PGI 247.573 General.

(a) *Delegated Authority.* The authority to make determinations of excessive ocean liner rates and excessive charter rates is delegated in Secretary of Defense Memorandum dated February 7, 2012.

(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 DoD or is clearly identifiable for eventual use by DoD.

(i) DD Form 1653, Transportation Data for Solicitations, shall be used—

(A) By the requesting activity in developing the Government estimate for transportation costs; and

(B) By the contracting officer in ensuring that valid shipping instructions and delivery terms are included in solicitations and contracts that may involve transportation of supplies by sea.

(ii)(A) If the contractor notifies the contracting officer that the contractor or a subcontractor considers that no U.S.-flag vessels are available, the contracting officer shall request confirmation of the nonavailability from—

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

(*2*) The Commander, Military Surface Deployment and Distribution (SDDC), through the SDDC global e-mailbox (usarmy.scott.sddc.mbx.g3-ffw-team@army.mil) for ocean liner and intermodal transportation.

(B) If the contractor notifies the contracting officer that the contractor or a subcontractor considers that 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.

(*1*) Prior to granting an exception, the contracting officer shall request advice, oral or written, from the Commander, MSC, through the Contracts and Business Management Directorate, MSC (MSC_N103_FFW@us.navy.mil), for voyage and time charters; or 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.

(*2*) In advising the contracting officer whether to grant the exception, evidence from the following sources shall be considered, as appropriate—

(*i*) Published tariffs;

(*ii*) Industry publications;

(*iii*) The U.S. Maritime Administration; and

(*iv*) Other available sources.

(C) If the contractor notifies the contracting officer that the contractor or a subcontractor considers that the freight charges proposed by U.S.-flag carriers are excessive or otherwise unreasonable—

(*1*) The contracting officer shall prepare a report in determination and findings format, and shall—

(*i*) 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;

(*ii*) 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

(*iii*) Include an analysis of whether the cost is excessive, taking into account factors such as—

(*a*) 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;

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

(*c*) 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

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

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

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

(*ii*) 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.

(*3*) The Commander, MSC, or the USTRANSCOM Director of Acquisition, will forward the report to the Secretary of the Navy or the Commander, USTRANSCOM, respectively, for a determination as to whether the proposed freight charges are excessive or otherwise unreasonable. Upon receipt of a determination by the Secretary of the Navy or the Commander, USTRANSCOM, respectively, that U.S. flag rates are excessive or unreasonable, the contracting officer shall provide the contractor with written approval to use a non-U.S. flag carrier, in accordance with that determination.

(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) Time charters;

(B) Voyage charters;

(C) Contracts for charter vessel services;

(D) Dedicated contractor contracts for charter vessel services;

(E) Ocean bills of lading;

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

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

(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 5158.4, United States Transportation Command.

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

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

(B) An evaluation criterion for offeror participation in the Voluntary Intermodal Sealift Agreement; 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. Work performed in foreign shipyards shall not be considered if—

(*1*) Such work was performed as emergency repairs in foreign shipyards due to accident, emergency, Act of God, or an infirmity to the vessel, and safety considerations warranted taking the vessel to a foreign shipyard; or

(*2*) Such work was paid for or reimbursed by the U.S. Government.

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

(A) The Commander, MSC, or the Commander, SDDC, determines that no U.S.-flag vessels are available;

(*1*) The Commander, MSC, and the Commander, SDDC, 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.

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

(*i*) For voyage and time 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 the SDDC global e-mailbox (usarmy.scott.sddc.mbx.g3-ffw-team@army.mil).

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

(B) 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, through the Contracts and Business Management Directorate, MSC (MSC_N103_FFW@us.navy.mil), or the USTRANSCOM Director of Acquisition, through the Sealift Services Division, (transcom.scott.tcaq.mbx.i-foreign-flag-waiver@mail.mil); or

(C) The Secretary of the Navy, for voyage and time charters, or the Commander, USTRANSCOM, for ocean liner and intermodal transportation, determines that the proposed freight charges for U.S.-flag vessels are excessive or otherwise unreasonable.

(*1*) After considering the factors in paragraphs (b)(1)(ii)(C)(*1*)(*i*) and (*ii*) of this section, if the contracting officer concludes that the freight charges proposed by U.S.-flag carriers may be excessive or otherwise unreasonable, the contracting officer shall prepare a report in determination and findings format that includes, as appropriate—

(*i*) An analysis of the carrier's costs in accordance with FAR Subpart 15.4, or profit in accordance with DFARS 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 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 paragraph (b)(1)(ii)(C)(*1*)(*iii*) of this section.

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

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

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

(*3*) The Commander, MSC, or the USTRANSCOM Director of Acquisition, will forward the report to the Secretary of the Navy or the Commander, USTRANSCOM, respectively, for a determination as to whether the proposed freight charges are excessive or otherwise unreasonable. Upon receipt of a determination by the Secretary of the Navy or the Commander, USTRANSCOM, respectively, that U.S. flag rates are excessive or unreasonable, the contracting officer shall provide the contractor with written approval to use a non-U.S. flag carrier, in accordance with that determination.

(3) The following annual reporting requirement procedures relate to the DFARS solicitation provision at 252.247-7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise of Noncontiguous Trade.

(i) No later than February 15th of each year, departments and agencies shall—

(A) Prepare a report containing all information received from all offerors in response to the DFARS provision at 252.247-7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise of Noncontiguous Trade during the previous calendar year; and

(B) Submit the report to: Directorate of Acquisition, U.S. Transportation Command, ATTN: TCAQ,

508 Scott Drive, Scott AFB, IL 62225-5357.

(ii) The Director of Acquisition, U.S. Transportation Command, will submit a consolidated annual report to the congressional defense committees, by June 1st of each year, in accordance with section 1017 of Pub. L. 109-364.

(4)(i) Contracting officers shall ensure the following procedures have been followed when security background checks are required pursuant to the DFARS clause at 252.247-7027, Riding Gang Member Requirements, when exercising the exemption provided by section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). The contracting officer shall coordinate as necessary with the Government official specified in the contract pursuant to paragraph 252.247-7027(c)(2)(i)(A).

(ii) Contracting officers shall ensure that security background checks are processed by the Military Sealift Command (MSC) using the procedures contained in COMSC Instruction 5521.1 series, Security Screening of Persons with Access to MSC Ships (FOUO). Force Protection for Military Sealift Command (COMSC N3) will act as the executive agent for DoD utilizing the U.S. Government's El Paso Intelligence Center (EPIC) to perform required background checks as required by section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), and COMSC N34 Director of Force Protection or COMSC Antiterrorism Officer at mschq_n34_epic@navy.mil will facilitate the processes necessary to conduct background checks.

Parent topic: PGI 247.5 -OCEAN TRANSPORTATION BY U.S.-FLAG VESSELS