



U.S. Department
of Transportation
**Maritime
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

November 7, 2001

Re: DFARS Case 2000-D020

Dear Ms. Williams:

The following comments are submitted in response to DFARS Case 2000-D020, which proposes to add policy for application of the Balance of Payment Program to construction contracts performed outside the United States to the DFARS.

The Maritime Administration supports the proposal to amend the DFARS to add policy pertaining to the Balance of Payments Program but we have a few concerns about the proposed implementation which are discussed below. It is important to our national economy that the Balance of Payments Program continue to apply to all relevant contracts, including construction contracts. Further, we urge that the rule include solicitations and contracts or construction materials that are at or below the Simplified Acquisition Threshold. The present rule that is written into the FAR does not differentiate applicability relative to the Simplified Acquisition Threshold, and that status must be maintained in the DFARS as well.

We do not believe the contracting officer should be authorized to make a pre-solicitation determination that a requirement can be filled by a foreign product. United States Citizens would thereby be precluded from an opportunity to participate. At any particular time and for any particular product, United States Citizens may be very competitive and they must be given the opportunity to participate. For the same reasons, we do not believe an assessment on exempting the entire project from the Balance of Payments Program should be authorized prior to a solicitation. Therefore, we request policy paragraph 225.7501(c) be deleted in its entirety.

Construction material, supplies and equipment used for DOD construction projects overseas represent jobs for our Citizens, support of our national economy, and potential cargo for the American maritime industry, which in accordance with the Military Cargo Preference Act of 1904 ("1904 Act"), 10 U.S.C. 2631, must be transported on U.S.-flag vessels. The purpose of the 1904 Act is to develop and maintain a U.S.-flag merchant marine capable of carrying the nation's export and import commerce and of meeting U.S. defense needs in times of war and national

emergency. This is accomplished by requiring that Department of Defense cargoes are carried on U.S.-flag vessels, which provides an economic incentive for them to continue their U.S.-flag registry.

It is declared DOD policy to achieve its sealift mission by relying on the use of commercial U.S.-flag vessels to transport military sustainment cargo during times of peace and critical surge cargo when contingencies occur. DOD has consistently demonstrated its reliance on commercial U.S.-flag ships to supplement U.S. Naval vessels and on U.S. merchant marine personnel to man the fleet of commercial ships under contract to the Navy. Reducing the cargo available for carriage on U.S.-flag vessels in the effort to streamline the acquisition process adversely impacts the economic vitality of the American merchant marine. Maritime industry representatives have repeatedly stated that there is no business incentive for their vessels to continue to be U.S.-flagged without the certainty of Government-impelled cargo made available under the cargo preference laws, such as the 1904 Act. There are no long term benefits for DOD to erode its commercial sealift capabilities by limiting cargo subject to the 1904 Act for the purpose of minimizing acquisition activities that are part of the Balance of Payments Program. To the contrary, DOD recently has stated that failure to maintain a commercial U.S.-flag merchant marine would result in DOD having to expend over \$9 billion in initial investment and over \$1 billion annually thereafter for operating costs.

Therefore, we strongly recommend that the following references to the Simplified Acquisition Threshold be deleted from the proposed rule:

- Subpart 225.1103 Other provisions and clauses. Paragraph (l)(i) in its entirety.
Subpart 225.7501 Policy. Paragraph (a) (1) in its entirety.
- Subpart 225.7503 Contract clauses. Paragraph (a) remove the words “. . .greater than the simplified acquisition threshold but. . .”
Section 252.225-70XX Balance of Payments Program – Construction Material. Paragraph (b) (1) in its entirety.
- Section 252.225-70YY Balance of Payments Program – Construction Material Under Trade Agreements. Paragraph (c) (1) in its entirety.
Section 252.225-70YY Balance of Payments Program – Construction Material Under Trade Agreements. Alternate I. Paragraph (c)(1) in its entirety.

In addition to the cargo limitations imposed by the Simplified Acquisition Threshold, there are two product descriptions exempted by the proposed rule that represent large volumes of cargo currently subject to the 1904 Act, which are being transported by U.S.-flag vessels. In Subpart 225.7501 Policy, paragraph (a)(2)(iii) exempts “a petroleum product” from consideration as a domestic end product or a domestic construction material under the Balance of Payments Program. Petroleum products are purchased and transported from the United States for use overseas by DOD and other federal agencies, and we fail to understand why they are listed as an exemption. There is no qualifying statement attached to the exemption, which leaves the product description open to wide interpretation, potentially exempting thousands of U.S.-made products from foreign markets, assuming similar foreign-made products are available.

In the same Subpart 225.7501, at paragraph (a)(4), it is proposed that any end product that is acquired for commissary resale is exempt. With few exceptions, nearly all commissary items are shipped from the United States to the commissaries at overseas military installations under terms

and conditions of transportation service contracts issued and administered by the Military Transportation Management Command (MTMC), a component command of the US. Transportation Command (USTC). These contracts include volume commitments to the commercial ocean carriers which are party to the contracts. The potential reduction of such cargo due to its exclusion from the Balance of Payments Program concerns us because there is no explanation or perceived benefit as to why such a broad generic item is singled out for exemption. Again, as with petroleum products, the product description of “end product acquired for commissary resale” is open for interpretation to an extremely wide variety of foreign products that could be substituted for similar domestic products made or produced in the United States. The issue is one of eliminating overseas military markets for domestic end products and reduced available cargo for U.S.-flag vessels, which is counter to the contract requirements asserted by USTC, the same DOD organization that relies on U.S.-flag vessels to fulfill its critical sealift mission.

Therefore, we urge that these two product descriptions be reviewed and the rationale for their exclusion be closely examined and re-considered. We believe that unless there are urgent and compelling reasons that override concerns of employment of United States Citizens in addition to adversely impacting DOD contractual commitments to U.S.-flag carriers by restricting available cargo, the two paragraphs cited above in Subpart 225.7501 should be deleted.

Thank you for the opportunity to comment on the proposed rule. We request that you consider our recommendations regarding the issue of available cargoes for U.S.-flag vessels and delete the restrictions imposed by the Simplified Acquisition Threshold. We also ask that you heed our concerns regarding the product descriptions exempted from consideration under the Balance of Payments Program and re-consider their exemption. Finally, we ask that you not allow pre-solicitation determinations or assessments not to use United States products. United States Citizens should be allowed to participate in all solicitations.

If there are questions regarding our comments, I can be reached at (202) 366-55 15 by facsimile at (202) 366-5522 or by email Tom.Harrelson@marad.dot.gov.

Sincerely,

Thomas W. Harrelson
Director, Office of Cargo Preference