



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Bureau of Industry and Security**  
Washington, D.C. 20230

December 6, 2004

Dear [redacted] :

This correspondence responds to your letter of [redacted] requesting an advisory opinion relating to the domestic sale of certain [redacted] equipment by its contractors to a foreign national within the United States and whether such a sale implicates the "deemed export" provisions of the Export Administration Regulations, 15 C.F.R. Parts 730-74 (EAR).

Your letter states that [redacted] contractors often release for public sale (within the United States) property, without accompanying operating manuals or software, that is considered surplus to the needs of the U.S. government and that, during such sale, a foreign national may purchase the property. As your letter further explains, the foreign national would then have access to the purchased property and an opportunity for close examination of it, perhaps even by taking the item apart. Finally, your letter states that [redacted] contractors have not been required to check the citizenship of participants in their public sales;

If the sale of the equipment is open to all members of the public, then any technology that might be transferred is deemed to be publicly available under Part 734 of the EAR and, thus, not subject to these Regulations. See Part 734, Supp. No. 1 (Section I: Miscellaneous, Question (1)). Thus, if your sales are open to all members of the public, consistent with terms of the EAR, then the mere inspection of the equipment does not raise a deemed export issue.<sup>2</sup>

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<sup>1</sup>The seller's provision of the [redacted] to purchasers of this property does not satisfy the seller's obligation to ensure compliance with the EAR.

<sup>2</sup>BIS notes that sales by [redacted] contractors may be occurring in a setting that is quite different from that in which commercial retail establishments, which generally permit any person to enter the premises and inspect merchandise, typically operate. A commercial retail establishment is organized to attract the general public of consumers and, unlike a contractor, does not engage in sales as a mere incident to its primary activities.



If the sale is not open to the public, then your contractor should be aware of a number of requirements of the EAR. Section 734.2(b)(2)(ii) of the EAR defines a deemed export as "any release of technology or source code subject to the EAR to a foreign national." Section 734.2 (b) (3) further states that release of technology for export may occur through "visual inspection by foreign nationals of U.S. origin equipment." BIS does not consider the transfer of **controlled equipment** to a foreign national in and of itself to be a "deemed export" of controlled technology. However, if the visual inspection of that item transfers technology controlled by the EAR, then a deemed export license requirement may exist depending on the type of controlled equipment and the nationality of the foreign national.

In addition, under Section 764.2(e) a person may not sell any item while knowing or having reason to know that a violation of the EAR has occurred or will occur. Also, pursuant to Section 744.6(a)(2), no U.S. person may, without a license from BIS, perform any service, contract or employment that the U.S. person knows will directly assist in the design, development, production, or use of missiles in or by a country in Country Group D:4, or the design, development, production, stockpiling, or use of chemical or biological weapons in or by a country listed in Country Group D:3. While these "knowledge" provisions do not impose upon your contractor the duty to investigate in-depth the details of each sale, the contractor is responsible for knowledge gained in the normal course of business and reacting to any "red flags" that may be present in a sales transaction. See 15 C.F.R. Part 732, Supp. No. 3 (Guidance).

If you have any questions or concerns, please contact me in the Office of National Security and Technology Transfer Controls at (202) 482-4875.

Sincerely,



Alexander K. Lopes, Jr.  
Director, Deemed Exports and Electronics Division  
Office of National Security and  
Technology Transfer Controls Division