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BAE Systems Never Asked Justice for Global Settlement

United Kingdom's BAE Systems (BAES) never asked the Justice Department to include a global settlement with the State Department when it reached agreement in February to plead guilty to conspiracy to make a false statement to the U.S. government, according to the Justice attorney who worked on the case. Without the global settlement, BAES has been operating under a cloud awaiting a decision by State's Directorate of Defense Trade Controls (DDTC) on whether it will face debarment from U.S. export licensing privileges or additional penalties in a consent agreement with the agency. The lack of a global settlement has perplexed many in the exporting community since BAES agreed to pay a \$400 million criminal fine as part of its plea.

"It just didn't enter into discussions," said Justice attorney Patrick Murphy. "I don't have any idea why they didn't approach the regulators about that, or they may have. I don't know," Murphy told a compliance program sponsored by the American Conference Institute July 14. "DoJ didn't take a position," he added. "I don't know why DDTC wasn't brought in early. I can't say that would have changed our result," Murphy said.

DDTC suspended the review of export licenses for BAES in March after the company entered its guilty plea and then resumed licensing for selected items and destinations while it considered whether to take legal action against the firm. "The Department continues to review other BAES related license applications to determine whether a decision can be made," a State official told WTTL. "We continue to actively engage with key stakeholders to resolve this matter as expeditiously as practicable," he added.

"We continue to accept BAES related licenses for processing," he said in an e-mail to WTTL. "Since March, the department has not been holding BAES license applications supporting U.S. and coalition operations in Afghanistan and Iraq, license applications that include no foreign BAES subsidiaries, and license applications for items related to existing programs for NATO and Major Non-NATO allied countries," the official explained.

China Makes Offer to Join Government Procurement Agreement

China not only kept its promise to submit a new proposal to join the World Trade Organization (WTO) Government Procurement Agreement (GPA), but at the first WTO review of the offer July 15, Chinese officials said they are willing to consult with other WTO members on their concerns about the offer and possibly present a revised version. At the GPA Committee



meeting, the U.S., European Union (EU) and Japan mostly praised the improvements in the Chinese offer, but still said additional changes are needed. China's willingness to consult on the text and revise it tempered the concerns that several WTO members had, according to sources in Geneva. China had promised to submit a new offer to join the GPA during the bilateral Strategic and Economic Dialogue (SAED) meeting with the U.S. in May (see **WTTL**, May 31, page 2). Deputy USTR Demetrios Marantis told an audience in Washington July 15 that the U.S. is still analyzing the Chinese proposal.

“But we recognize that it includes significant improvements over its initial offer that was submitted at the end of 2007,” he said. “After we complete our analysis, including consulting with domestic stakeholders, we will work with China and other GPA members to ensure China's terms of accession are comprehensive and comparable to that of other GPA parties,” he added. Marantis said two areas of concern are how sub-national government entities will be treated as well as state-owned enterprises.

The new offer improves on China's previous proposal in six ways, according to sources familiar with the text. It would (1) cover more central government entities; (2) lower the threshold value for government contracts subject to the GPA; (3) adopt international classifications instead of domestic classifications of services and supplies to be covered; (4) adopt a negative list of products exempt from the agreement; (5) expand the services that would be subject to the agreement; and (6) reduce the implementation period to five years from 15 years.

China's new proposal offers to reduce the threshold value for contracts subject to the GPA over the five-year implementation period. The threshold for supplies to central government entities will decline from 500,000 Special Drawing Rights (SDRs) in the first year to 200,000 in the fifth. For services, the numbers fall the same. The threshold for construction services will go from 100,000,000 SDRs in the first year to 15,000,000 SDRs in the fifth year, one source reported. The Chinese also offered to expand coverage in services and construction to include architectural services, rental and leasing services, advertising services, management consulting, equipment maintenance and repair. Almost all 51 construction categories listed by the United Nations will be covered, the source said.

Renewed U.S.-Korea FTA Talks Off to Slow Start

New talks to resolve complaints about the Korea-U.S. (KORUS) Free Trade Agreement (FTA) aren't getting off to the quick start that U.S. Trade Representative (USTR) Ron Kirk promised after President Obama announced his desire to have those issues addressed by November (see **WTTL**, July 5, page 1). Kirk had said he wanted to begin the talks in early July with Korean Trade Minister Kim Jong-hoon, but USTR sources say they are trying to reschedule that discussion. News reports in Korea suggest the talks won't start until September.

“We have to figure out what we are going to do domestically in terms of what package of proposals to present to Korea as we figure out a timetable with the Koreans on how best to engage,” Deputy USTR Demetrios Marantis told reporters July 15. He said autos and beef are the key issues that will have to be addressed. “There are other concerns that people have,” he said.

It remains unclear whether the complaints about the FTA can be resolved by opening up and revising the text of the agreement or through “side letters.” Renegotiating the text could require presidential “fast-track” negotiating authority, which has expired. “Once we decide what our policy tools are, then we will figure out what legal form it will take,” Marantis said. “We are engaged right now and working very closely with Congress as well as stakeholders to figure out how we can best address those concerns and then we will be in a position to present a package of proposals in the near future with the hope of meeting the president's challenge of concluding by the G-20 in November,” Marantis told a program in Washington earlier. Rep. Adam Smith (D-Wash.) told the program that two things are needed to get a KORUS FTA

approved by Congress. “To get there we need to show the members of Congress that we got more out of the agreement in the next four months of the negotiating process,” he said. A second critical piece is “to go the people who are opposed to Korea and have concerns about trade agreements and basically say, ‘What do you want?,” Smith said. “If you really dig down deep and ask that question, you will find a lot of the objections that have been out there have been addressed,” he said.

Support for the KORUS agreement also came in a July 14 letter to President Obama from firms belonging to the Emergency Committee for American Trade (ECAT). The letter noted the deal’s elimination of tariffs and nontariff barriers to U.S. exports of goods and services. “Decisive and quick progress on the Korea agreement is especially vital given that the European Union and Korea have signed their own trade pact which, once implemented, will put U.S. companies and their workers at an even greater disadvantage in the Korean market until the Korea-U.S. agreement is implemented,” it said.

New Single Export Control List Will Have Three Tiers

The single export control list envisioned in the Obama administration’s export control reform plan will merge the Commerce Control List (CCL) and the U.S. Munitions List (USML) and will have three tiers, according to Brian Nilsson, the White House staffer who chairs the interagency task force working on the reform plan. The placement of an item in a tier also will dictate what priority it gets in the license-review queue, he told the Defense Trade Advisory Committee (DTAG) July 7 (see **WTTL**, July 12, page 1).

The purpose of the tiering plan “is to make sure the most critical crown jewels will be in the highest-tiered control and subject to the most stringent licensing requirements and compliance requirements and enforcement requirements,” Nilsson said. “As you move down the tiers, we would have more flexible mechanisms available,” he added. “As we stand up the process and eventually get to Phase III, we want to be able to prioritize how to process a license based on the tier of control,” he said.

“A low-level item, such as a fingerprinting kit, should not go through the same level of interagency [review] like something like a five-axis machine tool goes through,” Nilsson said. “So what we envision is that we would peg the licensing process to the tier, so you would have different process in place based on the tier of control,” he added. The interagency work on developing the criteria for which items will go into which tiers and the “bright line” process for deciding the Commodity Jurisdiction for an item “has been our highest focus because... everything flows from what is on the control list,” he told the DTAG.

DDTC Will Give Credit for Disclosures Known to Other Agencies

DDTC will give defense exporters credit for making a voluntary disclosure to the agency even if the potential violation was already known by another federal agency, said Lisa Studtmann, DDTC’s director of defense trade compliance. “I’d like to be clear that any disclosure to us at any time is a positive thing and can be mitigating,” Studtmann said July 14.

“The fact that some other part of the government may already know about that does not mean we don’t want a disclosure. It does not mean you won’t get some mitigation for that,” she told an American Conference Institute program on compliance. “I try to emphasize that working with our office, volunteering information, being honest and open, and just generally trying to fix the issues, will go an extremely, extremely long way,” Studtmann said. Voluntary disclosures also are unlikely to lead to any monetary penalty, she offered. “In my view, and I think this is consistent with the past, if there has been a voluntary submission of information and the company is generally working with our office, it is extremely unlikely -- I can’t say it can’t happen --

but I say it is unlikely and it is not our practice to impose monetary penalties,” she noted. Studtmann also stressed the value of conducting compliance audits and reporting any violations discovered in the process. When companies conduct periodic audits, find problems and then submit disclosures to DDTC, “that is viewed very positively by our office,” she said.

“We know that companies that have robust compliance programs are going to find things periodically,” she added. Exporters need to document their findings and provide DDTC with “excruciating details” about what they find, she said. “That’s extremely important,” she noted. Studtmann also said the agency won’t pursue a consent agreement with a company “unless we are ready to do a real charging letter with an administrative law judge in place,” she said. “If we start a dialogue on a consent agreement, it will mean that we are fully prepared to do a real charging letter, if it is needed,” Studtmann warned.

* * * **BRIEFS** * * *

EXPORT ENFORCEMENT: Agar Corporation of Houston, Texas, maker of flow metering equipment for petroleum industry, has agreed to pay \$2 million in fines and forfeitures in settlements with Justice and OFAC to settle charges that it violated Sudan Sanctions Regulations and IEEPA by exporting 16 Multi-phase Flow Meters through its Venezuelan affiliate, Agarcorp de Venezuela, to Sudan for use in Melut Basin oil field. It pleaded guilty in Houston U.S. District Court to violating IEEPA and will pay \$760,000 criminal fine, \$380,000 forfeiture and \$860,000 civil penalty to OFAC. Firm will deposit \$250,000 toward penalties and pay rest in monthly payments of \$36,458.34 until balance is paid off. U.S. government has accepted promissory note for balance secured by company real estate in Houston.

TRADE FIGURES: May goods exports jumped 26.5% to \$107 billion compared to May 2009, but goods imports surged 34% to \$161.7 billion, Commerce reported July 13. Services exports in May rose 9.6% to \$45 billion from year ago, while service imports went up 9.4% to \$32.8 billion.

DEFENSE TREATIES: Sen. Richard Lugar (R-Ind.) introduced legislation (S. 3581) July 14 to implement pending defense trade treaties with United Kingdom and Australia. Treaties have still not been reported out of Foreign Relations Committee for Senate ratification (see **WTTL**, June 10, page 1). Need for legislation to assure U.S. ability to enforce provisions of treaties has been one of factors delaying ratification. “This legislation would address the problem by providing clear legislative authority under the Arms Export Control Act to implement and enforce the treaties,” Lugar said in statement accompanying introduction of measure. “In particular, it would provide authority to exempt from licensing requirements under the Arms Export Control Act exports of defense articles made in connection with the treaties,” he explained. “It would provide authority to allow violations or abuses of the treaty to be prosecuted under enforcement provisions of the Arms Export Control Act. It would provide for notification to the Congress of significant exports of defense articles made pursuant to the treaties,” he added.

CRIME CONTROLS: BIS in July 15 Federal Register issued final order revising CCL to update rules and controls on items subject to export licensing for crime control reasons (see **WTTL**, Aug. 17, 2009, page 4). New rule addresses controls on striking weapons, restraint devices, shotguns and parts, optical sighting devices and electric shock devices. It also adds equipment designed for execution of humans to CCL and adds definition of torture to implement UN convention against torture. “This rule makes no changes to the longstanding policy of denial of applications to export or reexport specially designed implements of torture,” BIS said.

EXPORTING: Second annual report from ITC released July 15 on role of small- and medium-size enterprises (SMEs) in exporting found that top barriers to exporting include: insufficient access to finance, complex and sometimes nontransparent domestic and foreign regulations, rising and unpredictable transportation costs, small scale of SME production, tariff and nontariff barriers, time consuming foreign customs procedures, language and cultural differences, and lack of knowledge of foreign markets. It also said SMEs in U.S. export less than comparable size firms in EU, but attributed difference to fact that U.S. has more integrated internal market and more large firms than EU. In addition, EU gives more financial and marketing support to exporters.

HARMONIZED TARIFFS: CBP asked ITC July 14 to conduct study under Section 1205 of 1988 Omnibus Trade Act on whether to revise Harmonized Tariff Schedule for products classified as “festive articles.”