

No. 4034

**UNITED STATES OF AMERICA
and
FEDERAL REPUBLIC OF GERMANY**

**Agreement relating to offshore procurement. Signed at
Bonn, on 4 April 1955**

Official texts: English and German.

Registered by the United States of America on 25 October 1957.

**ÉTATS-UNIS D'AMÉRIQUE
et
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE**

**Accord relatif au programme d'achats *offshore*. Signé à
Bonn, le 4 avril 1955**

Textes officiels anglais et allemand.

Enregistré par les États-Unis d'Amérique le 25 octobre 1957.

No. 4034. AGREEMENT¹ BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY RELATING TO OFFSHORE PROCUREMENT. SIGNED AT BONN, ON 4 APRIL 1955

Article 1

PURPOSE

The purpose of this Agreement is to set forth certain principles, policies and specific provisions which the United States of America (hereinafter called the United States) and the Federal Republic of Germany (hereinafter called the Federal Republic) have agreed shall govern procurement by the Armed Forces of the United States in the Federal Republic in the interests of the common defense. Such procurement is hereinafter referred to as offshore procurement. This Agreement shall apply to the contracts placed on and after the date hereof and also to uncompleted contracts placed prior to the date hereof; provided that this shall not impair the existing contract rights of private contractors.

Article 2

DEFINITIONS

For the purpose of this Agreement the following terms shall have the following meanings :

(a) United States Armed Forces shall mean the United States Army, the United States Navy and the United States Air Force.

(b) Offshore procurement shall mean procurement by means of contracts, purchase orders, and other instruments awarded and sub-contracts approved by the United States Armed Forces for goods and services of any description for which payment is made by the United States Armed Forces, provided, however, the term offshore procurement shall not include procurement by the United States Armed Forces for which payment is made from funds made available by the Federal Republic in discharge of occupation costs or from defense support funds contributed by the Federal Republic for support of the

¹ Came into force on 7 February 1957, upon the deposit of the instrument of ratification by the Federal Republic of Germany with the Government of the United States of America, in accordance with article 25.

United States Armed Forces, and shall not include procurement by the exchange systems of the Armed Forces and purchases by the individual members of the United States Armed Forces.

Article 3

OBJECTIVES

(a) The primary objectives of the United States in instituting the offshore procurement program are (i) to provide the United States Armed Forces with needed materials, supplies and services, (ii) to provide equipment as rapidly as possible to meet defense requirements of countries participating in the Mutual Security Program, and (iii) to increase the ability of participating countries to equip and maintain their own forces.

(b) Procurement under this program is not intended as substitute for the Federal Republic's own defense production and it is understood that the program will be carried out in such a manner that it takes into account the capabilities of the German economy as well as essential domestic and export requirements of the Federal Republic and that it will not have harmful effect on other defense production undertaken by the Federal Republic.

Article 4

CONDUCT OF PROGRAM

The United States shall conduct the offshore procurement program in accordance with the laws of the United States governing military procurement and the mutual security program. It is also the intent of the United States that the offshore procurement program shall be carried out in the Federal territory in furtherance of the principles of the Mutual Security Act of 1954, the Mutual Defense Assistance Control Act of 1951 as amended, and the Economic Cooperation Agreement between the Federal Republic and the United States, signed at Bonn on 15 December 1949 as amended.¹

¹ United Nations, *Treaty Series*, Vol. 92, p. 269; Vol. 141, p. 390, and Vol. 212, p. 329.

Article 5

SCOPE OF THE OFFSHORE PROCUREMENT PROGRAM

The goods and services which may be procured under the offshore procurement program include all types of military end items, materials, supplies, equipment, and services appropriate for United States military procurement which may be required either for the United States military assistance program or for the United States Armed Forces. Unless otherwise specified, the provisions of this Agreement are applicable to procurement for both categories.

Article 6

EXCHANGE OF INFORMATION

The Governments of the parties to this Agreement, in order to achieve coordination, shall exchange information on a continuing basis with respect to procurement plans, available production facilities and progress in the achievement of the offshore procurement programs in the Federal Republic. The Government of the United States shall, insofar as feasible and appropriate, furnish to the Government of the Federal Republic information relating to the United States' procurement program in the Federal Republic and will inform the Government of the Federal Republic in due time of individual requests for bids. The Government of the Federal Republic shall be supplied by the Government of the United States with copies or other appropriate information of such orders as have been placed with German firms.

Article 7

RESTRICTIVE BUSINESS PRACTICES

The Governments of the parties to this Agreement, each within its own competence, shall implement the offshore procurement program, insofar as feasible under German law, in such a way as to :

- (a) eliminate the barriers to, and provide the incentive for, a steadily increased participation of free private enterprise in developing the resources of the Federal Republic consistent with appropriate international agreements;
- (b) discourage, as far as feasible, all cartel and monopolistic business practices which result in restricting production and increasing prices, and to encourage competition and productivity.

Article 8

CONTRACT PLACEMENT BY CONTRACTING OFFICERS

It is understood that offshore procurement contracts will be awarded and administered on behalf of the United States by contracting officers of the United States Armed Forces or persons acting under their authority.

Article 9

PARTIES TO CONTRACTS

It is understood that United States contracting officers will contract directly with individuals, firms or other legal entities in the Federal territory or with the Government of the Federal Republic in accordance with the contracting officer's judgment.

Article 10

ASSISTANCE IN THE SELECTION OF CONTRACTORS

The competent United States agencies may consult the Government of the Federal Republic or its authorized offices for advice with regard to potential contractors. In furnishing such advice, in addition to considering the ability to produce within the time required, efficiency, technical ability and plant facilities, the Government of the Federal Republic shall be guided by the various principles, policies and provisions set forth in this Agreement, including, but not limited to, those concerning free competition and free private enterprise, availability of credit facilities and materials, and security considerations. Plants and subcontractors selected by the Government of the Federal Republic or private contractors must be acceptable to the United States contracting officer who shall, however, when selecting contractors, take into account, as far as possible, the recommendations made during such consultations as may be had with the Government of the Federal Republic.

Article 11

ASSISTANCE TO OFFSHORE PROCUREMENT CONTRACTORS

(a) The Government of the Federal Republic shall, subject to the relevant German legislation, grant the contractors and the subcontractors of offshore procurement orders, of which it has been informed under Article 6, no less favorable treatment and assistance, with regard to the supply of materials or

production equipment and to the furnishing of manpower, as will be granted to firms performing similar contracts for the Government of the Federal Republic.

(b) It is understood that no obligation with respect to assistance in obtaining materials or production equipment to contractors and sub-contractors shall be incurred by the United States by reason of entering into contracts under the offshore procurement program. Such assistance as the United States may be prepared to provide will be furnished through normal defense supply operations rather than through any special procedure or any special intercession in behalf of offshore procurement contractors.

Article 12

CREDIT ARRANGEMENTS

The Government of the Federal Republic shall, subject to the relevant German legislation, insure that contractors under the offshore procurement program receive Federal guarantees (*Bundesbürgschaft*) for the credits required to finance their operations under the same conditions as such guarantees are made available for the promotion of exports.

Article 13

TAXES, DUTIES AND LICENSES

(a) Relief from German taxes, levies and customs duties, insofar as they affect expenditures under offshore procurement programs, shall be granted in accordance with the "Agreement between the United States of America and the Federal Republic of Germany Concerning the Tax Relief to be Accorded by the Federal Republic to United States Expenditures in the Interests of the Common Defense", signed at Bonn on October 15, 1954.¹

(b) Subject to Article 3 (b) of this Agreement, and the relevant German regulations, the appropriate agencies in the Federal Republic shall issue upon application all the prescribed licenses, including foreign exchange, import and export licenses, which may be necessary for the execution of offshore orders.

Article 14

SECURITY

(a) In the case of procurement contracts placed by the Government of the United States with the Government of the Federal Republic, any classified

¹ United Nations, *Treaty Series*, Vol. 239, p. 135.

material, including information, delivered by one government shall be given security protection by the recipient government corresponding substantially to that afforded by the originating government and shall be treated by the recipient government as its own classified material of a corresponding security grading. The recipient government shall not use such material, or permit it to be used, for other than military purposes and shall not disclose such material, or permit it to be disclosed, to another nation without the consent of the originating government.

(b) In the case of procurement contracts placed by the Government of the United States with private contractors in the Federal territory, similar security arrangements for classified material shall be followed. Classified material of the United States needed by a contractor will be delivered to the appropriate Ministry of the Federal Republic. An authorized representative of that Ministry will transmit the material to the contractor in such a way as to make the provisions of the German penal legislation applicable to it. Such material shall, prior to transmittal, receive a security classification of the Federal Republic which shall afford to the material substantially the same degree of security as that afforded by the United States, and, at the time of transmittal, the Government of the Federal Republic shall notify the contractor that the classified material delivered to him is also classified material of the Federal Republic and subject to the provisions of the German penal legislation.

(c) The Government of the Federal Republic shall, upon request, conduct a security investigation of any prospective contractor in the Federal territory in the same manner as such investigations may in the future be conducted in accordance with German law in cases of defense procurement by the Government of the Federal Republic, and a recommendation resulting from such investigation shall be made to the Government of the United States. No charges shall be made by the Government of the Federal Republic for services rendered pursuant to this paragraph.

Article 15

INSPECTIONS

(a) Inspections shall be made for the purpose of determining whether military end items, materials, services, supplies and equipment conform to contract specifications and other requirements. Such inspections covering such items procured by the Government of the United States either from the Government of the Federal Republic or from other contractors shall, when

requested by the United States Armed Forces, be carried out without cost or charge to the Government of the United States by representatives of the Government of the Federal Republic. In connection with these inspections, the Government of the Federal Republic shall certify to the Government of the United States whether the supplies inspected meet the specifications and all the terms of the contract. Inspections when so requested shall be performed in a professional manner and in good faith without any financial liability for defects. When the Government of the Federal Republic carries out such inspections, it nevertheless recognizes the right of the United States Armed Forces to make inspections in all appropriate places, including plants of sub-contractors, at any stage of production or manufacture and shall accord the United States inspectors necessary facilities and cooperation to allow them to make such inspections. However, it is not the intention of the Government of the United States generally to duplicate inspections made by the Government of the Federal Republic. Final acceptance of articles produced or services rendered under the contract, as a basis for payment of the contract prices, shall be made solely by the Government of the United States.

(b) The Government of the United States shall inform its representatives that they should respect the confidential nature of any knowledge of production secrets and trade secrets of contractors and sub-contractors gained in the course of the performance of their duties through inspection or from documentation and instruction.

Article 16

STANDARD CONTRACT CLAUSES

Standard clauses will be agreed to by the Governments of the parties to this Agreement for use, as appropriate, in contracts between them. Other clauses, including, but not limited to, escalation, advance and progress payment clauses where appropriate, may be included in individual contracts. The Government of the Federal Republic shall render appropriate assistance to facilitate the performance of all contract provisions.

Article 17

PROTECTION OF UNITED STATES PROPERTY AND PERSONNEL

(a) Rights and interests of the United States pertaining to property which has been acquired by offshore procurement contracts in the Federal Republic,

or in property used in connection with such contracts, are not subject to seizure, attachment or other interference by German courts and authorities.

(b) The United States shall be immune from German jurisdiction with respect to legal liability which might arise out of an offshore procurement contract.

(c) United States Procurement Officers as well as other United States procurement personnel shall not be subject to German jurisdiction with respect to legal liability which might result from the execution of their official activity under the offshore procurement programs.

Article 18

NO PROFITS CLAUSE

On offshore procurement contracts it is understood that no identifiable profit of any nature, including net gains resulting from fluctuations in exchange rates, shall be retained by the Government of the Federal Republic. The Government of the Federal Republic agrees to determine whether any such profit has been realized, in which event, or in the event that the Government of the United States considers that such profit may have been realized, the Government of the Federal Republic agrees that it shall immediately enter into conversations with the Government of the United States for the purpose of determining the existence and the amount of such profit. During these conversations the United States representatives shall have access to such documents and accounting data as may be necessary to determine the facts. In the computation of net profits hereunder, the contracts shall be taken collectively, and total net losses under all contracts may be offset against total net profits under all contracts. If, as a result of conversations between the two Governments, it is established that profit has been realized by the Government of the Federal Republic on such contracts, it shall refund the amount of the profit to the Government of the United States under arrangements and procedure to be agreed upon between the two Governments. At the request of either Government, a refund adjustment shall be accomplished on completed contracts at the earliest practicable date, but this adjustment must be effected by the end of the year following the calendar year in which the contract concerned is completed. This article shall not be construed as affecting in any manner any profit-refunding provisions as may be contained in individual contracts. It is understood that there is in effect in the Federal territory legislation equivalent to the United States Renegotiation Act of 1951.

Article 19

CONTRACT TERMS

(a) Since the statutes of the United States prohibit utilization of a contract upon which payment is based on cost plus a percentage of cost, it is understood that such a system of determining payment shall not be employed in contracts entered into between the Government of the United States and either the Government of the Federal Republic or German contractors. Further, the Government of the Federal Republic shall not utilize the type of contract in which payment is made on the basis of cost plus a percentage of cost in sub-contracts under any contract between the Government of the United States and the Government of the Federal Republic.

(b) Subject to the provisions of Article 18, contracts based on cost plus a fixed fee are not prohibited.

Article 20

REPORTING OF SUB-CONTRACTS

The Government of the Federal Republic shall furnish to the United States contracting officers such information as may be requested regarding contracts placed by the Government of the Federal Republic under contracts entered into between the Government of the United States and the Government of the Federal Republic.

Article 21

DESTINATION OF END-ITEMS

Although the determination of specifications and other requirements of particular offshore procurement contracts may require a tentative identification of the recipient country to which the end-items are to be delivered, it is understood that the United States may subsequently amend any such tentative identification as to which country shall be the ultimate recipient of the end-items produced.

Article 22

RELATIONSHIP TO THE BONN CONVENTIONS

It is understood that the arrangements as provided for in this agreement would not be affected by the coming into force of the "Convention on Relations

between the Three Powers and the Federal Republic of Germany",¹ including related Conventions, as amended by the relevant Schedules to the "Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany"¹ signed at Paris on 23 October 1954.

Article 23

APPLICATION TO BERLIN

(a) This Agreement shall also apply from the date specified in Article 25 to *Land* Berlin which, for the purpose of this Agreement, comprises those areas over which the Berlin Senate exercises jurisdiction.

(b) It is a condition to the application of this Agreement to *Land* Berlin, in accordance with the preceding paragraph, that the Federal Republic shall previously have furnished to the United States a notification that all legal procedures in Berlin necessary for the application of this Agreement therein have been complied with.

Article 24

SUPPLEMENTS AND AMENDMENTS

(a) The Governments of the parties to this agreement shall, upon the request of either of them, consult regarding any question relating to the application of this Agreement or to the operations or arrangements carried out pursuant to this Agreement.

(b) Either Government may apply at any time for review of the Agreement. The two Governments shall enter into negotiations aiming at a mutually satisfactory solution based on the principles of this Agreement with respect to any problem that may arise.

(c) This Agreement may be amended at any time by agreement between the contracting parties.

Article 25

FINAL CLAUSES

This Agreement shall enter into force upon the deposit of an instrument of ratification by the Federal Republic with the Government of the United States.

¹ United States of America : *Treaties and Other International Acts Series 3425*.

IN WITNESS WHEREOF the respective representatives, duly authorized for the purpose, have signed this Agreement.

DONE at Bonn, in duplicate, in the English and German languages, both of which texts are authentic, this 4th day of April, 1955.

For the United States of America :

James B. CONANT

[SEAL]

For the Federal Republic of Germany :

ADENAUER

[SEAL]