NDIA NEWS

ETHICS CORNER

ITT Penalties: Does the Punishment Fit the Crime?

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If you have ever experienced driving down the road and seeing out of the corner of your eye a smoking multi-car pileup or a tractor-trailer upended in a ditch, then that neck-snapping "what was that!?!" experience would mirror what many of us in the export compliance bar experienced hearing about the recent plea agreement concluded with ITT Corp.

On March 26, ITT of White Plains, NY, the premier manufacturer of night-vision equipment for the U.S. armed forces, pleaded guilty to two counts of willful violations of the Arms Export Control Act (AECA), as implemented through the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Part 120-130.

This culminated a multi-agency investigation dating back to 2001 by the Defense Criminal Investigative Service, Department of Homeland Security's Immigration and Customs Enforcement and the U.S. Department of Justice, and one of the largest penalties ever in a criminal case: $100 million in fines and forfeitures. External observers to the case may never fully understand whether this extraordinary penalty was reasonable. Many in the defense aerospace industry have concluded that ITT was simply in the wrong place at the wrong time, thereby becoming the poster child for government's export enforcement apparatus.

This case underscores the conclusion that the U.S. government's desire to obtain and maintain the best technology from its suppliers for use by U.S. armed forces is matched by its resolve to keep the same much-sought-after technologies out of the hands of other nations and foreign individuals. U.S. export controls based on national security concerns will be enforced, even against the key U.S. producers of battlefield technology.

Specifically, ITT was charged with knowingly, willfully, and unlawfully:

• Exporting ITAR-controlled technical data related to a laser countermeasure (a "light interference filter") for military night-vision goggle systems via technical data releases to foreign nationals of Singapore and China, and physical transfers of technical data to an unauthorized, U.K.-based facility. [Note: This allegation was not made as to technology related to the core of night vision goggle systems, the "tube," or related technical data; only data relating to an accompanying filter.];

• Omitting from reports filed with the Department of State material facts pertaining to temporary exports or consignment of night-vision goggles or related parts to foreign persons; and

• Exporting technical data and defense services related to the enhanced night vision goggle system from the United States to China, Singapore and Japan. In exchange for ITT's guilty pleas to the two counts above, the Department of Justice deferred prosecution on this final charge for a period of five years.

As a result of the guilty pleas, ITT agreed to the following penalties:

• Independent monitoring and review of its internal compliance system,

• Up to three years statutory debarment for ITT's Night Vision Division from participating in exports of defense articles including technical data for which a license or other approval is required,

• $2 million criminal fine,

• $20 million civil fine,

• $28 million forfeiture of illegal proceeds, and

• $50 million deferred fine for five years.

Interestingly, while $50 million of the total penalty is deferred for a period of five years, ITT may (and doubtless will) reduce that sum dollar-for-dollar by investing in the development of more advanced night-vision technologies through research, development and capital improvements. Any amount unspent after five years, will be due and owing to the U.S. government.

Additionally, the U.S. government will maintain "government purpose rights" to all ITT developed technology under this agreement, and even share ITT's technologies developed under this agreement with rival defense firms bidding on future contracts. Of all of the penalties assessed, this condition may pose the greatest long-term financial impact on ITT.

What can other defense and aerospace contractors learn from the ITT case?

The U.S. government takes export control violations more seriously than ever in this industry. Current regulators remain unapologetic about the fact that they have made an example of ITT with the significant penalties imposed. The nature of the technologies involved, coupled with the U.S. enforcement officials' discovery of a "pattern of violations of the export laws of the United States" combined to make this an inevitably high-profile matter.

The plea agreement exemplifies one of the most extensive remedial action programs ever, all costs to be borne entirely by ITT. Enforcement officials have indicated their hopes that ITT's current cooperation and implementation of remedial measures will "become the standard throughout corporate America" to protect military-sensitive technologies, information and equipment. It remains to be seen whether U.S. enforcement authorities will view compliance systems short of this so-called new standard as inadequate. It behooves readers to assume that the ITT system will become a remedial compliance model for the future.

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