

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

(Revised March 16, 2000)

247.570 Scope.

This subpart—

(a) Implements the Cargo Preference Act of 1904, 10 U.S.C. 2631, which applies to the ocean transportation of cargo owned by, or destined for use by, the DoD.

(b) Does not specifically implement the Cargo Preference Act of 1954, 46 U.S.C. 1241(b). The 1954 Act is applicable to the DoD, but DFARS coverage is not required because compliance with the 1904 Act historically has resulted in the DoD exceeding the 1954 Act's requirements.

(c) Is an approved class deviation from FAR Subpart 47.5 in its entirety (but see 247.571(c)).

247.571 Policy.

(a) DoD contractors shall transport supplies, as defined in the clause at 252.247-7023, Transportation of Supplies by Sea, exclusively on U.S.-flag vessels unless—

(1) Those vessels are not available, and notices are given and approvals received in accordance with this subpart;

(2) The Secretary of the Navy determines that the freight charged is excessive or unreasonable; or

(3) The contracting officer finds that the charges to the Government are higher than charges to private persons for the transportation of like goods.

(b) Contracts shall provide for the use of Government-owned vessels when security classifications prohibit the use of other than Government-owned vessels.

(c)(1) Any vessel used under a time charter contract for the transportation of supplies shall have any reflagging or repair work, as defined in the clause at 252.247-7025, Reflagging or Repair Work, performed in the United States or its territories, if the reflagging or repair work is performed—

(i) On a vessel for which the contractor submitted an offer in response to the solicitation for the contract; and

(ii) Prior to acceptance of the vessel by the Government.

(2) The Secretary of Defense may waive this requirement if the Secretary determines that such waiver is critical to the national security of the United States.

(d) The Cargo Preference Act of 1904 does not apply to ocean transportation of—

(1) Products obtained for contributions to foreign assistance programs; or

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(2) Products owned by agencies other than the DoD. In these cases, FAR Subpart 47.5 applies.

247.572 Procedures.

247.572-1 Ocean transportation incidental to a contract for supplies, services, or construction.

(a) This subsection applies when ocean transportation is not the purpose of the contract.

(b) The contracting officer shall obtain assistance from the cognizant transportation activity (see 247.105), in developing—

(1) The Government estimate for transportation costs, irrespective of whether freight will be paid directly by the Government;

(2) Shipping instructions and delivery terms for inclusion in solicitations and contracts that may involve transportation of supplies by sea.

(c) The contracting officer shall ask each offeror whether it will transport supplies by sea if awarded the contract (see 247.573(a)). Even if the successful offeror responds that it does not anticipate sea transport of supplies, it may discover during contract performance that ocean transportation is required. In that event, the Act will apply to the contract, and it must—

(1) Notify the Government that it now intends to use ocean transportation;

(2) Use U.S.-flag vessels unless certain conditions exist (see 247.571(a)); and

(3) Comply with the other requirements of the clause at 252.247-7023, Transportation of Supplies by Sea.

(d) When the contracting officer is notified that the contractor or subcontractor considers that—

(1) No U.S.-flag vessels are available, the contracting officer shall request confirmation of the nonavailability from the Director, Office of Contracts and Business Management, Military Sealift Command (MSC).

(2) The freight charges to the Government, the contractor or any subcontractor, are higher than charges for transportation of like goods to private persons, the contracting officer may approve any request for a waiver of the requirement to ship on U.S.-flag vessels for a particular shipment.

(i) Prior to granting a waiver, the contracting officer shall request advice, oral or written, from the Commander, MSC.

(ii) In advising the contracting officer whether to grant the waiver, the Commander, MSC, shall consider, as appropriate, evidence from—

(A) Published tariffs;

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- (B) Industry publications;
- (C) The Maritime Administration; and
- (D) Any other available sources.

(3) The freight charged by U.S.-flag carriers is considered excessive or otherwise unreasonable, the contracting officer shall forward a report to the Commander, MSC, through the head of the contracting activity, and the Director, Office of Contracts and Business Management, MSC.

- (i) The report shall be in determination and finding format, and—

- (A) Take into consideration that the 1904 Act is, in part, a subsidy of the U.S.-flag commercial shipping industry that recognizes that lower prices may be available from foreign shippers;

- (B) Consider, accordingly, not only excessive profits to the vessel owner, if ascertainable, but also excessive costs (i.e., costs beyond the economic penalty normally incurred by excluding foreign competition) resulting from the use of U.S.-flag vessels in extraordinarily inefficient circumstances;

- (C) Include, as appropriate—

- (1) An analysis of whether the cost is excessive, taking into account factors such as the differential between freight charges by the U.S.-flag carrier and an estimate of what foreign-flag carriers would charge based upon a price analysis;

- (2) A comparison of U.S.-flag rates charged on comparable routes;

- (3) Efficiency of operation regardless of rate differential (i.e., suitability of the vessel for the required transportation in terms of cargo requirements/ vessel capacity; the commercial reasonableness of vessel positioning required, etc.); and

- (4) Any other relevant economic and financial considerations.

- (D) Consider that the fact that it would be less expensive to use a foreign-flag vessel is not a sufficient basis, on its own, to determine that the freight rate proposed by the U.S.-flag carrier is excessive or otherwise unreasonable. However, such a differential may indicate a need for further review.

- (ii) If the Commander, MSC, concurs with the contracting officer, the Commander will forward the report to the Secretary of the Navy, via ASN(RDA)(PP), for a determination as to whether the freight charges are excessive or otherwise unreasonable.

247.572-2 Direct purchase of ocean transportation services.

- (a) This subsection applies when ocean transportation is the principal purpose of the contract, including—

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- (1) Time charters;
 - (2) Voyage charters;
 - (3) Contracts of affreightment;
 - (4) Dedicated contractor contracts of affreightment;
 - (5) Ocean bills of lading; and
 - (6) Subcontracts under Government contracts or agreements for ocean transportation services.
- (b) Coordinate these acquisitions, as appropriate, with the MSC in accordance with DoDD 5160.10, Single Manager Assignment for Ocean Transportation.
- (c) The Commander, MSC, is authorized to make any determination as to the availability of U.S.-flag vessels, in order to ensure the proper utilization of Government and private U.S. vessels.
- (d) All solicitations for ocean transportation services for supplies owned by the military departments shall provide a preference for U.S.-flag vessels as an evaluation factor.
- (e) The contracting officer shall not award a contract of the type described in paragraph (a) of this subsection for a foreign-flag vessel unless—
- (1) The contracting officer determines that no U.S.-flag vessels are available, and obtains approval of the Commander, MSC; or
 - (2) The contracting officer determines that the freight charges proposed by U.S.-flag vessels to the Government are higher than charges to private persons for transportation of like goods, and obtains the approval of the Commander, MSC; or
 - (3) The Secretary of the Navy determines (see paragraph (f) of this subsection) that the freight charges for U.S.-flag vessels are excessive or otherwise unreasonable.
- (f) When the contracting officer concludes, based solely on economic considerations, that the charge offered for a U.S.-flag vessel is excessive or otherwise unreasonable, the contracting officer will send a report through the head of the contracting activity to the Commander, MSC.
- (1) The fact that it would be less expensive to use a foreign-flag vessel is an insufficient basis, on its own, to determine that the freight rate proposed by the U.S.-flag carrier is excessive or otherwise unreasonable. However, such a differential may indicate a need for further review.
 - (2) The Commander, MSC, will forward the report, if in agreement with the contracting officer, to the Secretary of the Navy for a determination.
 - (3) The report shall be in determination and finding format; take into consideration the factors in 247.572-1(d)(3); and include, as appropriate—

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(i) An analysis of the carrier's cost in accordance with FAR Subpart 15.4, or profit in accordance with 215.404-4. The costs or profit should not be so high as to make it unreasonable to apply the preference for U.S.-flag vessels;

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

(iii) An analysis of whether the cost is excessive (i.e., cost beyond the economic penalty normally incurred by excluding foreign competition), taking into consideration such factors as—

(A) The differential between freight charges by the U.S.-flag carrier and an estimate of what foreign-flag carriers would charge based upon a price analysis;

(B) A comparison of rates charged by other U.S.-flag carriers on comparable routes;

(C) Efficiency of operation regardless of rate differential (i.e., suitability of the vessel capacity/cargo requirements; the commercial reasonableness of the vessel positioning required, etc.); and

(D) Any other relevant economic and financial considerations affecting the Government.

247.573 Solicitation provision and contract clauses.

(a) Use the provision at 252.247-7022, Representation of Extent of Transportation by Sea, in all solicitations except—

(1) Those for direct purchase of ocean transportation services; or

(2) Those with an anticipated value at or below the simplified acquisition threshold.

(b)(1) Use the clause at 252.247-7023, Transportation of Supplies by Sea, in all solicitations and resultant contracts, except—

(i) Those for direct purchase of ocean transportation services; or

(ii) Those with an anticipated value at or below the simplified acquisition threshold.

(2) Use the clause with its Alternate I in other than construction contracts, if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations.

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(3) Use the clause with its Alternate II in other than construction contracts, if any of the supplies to be transported are commercial items that are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643.

(c) Use the clause at 252.247-7024, Notification of Transportation of Supplies by Sea, in all contracts for which the offeror made a negative response to the inquiry in the provision at 252.247-7022, Representation of Extent of Transportation by Sea.

(d) Use the clause at 252.247-7025, Reflagging or Repair Work, in all time charter solicitations and contracts for the use of a vessel for the transportation of supplies, unless a waiver has been granted in accordance with 247.571(c).