



AMERICAN MARITIME CONGRESS
Franklin Square, 1300 Eye Street, NW, Suite 250 West, Washington, DC 2000533 14

November 9, 2001

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD(AT&L)DP(DAR)
IMD 3C 132
3062 Defense Pentagon
Washington, DC 20301-3062

RE: DFARS Case 2000-D020 - Defense Federal Acquisition
Regulation Supplement; Balance of Payments Program - Proposed Rule

Dear Ms. Williams:

On behalf of the American Maritime Congress, the Maritime Institute for Research and Industrial Development, and our member companies, we are submitting comments on the proposed rule in DFARS Case 2000-D020. We are maritime industry associations representing most U.S.-flag ship operating companies in both the international and domestic shipping trades.

As you and the Defense Acquisition Regulations (DAR) Council are aware, the U.S.-flag maritime industry has been deeply involved since 1993 concerning the application of U.S.-flag cargo preference to DOD-generated shipments and acquisitions that contain any element of ocean transportation. We have particularly focused since then on the application of cargo preference in the context of acquisition reform, and a brief summary of developments since 1993 in this area is included in our response to the proposed rule in DFARS Case 2000-D014 which we are also submitting today to the DAR Council.

One very important general point we want to stress right at the beginning. It is that any proposals to restrict U.S.-flag cargo preference or cargo available to U.S.-flag vessels must be seen and evaluated in a broad economic and national security context. This should be true even though such proposals may provide short-term savings, please other nations (whose vessels then get to carry our own fleet's cargoes, or in this case of balance of payments, whose products or materials they wish to substitute for those made in America), or make contracting marginally more simple.

For example, on the issue of cost, as the Commander in Chief of USTRANSCOM noted in August 2001, it would cost DoD more than \$9 billion to replace the current commercial sealift capacity and an additional \$1 billion annually for operations and maintenance, excluding the

expense of providing crews and replicating the private-sector intermodal infrastructure. These exist already in the commercial sector; they are continually updated as part of normal competitive commercial operations; they are cutting-edge technology, they come virtually **free** to **DoD**; they are readily available to **DoD** through the Maritime Security Program (MSP) and the Voluntary Intermodal **Sealift** Agreement (VISA); **they** free up resources and allow **DoD** to focus on combat missions that only it and our Armed Forces can **perform**; and the funds they save dwarf any conceivable savings to **DoD** **from** any limitations on US-flag cargoes resulting from acquisition reform or policy proposals such as those embodied in this rule.

For example, commercial private-sector maritime manpower is now essential to **DoD** “grey-hulled” **sealift** assets (such as **LMSRs**) that provide the critical surge **sealift** without which **sizeable** ground force power projection simply cannot proceed - unless one wants to have vast disruption of plans, increased cost, and lengthy delays that could be a key element of mission success or failure. This private-sector manpower also provides crews for nearly one hundred Ready Reserve Force **sealift** vessels. The crews that are provided as an **offshoot** of the normal operations of the commercial fleet have years of continually-updated seagoing experience; they are ready to go without hesitation - that was proven in the Gulf War and every previous conflict; and they are unquestionably loyal to the policies and objectives of our government and the American people. In today’s uncertain world, with shifting alliances, religious and ethnic divisions, it is not prudent national security to rely on the world’s foreign-flag ships whose crews predominantly come **from** Third World nations.

For example, while it is **DoD** policy to simplify and improve the acquisition process, an objective with which no one disagrees, it is not **DoD** policy to have “acquisition reform at any cost” – as **if it** is the preeminent consideration. Acquisition reform goals or proposed balance of payments changes that could effect the U.S.-flag fleet must be balanced against other, broader considerations. It is militarily essential to **DoD** to maintain a strong **sealift capability** entirely under American control, and a key element of the policies and programs to achieve this has been the use of the U.S. Merchant Marine and its personnel. This is declared **DoD** policy, and it is built into war-fighting plans. Where acquisition reform or other proposals, such that embodied in this proposed rule, would erode the very capabilities that **DoD** has repeatedly said it needs and wants, then such proposals must be seen through this wider angle lens of full costs and implications.

Cargo preference and generating cargoes that provide a guaranteed base of cargo vital to the continued operation of vessels under the U.S.-flag is not a minor, peripheral issue. It basically determines whether or not America will have a merchant marine on the **sealanes** of the world. That is why we view this proposed rule with no small degree of concern and, for all the reasons noted above, why consideration of these proposed changes must take into account the broad as well as the narrow impacts.

With these important considerations as background, we would like to address now specific aspects of the proposed rule.

The proposed rule would exempt “any particular construction material that is at or below the simplified acquisition threshold.” This would deny significant cargoes to U.S.-flag vessels - not to mention jobs for American workers and business for American producers, now more important than ever due to the economic impact of the September 11 tragedy. Many purchases for construction materials could fit under the threshold, and, even **if they** did not, there is always the potential for **dis-**aggregation of larger purchases to get under the threshold. Furthermore, the effect of this exemption would be to undo part of the very salutary action proposed in DFARS Case **2000-D0** 14 that applies cargo preference to acquisitions below the threshold.

The proposed rule would also exempt “a petroleum product” “end product” and end products “acquired for commissary resale.” The former could deny to U.S.-flag carriers significant petroleum cargoes, and the wide discretionary wordii in this proposed rule (Subpart 225.7501) could also be used to send many petroleum cargoes foreign flag (except of course those already going foreign flag as a result of trade agreements). The same is true for “commissary resale” products for which the proposed rule gives a wide open pathway to purchase goods in foreign countries. This means less jobs and income for American producers, and, if such goods do not come **from** America, it means less cargoes for **U.S.-flag** vessels. Additionally, these commissary cargoes, by Defense Department policy, are supposed to travel in the Defense Transportation System (**DTS**). By opening wide the door to foreign purchases for commissaries, this proposed rule would weaken the U.S. military’s own DTS.

We therefore strongly urge that, in Section 225.7501, paragraphs (a)(1), **(a)(2)(iii)**, and (a)(4) be removed, as well as Section **225.1103(1)(i)** entirely, the words “greater than the simplified acquisition threshold but” in Section 225.7503(a), Section **252.225-70XX(b)(1)** entirely, Section **252.225-70YY(c)(1)** entirely, and Section **252.225-70YY** Alternate I **(c)(1)** also entirely.

Part of our alarm over this proposed rule lies in the wide discretionary authority granted to contracting officers (Section 225.7501, paragraph (a) **(5)**), and to agency heads (Section 225.7501, paragraph (c)) to avoid implementing the balance of payments program. For **example**, the reality is that when “the head of the agency determines that is not in the public interest” to apply balance of payments restrictions, staff at far lower levels will receive a call from the contracting officer, make the determination, write the paperwork, and the agency head may never see or have time to consider seriously the determination. This is not to imply that discretionary authority is bad in itself or that contracting officers or agency heads would necessarily overstep the intended discretion. But there is no way to know **if it** takes place, no way to track it, and no mechanism for redressing wrongs **if they** do occur. The result will be that fewer and fewer American products and materials will be purchased, and fewer and fewer cargoes will travel on **U.S.-flag** vessels.

Furthermore, in both sections noted above in the **preceding** paragraph, situations could easily arise where U.S. sources or providers would not even **be** able to participate or offer a bid - no matter how competitive. In the wake of September 11, let alone even before that date, we simply

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do not understand who could imagine that such a proposal is fair, or even within the bounds of common sense. Both should be rewritten to include and encourage U.S.-source participation.

Finally, the proposed rule also asks for comments on discontinuing entirely the application of the balance of payments program to all **DoD** construction contracts. Clearly, if for the reasons detailed already we are opposed to any piecemeal dismantling of this program, we are strongly opposed as well to its elimination.

Before closing, we wish to point out the devastating irony that this proposed rule was issued in the Federal Register on September 11. The proposed rule represents, in a sense, business as usual - tunnel vision that sees change only in its minute benefits and not in its overall implications. It is also business as usual in rationalizing away American jobs and economic revenues. As we believe that all Americans now understand, business as usual is not enough any more. Every action we take, even every rule we publish, should be looked at now in terms of how it helps American jobs, the American economy, and American security. In the light of September 11 and the **long-term** war on which we have now embarked, this proposed rule **fails** that test. We urge that it be re-examined entirely with this new perspective in mind.

Thank you for the opportunity to provide these comments. We would be pleased to answer any questions you may have.

Sincerely yours,



Gloria Cataneo Tosi
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