PGI 247.5 -OCEAN TRANSPORTATION BY U.S.-FLAG VESSELS

Parent topic: PGI Part 247 - TRANSPORTATION

PGI 247.573 General.

(a) *Delegated authority.*

(1) The authority to make determinations that a U.S.-flag vessel is not available at a fair and reasonable rate for commercial vessels of the United States, or is otherwise not available, is delegated in the Secretary of Defense Memorandum dated August 25, 2021, to—

(i) The Commander, United States Transportation Command (USTRANSCOM); and

(ii) The Secretary of the Navy.

(2) In accordance with the Commander, USTRANSCOM, Memorandum dated March 1, 2023, the authority at paragraph (a)(1) of this section is further delegated as follows:

(i) The Director, Acquisition (TCAQ) is delegated the authority to make determinations that a U.S.-flag vessel is not available for liner or intermodal services at a fair and reasonable rate for commercial vessels of the United States.

(ii) The Commander, Military Surface Deployment and Distribution Command (MSDDC) is delegated the authority to make determinations that a U.S.-flag vessel is otherwise not available for liner or intermodal services.

(iii) The Commander, Military Sealift Command (MSC) is delegated the authority to make determinations that a U.S.-flag vessel is not available at a fair and reasonable rate for commercial vessels of the United States or is otherwise not available for charter contracts.

(3) In accordance with the Secretary of the Navy Memorandum dated March 3, 2022, the Commander, MSC is delegated the authority to make determinations that a U.S.-flag vessel is not available at a fair and reasonable rate for commercial vessels of the United States or is otherwise not available for charter contracts.

(4) Contracting officers are not delegated the authority at paragraph (a)(1) of this section and therefore are not authorized to waive the use of U.S.-flag vessels.

(b) *Procedures.*

(1) Contracting officers shall follow these procedures when ocean transportation is not the principal purpose of the contract, and the cargo to be transported is owned by, destined for use by, or otherwise transported by DoD.

(i)(A) If the contractor notifies the contracting officer that the contractor considers that no U.S.-flag vessels are available, the contracting officer shall review that notification. If the contracting officer agrees with the contractor’s request, then the contracting officer shall request a nonavailability waiver, in determination and findings format, using details received from the contractor in

accordance with paragraph (d) of the clause at DFARS 252.247-7023, from—

(*1*) The Commander, MSC, through the Contracts and Business Management Directorate, MSC (*MSC_N103_FFW@us.navy.mil*), for vessel charters; or

(*2*) The Commander, MSDDC, by email at *usarmy.scott.sddc.mbx.g3-ffw-team@army.mil* for ocean liner and intermodal transportation.

(B) Pursuant to their delegations from the Secretary of the Navy or the Commander, USTRANSCOM, the Commander, MSC, or the Commander, MSDDC, will make a determination to approve a waiver based on nonavailability of a U.S.-flag vessel. Upon receipt of an approved waiver, the contracting officer shall provide the contractor with written approval to use a non-U.S. flag carrier in accordance with that waiver. Variances from that approved waiver, including changing the foreign-flag vessel approved for use, may require a new request and approval from the cognizant waiver approval authority. Additionally, see contractors' bill of lading submission requirement at paragraph (e) of the clause at DFARS 252.247-7023.

(ii) If the contractor notifies the contracting officer that the contractor considers that U.S.-flag carriers are not available at a fair and reasonable rate for commercial vessels of the United States, and if the contracting officer agrees with the contractor's assertion—

(A) The contracting officer shall prepare a waiver request in determination and findings format, and shall—

(*1*) Take into consideration that the Military Cargo Preference Act of 1904 is, in part, a subsidy of the U.S.-flag commercial shipping industry that recognizes that lower prices may be available from foreign-flag carriers. Therefore, a lower price for use of a foreign-flag vessel is not a sufficient basis, on its own, to determine that a U.S.-flag vessel is not available at a fair and reasonable rate for commercial vessels of the United States for the services sought. However, such a price differential may indicate a need for further review;

(*2*) Include a description of efforts taken pursuant to FAR 15.405 to negotiate a reasonable price. For the purpose of FAR 15.405(d), this waiver request is the referral to a level above the contracting officer; and

(*3*) Include an analysis of price reasonableness, taking into account factors such as—

(*i*) A comparison of U.S.-flag rates charged on comparable routes, or for similar services;

(*ii*) Any other relevant economic and financial considerations; and

(B) The contracting officer shall forward the waiver request to—

(*1*) The Commander, MSC, through the Contracts and Business Management Directorate, MSC (*MSC_N103_FFW@us.navy.mil*), for charters; or

(*2*)The USTRANSCOM Director of Acquisition, through the Sealift Services Division (*transcom.scott.tcaq.mbx.i-foreign-flag-waiver@mail.mil*), for ocean liner and intermodal transportation.

(C) Pursuant to their delegations from the Secretary of the Navy and the Commander, USTRANSCOM, the Commander, MSC, or the USTRANSCOM Director of Acquisition, will make a determination whether to approve the request that a U.S.-flag vessel is not available at a fair and

reasonable rate for commercial vessels of the United States. Upon receipt of an approved waiver, the contracting officer shall provide the contractor with written approval to use a non-U.S. flag carrier, in accordance with the terms of that waiver. Variances from that approved waiver, including changing the foreign-flag vessel approved for use, may require a new request and approval from the cognizant waiver approval authority. Additionally, see contractors' bill of lading submission requirement at paragraph (e)(1) of the clause at DFARS 252.247-7023.

(2) Contracting officers shall follow these procedures when the direct purchase of ocean transportation services is the principal purpose of the contract.

(i) Direct purchase of ocean transportation may include—

(A) Contracts for charter vessel services;

(B) Dedicated contractor contracts for charter vessel services;

(C) Ocean bills of lading;

(D) Subcontracts under Government contracts or agreements for ocean transportation services; and

(E) Ocean liner contracts (including contracts where ocean liner transportation is part of an intermodal movement).

(F) Ferry service.

(ii) Coordinate these acquisitions, as appropriate, with USTRANSCOM, the DoD single manager for commercial transportation and related services, other than Service-unique or theater-assigned transportation assets, in accordance with DoDD 4500.09, Transportation and Traffic Management, and DoDI 4500.57,Transportation and Traffic Management.

(iii) All solicitations within the scope of this section shall provide—

(A) A preference for U.S.-flag vessels in accordance with the Military Cargo Preference Act of 1904;

(B) An evaluation criterion for offeror participation in the Voluntary Intermodal Sealift Agreement (for cargo movement only); and

(C) An evaluation criterion considering the extent to which offerors have had overhaul, repair, and maintenance work for all covered vessels in an offeror's fleet performed in shipyards located in the United States or Guam as applicable under DFARS 247.572(d).

(iv) Do not award a contract of the type described in paragraph (b)(2)(i) of this section for a foreign-flag vessel unless—

(A) The Commander, MSC, or the Commander, MSDDC, has issued a waiver that no U.S.-flag vessels are available;

(*1*) The Commander, MSC, and the Commander, MSDDC, are authorized to issue waivers regardingthe availability of U.S.-flag vessels to ensure the proper use of Government and private U.S. vessels;

(*2*) The contracting officer shall request such waivers—

(*i*) For vessel charters, through the Contracts and Business Management Directorate, MSC

(*MSC_N103_FFW@us.navy.mil*); and

(*ii*) For ocean liner and intermodal transportation, including contracts for shipment of military household goods and privately-owned vehicles, through MSDDC by email at *usarmy.scott.sddc.mbx.g3-ffw-team@army.mil* ;

(*3*) For ocean liner and intermodal transportation, in the absence of regularly scheduled U.S.-flag service to fulfill stated DoD requirements, the Commander, MSDDC, may grant, on a case-by-case basis, an on-going nonavailability waiver for foreign-flag service approval with predetermined review date(s);

(*4*) The contracting officer shall prepare a waiver request documenting nonavailability in determination and findings format and shall forward the waiver request to—

(*i*) The Commander, MSC, through the Contracts and Business Management Directorate, MSC (MSC_N103_FFW@us.navy.mil), for vessel charters; or

(*ii*) The Commander, MSDDC, by email at usarmy.scott.sddc.mbx.ffw-team@mail.mil for ocean liner and intermodal transportation; and

(*5*) Upon receipt of an approved waiver, the contracting officer shall provide the contractor with written approval to use a non-U.S. flag carrier, in accordance with that waiver.

(B) Pursuant to their delegations from the Secretary of the Navy and the Commander, USTRANSCOM, the Commander, MSC, or the USTRANSCOM Director of Acquisition possess approval authority to grant a waiver based on nonavailability of a U.S.-flag vessel based on a determination that the proposed freight charges for U.S.-flag vessels are not fair and reasonable for commercial vessels of the United States.

(*1*) After considering the factors in paragraph (b)(1)(ii)(A)(*1*) of this section, if the contracting officer concludes that the freight or charter charges proposed by U.S.-flag carriers may not be fair and reasonable for commercial vessels of the United States, the contracting officer shall prepare a waiver request in determination and findings format that includes—

(*i*) A description of efforts taken pursuant to FAR 15.405 to negotiate a reasonable price. For the purpose of FAR 15.405(d), this waiver request is the referral to a level above the contracting officer; and

(ii) An analysis of price reasonableness, taking into consideration factors such as those listed at paragraph (b)(1)(i)(A)(2) of this section.

(*2*) The contracting officer shall forward the waiver request to—

(*i*) The Commander, MSC, through the Contracts and Business Management Directorate, MSC (*MSC_N103_FFW@us.navy.mil*), for vesselcharters; or

(*ii*) The USTRANSCOM Director of Acquisition, through the Sealift Services Division (transcom.scott.tcaq.mbx.i-foreign-flag-waiver@mail.mil).

(*3*) Upon receipt of an approved waiver, the contracting officer shall provide the contractor with written approval to use a non-U.S. flag carrier, in accordance with that waiver.

(3) When security background checks are required pursuant to paragraph (c)(2) of the clause at

DFARS 252.247-7027, Riding Gang Member Requirements, contracting officers shall specify in the contract the responsible security office to coordinate a Tier 1 investigation pursuant to Federal Investigations Notice 15-03, dated November 4, 2014. Contracting officers shall accordingly specify in the contract the requirement for Tier 1 investigations to satisfy the requirement for background checks at paragraph (c)(2) of the clause at DFARS 252.247-7027.