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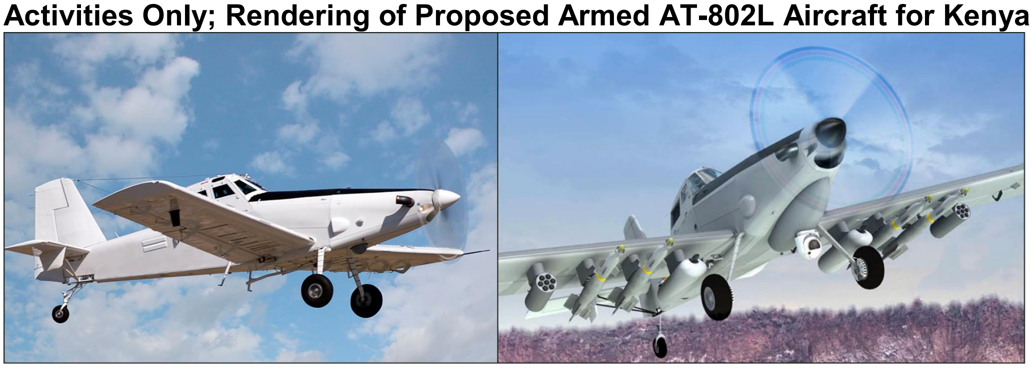
Congressional Requesters

Foreign Military Sales: Kenyan Request for Armed Aircraft

In January 2017, the Department of Defense (DOD) notified Congress of a proposed Foreign Military Sale (FMS) to the government of Kenya for up to 12 armed aircraft known as the AT-802L. You requested that we examine the FMS request and the U.S. government's subsequent offer. This report examines the facts and circumstances surrounding the proposed sale of up to 12 AT-802L aircraft to the government of Kenya through the FMS program. See figure 1 for a photograph of a certified AT-802L aircraft configured for intelligence, surveillance and reconnaissance activities only, and a rendering of the proposed armed AT-802L aircraft requested by Kenya.

Figure 1: Certified AT-802L Aircraft for Intelligence, Surveillance and Reconnaissance Activities Only; Rendering of Proposed Armed AT-802L Aircraft for Kenya



Source: (left to right) © 2015 L-3 Platform Integration Division, and © L-3 Communications, 2017. | GAO-17-713R

To perform this work, we reviewed key acquisition documentation such as the Letters of Request (LOR) from the Kenyan government, the subsequent Letter of Offer and Acceptance (LOA) from the U.S. government, and other DOD documentation relevant to the FMS process. We interviewed officials from the U.S. Air Force, the Defense Security Cooperation Agency (DSCA), a Security Cooperation Organization (SCO) in Kenya, and the Department of State (State), who provided insights into the request and the FMS process.[1] Finally, we reviewed relevant laws and policies, such as DOD's Security Assistance Management Manual (SAMM), which guides the day-to-day management of the FMS program.[2]

[1]Security Cooperation Organizations (SCOs) are comprised of U.S. military and civilian personnel in DOD stations overseas that manage security cooperation programs. The DOD has SCO personnel working in most of the U.S. embassies around the world. In the Foreign Military Sales process, SCOs can assist foreign partners by sharing their knowledge or contacting subject matter experts in specialty areas to respond to detailed or technical questions.

[2]The FMS program is authorized by the Arms Export Control Act (AECA), as amended, which establishes general rules for the program. The Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) provide implementing regulations for acquisition for foreign military sales, and DOD's Security Assistance Management Manual further implements ACEA, FAR and DFARS. While GAO reviewed the laws and policies that govern the FMS program, this work does not constitute a GAO legal opinion on whether the transaction complied with FMS laws and policies.

We conducted this performance audit from April 2017 to September 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Results in Brief

In December 2015, the government of Kenya submitted the first in a series of requests to purchase six AT-802L aircraft to support the country's anti-terrorism efforts. The requests included an option for additional purchases, so the U.S. Air Force developed an approach that allows for the purchase of up to 12 AT-802L aircraft. The offer was set to expire in June 2017, but, according to DOD and State officials, Kenyan government officials did not want to agree to the offer until after their national elections, which took place in August 2017. For this reason, the Air Force authorized an extension, giving the Kenyan government until September 16, 2017, to make a determination. As of August 30, 2017, the Kenyan government had not formally agreed to the offer. Air Force, DSCA, and SCO officials stated that Kenya conducted its own market research prior to selecting the AT-802L, which included attending air shows and consulting partner nations, and that it considered several aircraft models manufactured by several companies. According to a SCO official based in Nairobi, the Kenyans value the AT-802L's simplicity of use, ease of maintenance, and long loiter time. When the Kenyans initially requested the AT-802L, they listed Air Tractor as the prime contractor, and L3 Technologies, Inc. (L3) as a subcontractor. In January 2017, the Kenyans sent a memorandum correctly identifying L3, rather than Air Tractor, as the prime contractor. DSCA and SCO officials explained that L3 is considered the prime contractor because it is the systems integrator for the AT-802L. We found that the events related to this FMS transaction are consistent with the standard FMS process.

The laws and policies that govern the FMS program allow DOD to enter into contracts for military equipment and services for resale to a foreign country, and to use sole-source contracting under certain circumstances. Specifically, the Competition in Contracting Act of 1984 (CICA) allows for sole-source contracting when the acquisition is to be reimbursed by a foreign country that provides a written request to procure FMS goods or services from a specific firm.[3] DOD's SAMM states that foreign customers need not provide a rationale for their sole-source contracting requests, and that the U.S. government does not generally investigate circumstances behind foreign purchasers' requests to use sole-source contracting as long as U.S. government officials are not aware of any indication that such requests violate U.S. law or ethical business practices.[4] Air Force and DSCA officials stated that they did not have any reason to believe that Kenya improperly selected the AT-802L. The Air Force determined that Kenya made a reasonable choice when it selected the AT-802L aircraft.

We are not making any recommendations in this report.

Background

The Arms Export Control Act, as amended, authorizes the sale of military equipment and services to eligible foreign customers under the FMS program, which is one of multiple security cooperation programs that provide for the transfer of such military equipment and services to

[3] 10 U.S.C. § 2304(c)(4).

[4] SAMM § C6.3.4 and C6.3.4.3.

foreign governments.[5] Through the FMS program, the U.S. government may sell military equipment and services to foreign countries through government-to-government agreements at no cost to the U.S. government. DSCA reported a total of $33.6 billion in sales in fiscal year 2016.

According to Air Force, DSCA, and State officials, the FMS program benefits both foreign governments and the U.S. government. These officials told us foreign governments that choose to use the FMS program leverage DOD's mature and well-regulated acquisition process, receive greater assurance of a reliable product, benefit from DOD's economies of scale, improve interoperability with the U.S. military, and build a stronger relationship with the U.S. government. DSCA anticipates the strong demand for FMS-provided military equipment and services will continue, but Air Force, State and SCO officials acknowledged that using the FMS program is generally not the quickest or least expensive option for foreign governments. Other options include direct commercial sales, where foreign governments can contract directly with a U.S. firm without the assistance of the U.S. government. From the U.S. perspective, Air Force and DSCA officials stated that the FMS program expands the market for American businesses and contributes to foreign policy and national security objectives.

The United States has been building a relationship with Kenya via the FMS program for more than 40 years. Kenya first used the FMS program in 1976 to purchase 12 F-5 fighter jets.[6]

Multiple U.S. agencies have a role in the FMS program, including State and DOD. State has overall responsibility for the program and approving FMS sales. The DOD organizations involved include:

- **Defense Security Cooperation Agency (DSCA)**. The DSCA administers and supervises the execution of all FMS cases, develops related policy, and conducts negotiations with the foreign government, among other responsibilities.
- **Implementing Agency.** The implementing agency—usually a military department—executes the sale, gathering information, developing the sales agreement, and fulfilling the agreement by supplying items from existing stocks or procuring the items through the DOD acquisition process. The designated implementing agency varies depending on what military equipment and services are requested. For the proposed aircraft sale to Kenya, the U.S. Air Force is the implementing agency.
- **Security Cooperation Organization (SCO).** The SCOs are DOD organizations permanently located in foreign countries. SCO personnel are assigned responsibilities for carrying out security cooperation management functions. Among other things, they act as intermediaries between the various U.S. government agencies involved in the FMS process and the host-country governments. They also facilitate business outreach for licensed American vendors in the foreign country. According to a SCO official, SCOs encourage the host-country governments to buy American products without endorsing particular U.S. vendors.

The FMS process generally includes multiple steps involving several different entities. Key aspects of the process include:

Request and Offer:

The FMS process begins when a foreign government submits a Letter of Request (LOR) to State or DOD to purchase military equipment or services. In the LOR, the foreign government

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[5]Where we reference military equipment and services, we refer to items and services included in the definitions for both "defense articles," "defense services," and, with respect to commercial exports, "defense articles and defense services" under section 2794 of title 22 of the U.S. Code.

[6]GAO, *Military Sales: An Increasing US Role in Africa*, ID-77-61, (Washington, D.C.: April 4, 1978).

may express interest in (1) obtaining a preliminary cost estimate for the capabilities it needs; or (2) requesting a Letter of Offer and Acceptance (LOA), or sales agreement, which details the specific items, quantities, cost, and schedule for the sale of military equipment and services. Defining the requirements to meet the desired capability can be an iterative process that requires multiple interactions between the foreign government and the military department or vendors.

The LOR is forwarded to the implementing agency, which then provides preliminary pricing data, or develops a LOA or a sales agreement between the U.S. government and the foreign government. The implementing agency has the option to reject the LOR if it deems that the requested material solution will not address the foreign government's described requirement. If the LOR is accepted, the implementing agency then generates an LOA or sales agreement to address the LOR using a total package approach. A total package approach seeks to provide the requested article plus the relevant support and maintenance items—such as training, technical assistance, ammunition, and follow-on support—that ensure the military equipment can be operated and maintained in the future.

Congressional Notification:

Once the implementing agency has drafted the LOA, State and DSCA officials review and approve it. DSCA subsequently notifies Congress of the offer if it meets certain dollar thresholds or other requirements. Specifically, the Arms Export Control Act, as amended, requires submission of a notification if the LOA is for (a) major defense equipment that totals $14 million or more, (b) defense articles (non-major defense equipment) or services that total $50 million or more, or (c) design and construction services that total $200 million or more.[7] For FMS sales to NATO countries, Japan, Australia, the Republic of Korea, New Zealand, Israel, and, until February 2019, Jordan, these dollar values increase to $25 million, $100 million, and $300 million, respectively.[8]

In practice, this congressional notification process entails two phases. First, DSCA submits a draft of the LOA notification to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, and their staffs, providing an opportunity for informal discussions regarding the LOA. Subsequently, DSCA submits the formal notification required under the law to the Speaker of the House, the House Committee on Foreign Affairs, and the Chairman of the Senate Committee on Foreign Relations. The proposed sale cannot proceed if Congress enacts a joint resolution prohibiting the offer within specific time frames, which can range from 15 to 30 days. If Congress does not prohibit the offer, the implementing agency sends the LOA to the foreign government. LOAs expire after a set period of time—typically 85 days—but the foreign government can request an extension.

LOA Implementation:

Once the LOA has been signed and the foreign government has provided funding, the implementing agency fulfills the FMS request from existing supply or procures the items and services from vendors. DOD contracting officers may solicit proposals from industry and negotiate prices, as necessary, to award contracts. After the implementing agency fulfills the

[7]Section 2794 of title 22 of the U.S. Code defines major defense equipment as any item of significant military equipment (articles for which special export controls are warranted) on the U.S. Munitions List having a nonrecurring research and development cost of more than $50 million or a total production cost of more than $200 million. This provision also contains definitions for "defense articles" and "defense services."

[8]22 U.S.C. § 2776; SAMM Table C5.T13; United States-Jordan Defense Cooperation Act of 2015, Pub. L. No. 114-123 (2016).

request, the foreign government takes custody from the implementing agency and makes arrangements for transport of the items. An FMS case can be closed when all equipment is delivered, services are performed, other requirements of the LOA are satisfied, and known financial transactions (including collections) are completed.

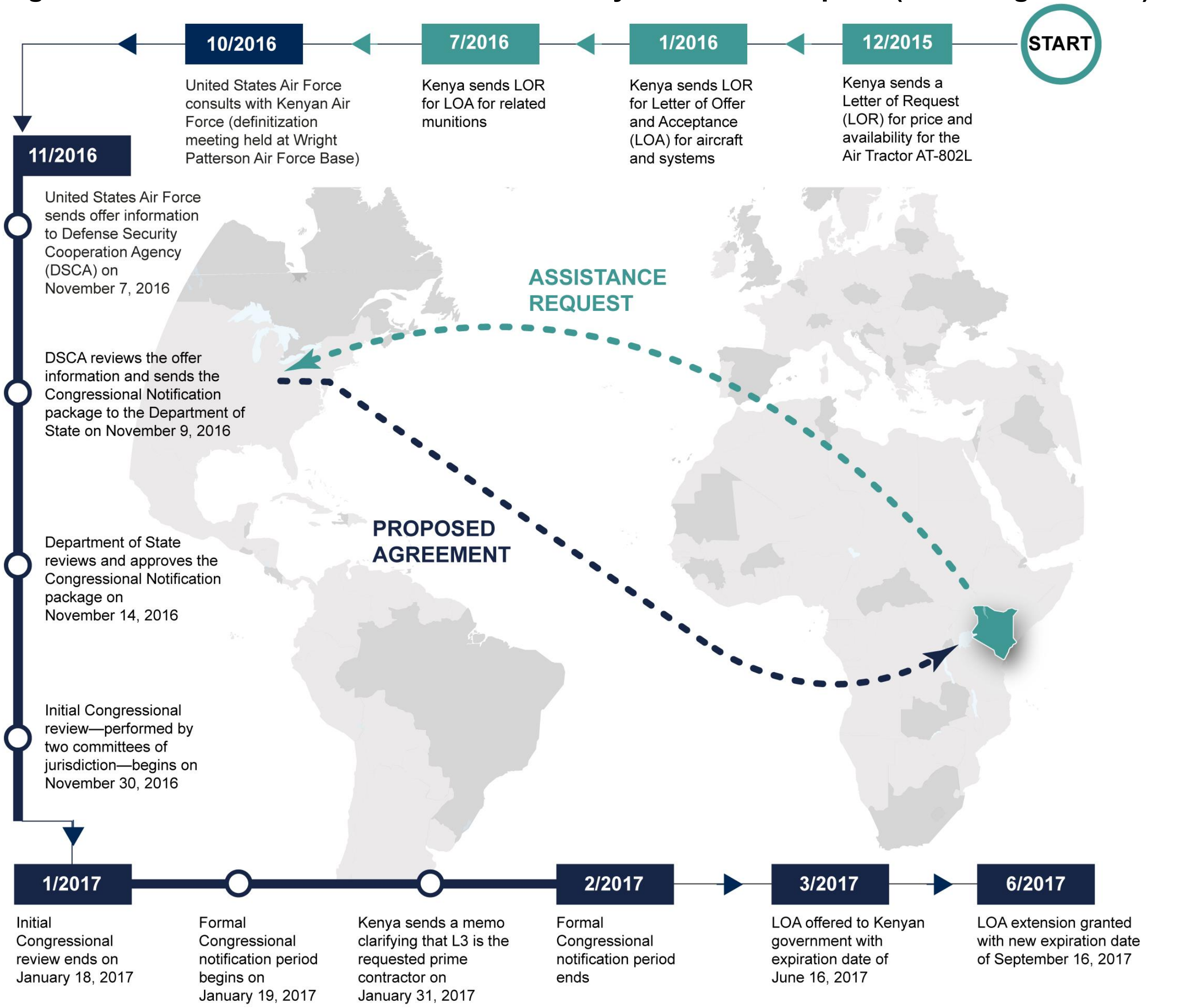
The Kenyan Government Submitted a FMS Request Specifically for AT-802L Aircraft

In December 2015, the government of Kenya submitted the first in a series of LORs for six AT-802L aircraft, two training aircraft, and the option for additional purchases at a later date. DSCA subsequently concluded that the proposed FMS would further U.S. foreign policy and national security interests. DSCA views Kenya as a strong regional partner and leader that undertakes critical operations against the al-Qaeda-linked militant group, al-Shabaab, and contributes troops to a regional alliance combatting terrorism in Somalia. According to DSCA and Air Force officials, because Kenya's request included the option for additional purchases, the Air Force sought State approval for and notified Congress of an offer for up to 12 AT-802L aircraft. In the LOA, the cost estimate for 6 aircraft—including supporting equipment and services and 2 training aircraft under a total package approach—was valued at approximately $243 million, while the cost for 12 aircraft under a total package approach was valued at $418 million in the notification to Congress.

The Kenyan LORs specifically requested the AT-802L model and listed Air Tractor as the prime contractor, and L3 and Moog as subcontractors. In January 2017, the government of Kenya sent a memorandum correcting the terminology in the LORs by identifying L3, rather than Air Tractor, as the prime contractor. DSCA and SCO officials explained that L3 is considered the prime contractor because it is the systems integrator for the AT-802L.

The U.S. Air Force presented the LOA for six AT-802L aircraft, two training aircraft, and supporting equipment and services to Kenya on March 29, 2017, following reviews by DSCA, State, and Congress. The offer was set to expire in June 2017, but, according to Air Force, DSCA, SCO, and State officials, Kenyan government officials did not want to agree to the offer until after their national elections, which took place in August. For this reason, the Kenyan government requested and the Air Force authorized an extension, giving the Kenyan government until September 16, 2017, to make a determination. As of August 30, 2017, the Kenyan government had not formally agreed to the offer. See figure 2 for a timeline of events related to this FMS transaction, which we found to be consistent with the standard FMS process.

Figure 2: Timeline of the FMS Process for Kenyan Aircraft Request (as of August 2017)



Source: GAO analysis of Department of Defense documentation. | GAO-17-713R

Kenya is seeking to acquire the AT-802L to support the country's anti-terrorism efforts in fighting the terrorist group al-Shabaab along its borders with Ethiopia and Somalia. In recent years, Kenya has experienced a number of violent attacks by al-Shabaab, including incidents at a shopping mall, a University, and, in January 2016, an attack on a Kenyan military base that resulted in the extensive loss of personnel. Kenyan officials have expressed an interest in addressing a capability gap that exists because their F-5 aircraft are not designed to support the air-to-ground missions that the anti-terrorism efforts entail. According to Air Force officials, F-5 aircraft are too fast for air-to-ground missions. Additionally, the aircraft are relatively old as they were first purchased in 1976, as noted above.

According to a SCO official, the Kenyan government's request for AT-802L aircraft was motivated by specific interest in Air Tractor. Air Force, DSCA and SCO officials stated that Kenya conducted its own market research, which included attending air shows and consulting partner nations, and that it considered several aircraft models manufactured by several companies. The SCO official based in Nairobi who worked closely with Kenyan officials on this proposed sale told us that the Deputy Commander of the Kenyan Air Force—the second highest ranking official in the Air Force—advocated for the AT-802L aircraft because of its simplicity of use, ease of maintenance, and long loiter time. The SCO official and Air Force officials emphasized that the Kenyan government selected L3 as the prime contractor for this proposed sale because it is partnered with Air Tractor.

The laws and policies that govern the FMS program allow DOD to enter into a contract for military equipment and services for resale to a foreign country, and to use sole-source contracting under certain circumstances. Most notably, CICA—as implemented in federal and DOD regulations—allows for sole-source contracting when the acquisition is to be reimbursed by a foreign country that provides a written request to procure FMS goods and services from a specific firm.[9] According to Air Force and DSCA officials, foreign countries frequently specify particular equipment and contractors in FMS cases. DOD's SAMM states that foreign customers need not provide a rationale for their sole-source contracting requests, although these requests must meet the objective requirements of the purchaser, and should not be motivated by improper or unethical considerations.[10] The SAMM also states that the U.S. government does not generally investigate circumstances behind foreign purchasers' requests to use sole-source contracting as long as U.S. government officials are not aware of any indication that such requests violate U.S. law or ethical business practices. Air Force and DSCA officials stated that they did not have any reason to believe that Kenya improperly selected the AT-802L. The Air Force determined that Kenya made a reasonable choice when it selected the AT-802L aircraft.

Agency Comments

We provided a draft of this report to DOD and State. Neither agency provided formal comments, but DOD provided some technical comments, which we incorporated, as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Secretaries of State and Defense and other interested parties. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

[9] 10 U.S.C. § 2304(c)(4); FAR § 6.302-4; and DFARS § 206.302-4.

[10] SAMM § C6.3.4 and C6.3.4.3.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or WoodsW@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. In addition to the contact named above, Nate Tranquilli, Assistant Director; Holly Williams, Analyst-in-Charge; Betsy Gregory-Hosler; Lorraine Ettaro; Stephanie Gustafson; Kristine Hassinger; Katherine Lenane; Robin Wilson and others made key contributions to this report.

William T. Woods
Director, Acquisition and Sourcing Management

List of Requesters

The Honorable Mark Meadows
Chairman
Subcommittee on Government Operations
Committee on Oversight and Government Reform
House of Representatives
The Honorable Ted Budd
House of Representatives
The Honorable Jeff Duncan
House of Representatives
The Honorable Virginia Foxx
House of Representatives
The Honorable Walter B. Jones
House of Representatives
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