

# Defense Federal Acquisition Regulation Supplement

## Part 247--Transportation

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

*(Revised August 17, 2000)*

#### **247.570 Scope.**

This subpart—

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

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

(c) Does not apply to ocean transportation of the following products, in which case FAR Subpart 47.5 applies:

(1) Products obtained for contributions to foreign assistance programs.

(2) Products owned by agencies other than DoD, unless the products are clearly identifiable for eventual use by DoD.

#### **247.571 Policy.**

(a) DoD contractors must 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 the procedures at 247.572-1(d)(1) or 247.572-2(d)(1) are followed;

(2) The proposed charges to the Government are higher than charges to private persons for the transportation of like goods, and the procedures at 247.572-1(d)(2) or 247.572-2(d)(2) are followed; or

(3) The Secretary of the Navy or the Secretary of the Army determines that the proposed freight charges are excessive or unreasonable in accordance with 247.572-1(d)(3) or 247.572-2(d)(3).

(b) Contracts must 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 under this section must 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

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(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.

### **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 principal purpose of the contract, and the cargo to be transported is owned by DoD or is clearly identifiable for eventual use by DoD.

(b) The contracting officer must 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; and

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

(c) The contracting officer must 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 1904 Act will apply to the contract, and the contractor 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) If the contractor notifies the contracting officer that the contractor or a subcontractor considers that—

(1) No U.S.-flag vessels are available, the contracting officer must request confirmation of the nonavailability from--

(i) The Commander, Military Sealift Command (MSC), through the Contracts and Business Management Directorate, MSC; or

(ii) The Commander, Military Traffic Management Command (MTMC), through the Principal Assistant Responsible for Contracting, MTMC.

(2) The proposed 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 a request for an exception to the requirement to ship on U.S.-flag vessels for a particular shipment.

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(i) Prior to granting an exception, the contracting officer must request advice, oral or written, from the Commander, MSC, or the Commander, MTMC.

(ii) In advising the contracting officer whether to grant the exception, the Commander, MSC, or the Commander, MTMC, must consider, as appropriate, evidence from—

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

(3) The freight charges proposed by U.S.-flag carriers are excessive or otherwise unreasonable--

(i) The contracting officer must prepare a report in determination and finding format, and must—

(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-flag carriers. Therefore, a lower price for use of 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 price differential may indicate a need for further review;

(B) Consider, accordingly, not only excessive profits to the carrier (to include vessel owner or operator), if ascertainable, but also excessive costs to the Government (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; and

(C) Include an analysis of whether the cost is excessive, taking into account factors such as--

(1) The differential between the freight charges proposed 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 (e.g., suitability of the vessel for the required transportation in terms of cargo requirements or vessel capacity, and the commercial reasonableness of vessel positioning required); and

(4) Any other relevant economic and financial considerations.

(ii) The contracting officer must forward the report to--

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(A) The Commander, MSC, through the Contracts and Business Management Directorate, MSC; or

(B) The Commander, MTMC, through the Principal Assistant Responsible for Contracting, MTMC.

(iii) If in agreement with the contracting officer, the Commander, MSC, or the Commander, MTMC, will forward the report to the Secretary of the Navy or the Secretary of the Army, respectively, for a determination as to whether the proposed 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—

(1) Time charters;

(2) Voyage charters;

(3) Contracts for charter vessel services;

(4) Dedicated contractor contracts for charter vessel services;

(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 U.S. Transportation Command, the DoD single manager for commercial transportation and related services, other than Service-unique or theater-assigned transportation assets, in accordance with DoDD 5158.4, United States Transportation Command.

(c) All solicitations within the scope of this subsection must provide--

(1) A preference for U.S.-flag vessels in accordance with the 1904 Act; and

(2) An evaluation factor or subfactor for offeror participation in the Voluntary Intermodal Sealift Agreement.

(d) Do not award a contract of the type described in paragraph (a) of this subsection for a foreign-flag vessel unless—

(1) The Commander, MSC, or the Commander, MTMC, determines that no U.S.-flag vessels are available.

(i) The Commander, MSC, and the Commander, MTMC, are authorized to make any determinations as to the availability of U.S.-flag vessels to ensure the proper use of Government and private U.S. vessels.

(ii) The contracting officer must request such determinations--

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(A) For voyage and time charters, through the Contracts and Business Management Directorate, MSC; and

(B) For ocean and intermodal transportation of DoD and DoD-sponsored cargoes, as applicable under contracts awarded by MTMC, including contracts for shipment of military household goods, through the Chiefs of the MTMC Ocean Cargo Clearance Authority.

(iii) In the absence of regularly scheduled U.S.-flag service to fulfill stated DoD requirements under MTMC solicitations or rate requests, the Commander, MTMC, may grant, on a case-by-case basis, an on-going nonavailability determination for foreign-flag service approval with predetermined review date(s);

(2) The contracting officer determines that the U.S.-flag carrier has proposed to the Government freight charges that are higher than charges to private persons for transportation of like goods, and obtains the approval of the Commander, MSC, or the Commander, MTMC; or

(3) The Secretary of the Navy or the Secretary of the Army determines that the proposed freight charges for U.S.-flag vessels are excessive or otherwise unreasonable.

(i) After considering the factors in 247.572-1(d)(3)(i)(A) and (B), if the contracting officer concludes that the freight charges proposed by U.S.-flag carriers may be excessive or otherwise unreasonable, the contracting officer must prepare a report in determination and finding format that includes, as appropriate—

(A) An analysis of the carrier's costs 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;

(B) 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

(C) An analysis of whether the costs are excessive (i.e., costs beyond the economic penalty normally incurred by excluding foreign competition), taking into consideration factors such as those listed at 247.572-1(d)(3)(i)(C).

(ii) The contracting officer must forward the report to--

(A) The Commander, MSC, through the Contracts and Business Management Directorate, MSC; or

(B) The Commander, MTMC, through the Principal Assistant Responsible for Contracting, MTMC.

(iii) If in agreement with the contracting officer, the Commander, MSC, or the Commander, MTMC, will forward the report to the Secretary of the Navy or the Secretary of the Army, respectively, for a determination as to whether the proposed freight charges are excessive or otherwise unreasonable.

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### **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.

(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).