in value, an attempt should be made to decline accepting it. However, if this would result in offense or embarrassment, or adversely affect U.S. foreign relations, the gift may be accepted *on behalf of* the government. Special rules apply in this instance, but in general terms, one may surrender the gift to your agency for disposal or official use, or the recipient may purchase it at the appraised value plus appraisal costs.[14] The key word with regard to gifts is "accept" vs. "solicit," the latter always being unethical and illegal. Consult with your agency's legal office in this instance, or wherever a question concerning a breach of ethical conduct might exist.

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— *"Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government."*

Commitments binding the U.S. Government are subject to strict controls and much contemporary legal debate. Control of international acquisition program commitments is exercised by the Office of the Secretary of Defense under DoD Directive 5530.3 on international agreements. One must obtain proper legal authority to both negotiate and conclude an international acquisition program agreement. This agreement is normally called a Memorandum of Agreement (MOA), or Memorandum of Understanding (MOU), and is required by law for all cooperative acquisition programs. The controls of the Office of the Secretary of Defense on the MOA/MOU process extend to determinations of appropriate legal authority to conduct the program, financial authority to obligate funds for the program, security policy authority to exchange information, and host of other complex considerations. Furthermore, a requirement for these agreements is consultation with the Departments of Commerce and State, as well as congressional notification.

— *"Employees shall act impartially and not give preferential treatment to any private organization or individual."*

Table 2. Specific Principles of Ethical Conduct Having No Apparent Implications in International Acquisition Programs

- "Employees shall not hold financial interests that conflict with the conscientious performance of duty."
- "Employees shall not engage in financial transactions using nonpublic government information or allow the improper use of such information to further private interest."
- "Employees shall put forth honest effort in the performance of their duties."
- "Employees shall not use public office for private gain."
- "Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those — such as Federal, State, or local taxes — that are imposed by law."
- "Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order."

This principle requires elaboration, as it most often seems to work in the reverse with international acquisitions. Certain types of preferential treatment for domestic contractors is encouraged by the Federal Acquisition Regulations to meet national objectives of protecting or enhancing domestic sources for defense products. Examples of this type of legal preferential treatment are the Buy American Act, the Berry Amendment on food and clothing, the Stratton Amendment on large caliber gun tubes, and Required Sources for Jeweled Bearings. However, under certain situations, the Secretary of Defense may require subcontracts be awarded to particular allied nation subcontractors in furtherance of cooperative projects, and may waive most of the restrictive provisions of U.S. law.[15]

— *"Employees shall protect and conserve Federal property and shall not use it for other than authorized activities."*

The protection, conservation and authorized use of U.S. Government property in international acquisition programs can become a complex consideration. The treatment of intellectual and physical property, and the potential liability associated with the use of government property within an international acquisition program, is far beyond the scope of this article. Normally, the U.S. Government must obtain a return, or *quid pro quo*, (equal or equitable, depending upon the legal authority cited) to conduct the program. Strict rules apply to the loan, or transfer, of U.S. Government property in an international program.[16] Experts should be consulted before committing to an international acquisition.

— *"Employees shall not engage in outside employment activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities."*

One must be conscious of national sovereignty, and different rules and regulations governing foreign nationals.

The Constitution prohibits compensation to federal officials for employment with a foreign government. However, DoD Directive 5500.7 on Standards of Conduct notes that travel or reimbursement for travel may be accepted under certain circumstances. One should be especially sensitive to any aspect of employment activities with a foreign government. Legal counsel should be obtained regarding any of these activities.

— *"Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."*

Disclosure of waste, fraud, abuse or corruption must be made to appropriate U.S. Government authorities. One must be conscious of national sovereignty, and different rules and regulations governing foreign nationals. Ignoring these could be construed as sanctioning unethical activities.

— *"Employees shall adhere to all laws and regulations that provide for equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap."*

This principle may become an issue when dealing with certain cultures. Gender is an especially sensitive issue in much of the world, and especially the Middle East and Far East (although this is country dependent). I advise women entering the world of international acquisition to study this issue carefully.[17] Religion could be an issue in selected nations in the Middle East. My personal experience is that race is of lesser importance; Americans are perceived and accepted as a multiracial society. U.S. Government officers and employees should be especially vigilant in avoiding the compromise of this ethical principle in international situations.

Conclusions

International acquisition programs present unique ethical and legal challenges to the acquisition professional. The acquisition professional should become educated on the foreign culture that he or she will be dealing with to avoid any unanticipated negative outcomes from a clash in principles. More important, the acquisition professional needs to become familiar with the highlighted specific principles to avoid breaches in ethical conduct in international situations or, most importantly, to avoid unanticipated administrative or legal violations. A review of my remarks for these principles should serve as a general guide for navigating the international minefield of diverse ethical and legal standards.

Endnotes

1. DoD Directive 5500.7, "Standards of Conduct," May 6, 1987.
2. All foreign visits must be cleared with the host government. Your local security office or international programs office can advise you on clearance requirements and lead times for each country. NATO visits are handled the same as a country visit.

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tive contracting process is especially weak. As noted earlier, DSMC has forwarded additional information related to specifications and standards to the Bulgarian MOD through the in-country MLT in the near future.

The Bulgarian delegation clearly demonstrated a totally different concept of the contract. To them it represents a service order from one governmental echelon to another which cannot be refused. The competitive, open nature of obtaining the contract, along with the American system of contract performance was a foreign concept, and much discussion was spent in trying to explain this.

Their questions were directed at the end of the process to the application of contractually-required military specifications, and how such standards evolve into military programs through the contracted acquisition process. As previously mentioned, the Bulgarian government has just enacted a patent law, which increased their interest in applying this to their infrastructure.

As we went deeper into our system of "open markets" and "free enterprise" during the working group sessions, we were proud of how well American industry works. As we discussed issues of quality assurance, Defense Contract Management Command (DCMC), etc., we were taken back when the Bulgarians drew a parallel between their government-owned captive industry and American industry with extensive program office and DCMC in-plant representatives monitoring every step of the development and production process.

In the plenary and group sessions it was mentioned, also, how our major system acquisition programs have strong DoD and congressional oversight. The TCT free-market nonexperts explained that the key difference is that private industry has ownership of their technology and the ability to compete or not compete for new work. Also, the continuous DoD Acquisition Reform effort is to empower the engineering strength of our private sector, but it must live in the real world of tax dollars at work.

No further DSMC assistance is scheduled. The focus of the USEUCOM program is to assist each nation with what *they* want as they want it. Once they've had a chance to study the forwarded U.S. specifications and regulations, they may call upon another team to extend the learning curve. Free-market forces are strongly at work on the Bulgarian people from outside, causing them to spread their valuable resources thin as they embrace so much opportunity so fast.

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3. DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program," November 5, 1963.

4. Under Secretary of Defense (Policy) Memorandum I-93/16347, Subject: Security Arrangements for Multinational Armament Cooperative Programs, September 21, 1993. Document Number 4., "Security Clauses," paragraph 2 - "Clauses Governing Visits"; and Document Number 7, "International Visit Procedures."

5. DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program," November 5, 1963.

6. DoD Directive 2000.9, "DoD Participation in International Technical Exchange, Cooperative and Coproduction Programs." Draft.

7. DoD Directive 5230.11, "Disclosure of Classified Military Information to Foreign Governments and International Organizations," December 31, 1994.

8. DoD Directive 5530.3, "International Agreements," June 11, 1987.

9. Title 10 U.S. Code.

10. Section 27 of the Arms Export Control Act (22 U.S. Code 2767, "Authority of the President to Enter into Cooperative Projects with Friendly Foreign Countries."

11. Section 2350a of Title 10, U.S. Code, "Cooperative Research and Development Projects: Allied Countries."

12. "Is U.S. Business Obsessed with Ethics?" Daniel Vogel, *Across the Board: The Conference Board Magazine*, November/December 1993.

13. DoD Directive 1005.13, "Gifts from Foreign Governments," October 13, 1988; Change 1 dated February 21, 1990. This directive allows for periodic increases in the value of gifts of minimal value.

14. Public Law 95-105, "Receipt and Disposition of Foreign Gifts and Decorations." August 17, 1977.

15. Section 2350b of Title 10, U.S. Code, "Acquisition of Defense Equipment Under Cooperative Projects." Original Quayle Amendment, further amended.

16. Section 65 of the Arms Export Control Act (22 U.S.C. 2796), "Leases of Defense Articles and Loan Authority for Cooperative Research and Development Purposes."

17. *The Cultural and Political Environment of International Business: A Guide for Business Professionals*, Don Alan Evans, McFarland & Company, Inc., 1991. This reference contains an especially good write-up on gender, as well as other related considerations, such religion and culture.