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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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**FILE:** B-218497

**DATE:** July 23, 1985

**MATTER OF:** Application of foreign shipyard construction prohibitions to acquisition of existing foreign-built naval vessels

**DIGEST:**

Limitations in annual "Shipbuilding and Conversion, Navy" appropriation (known as Tollefson-Byrnes Amendment) and 10 U.S.C. § 7309, prohibiting construction of "naval vessels" in foreign shipyards apply to construction of floating drydocks which are "naval vessels" for the purpose of these prohibitions. However, the prohibitions do not preclude acquisition of existing foreign-built floating drydocks since they only serve to preclude new construction of "naval vessels" from taking place in foreign shipyards and not acquisitions by other means. The prohibitions do serve to preclude the acquisition of a floating drydock not yet in existence from a domestic shipyard but which will be built for it by a foreign shipyard. Construction of "naval vessels" in a foreign shipyard is precluded by these prohibitions whether contracted for directly or through a subcontractor.

This decision is in response to a request from Vice Admiral E.B. Fowler, Commander, Naval Sea Systems Command (NAVSEA), for our opinion on whether the prohibitions against foreign shipyard construction of "naval vessels" set forth in the annual "Shipbuilding and Conversion, Navy" (SCN) appropriations (know as the Tollefson-Byrnes Amendments) and in 10 U.S.C. § 7309 (1982), apply to:

1. a contract for the purchase from a domestic shipyard of an existing foreign-built floating drydock;
2. a contract for the purchase from a domestic shipyard of a floating drydock currently under construction in a foreign shipyard pursuant to a contract between the domestic shipyard and the foreign builder; and
3. a contract for the purchase of an existing foreign-built floating drydock from a foreign shipyard, represented by a United States agent.

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For the reasons stated below, in response to questions 1 and 3, we hold that the Navy may procure existing foreign-built drydocks from any source. However, in answer to question 2, procurement of the drydock for which construction in a foreign shipyard has just begun would contravene the prohibitions if the Government makes a firm commitment to purchase the drydock once construction is completed.

The NAVSEA submissions of April 5 and 23, 1985, indicate that the Navy has a requirement for up to two medium auxiliary floating drydocks (AFDM). Based on our non-technical reading of the "Principal characteristics" section of Navy's Request for Proposals, issued November 30, 1984, we gather that a floating drydock is a multi-level steel platform moored at one end to a pier. Its function is to serve as a repair or maintenance resource for naval ships. It must be "ocean towable without modification," since the Navy intends, after award, to have the drydocks delivered to the Naval Ship Repair Facility, Subic Bay, Philippines.

NAVSEA analysis concluded that the requirement for two AFDMs could be satisfied at a substantial savings to the Government by the purchase of existing floating drydocks from commercial yards. The NAVSEA estimate to construct a new AFDM in a domestic commercial shipyard is \$130,000,000. Market surveys conducted in 1984 indicated that at least one existing dock, capable of meeting Navy standards and certification requirements, was available for purchase within the \$20,000,000 range.

On June 8, 1984, NAVSEA announced in the Commerce Business Daily (CBD) its interest in purchasing an existing United States-built floating drydock. Only one expression of interest was received and that was for a dock which failed to meet the Navy's minimum requirements for technical acceptability.

NAVSEA was aware that there were several foreign-built floating drydocks capable of meeting Navy requirements. It determined that the prohibition against foreign construction of naval vessels contained both in the Tollefson-Byrnes Amendment and 10 U.S.C. § 7309 were not applicable to the acquisition of an already built floating drydock.

Faced with the unavailability of United States-built floating drydocks, NAVSEA decided to republish its earlier CBD announcement on September 5, 1984, without the requirement that the existing drydocks had to have been United States-built, and proceeded with the competitive procurement of at least one existing floating drydock on a firm fixed-price basis.

By March 29, 1985, there were two offerors remaining within the competitive range. One proposed a floating drydock, originally constructed in Germany, which had been in use for 10 years. The other offeror proposed a floating drydock which is presently under construction in Germany, pursuant to a contract entered into before the present RFP was issued between the offeror and the German shipbuilder. Later, as a result of further evaluation by the Government, a third proposal, originally eliminated from the competitive range, was reinstated. This third proposal involved the purchase of an existing foreign-built floating drydock from a German shipyard, represented by a United States agent. This floating drydock is currently owned and used by the foreign offeror.

#### DISCUSSION

1. Is a floating drydock a vessel?

Subsequent to receipt of NAVSEA's request, Continental Maritime of San Francisco, Inc. (CMSF), owner of the drydock currently under construction in Germany, submitted supplemental information for our consideration. CMSF contends that the "threshold" question must be whether floating drydocks are "naval vessels" for purposes of applying the statutory restrictions on foreign shipyard construction.

Neither the Tollefson-Byrnes Amendments nor 10 U.S.C. § 7309 expressly define the term, "naval vessel." Moreover, while the legislative history of those prohibitions indicates an intention on the part of the Congress to distinguish between "naval vessels" and "commercial vessels" for purposes of application of the prohibitions, it also sheds little light on the scope of the term, "vessel."

NAVSEA, which had received a copy of the CMSF submission, is of the firm opinion that an AFDM is a "naval vessel" covered by the Tollefson-Byrnes Amendments and 10 U.S.C. § 7309, which as a minimum extend to vessels essential to the national defense since:

--The AFDM appears on the Navy Vessel Register established pursuant to law and as such are included in assessments of the relative strengths of the navies of the various countries of the world (10 U.S.C. § 7291, SECNAV Instruction 5030.15); and

--AFDMs serve warships which are essential to the national defense.

We have carefully considered the CMSF materials but do not find them so compelling that we would disregard the views of the agency designated to administer the program. Moreover, we note that neither the Congress nor any of the parties involved have ever contended that the SCN appropriation was not available for acquisition of floating drydocks. If a floating drydock is a "vessel" for purposes of the appropriation, it must also be considered a "vessel" for purposes of the restrictions on use of the appropriation. Therefore, we accept the NAVSEA view that the Tollefson-Byrnes Amendments and 10 U.S.C. § 7309 apply to the acquisition of floating drydocks.

2. Applicability of the prohibitions.

The SCN appropriation contained in the 1985 Department of Defense Appropriation Act which will be used to fund the procurement provides:

"For expenses necessary for the construction, acquisition, or conversion of vessels as authorized by law, \* \* \* \$450,200,000; \* \* \* to remain available for obligation until September 30, 1989: \* \* \* Provided further, That none of the funds herein provided for the construction or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or superstructure of such vessel: Provided further, That none of the funds herein provided shall be used for the construction of any naval vessel in foreign shipyards \* \* \*." Pub. L. No. 98-473, Oct. 12, 1984, 98 Stat. 1913-14.

The first proviso quoted (known as the "Tollefson Amendment" after its sponsor) first appeared in the 1965 Shipbuilding and Conversion Navy appropriation. Pub. L. No. 88-446, Aug. 19, 1964, 78 Stat. 471. The purpose of this amendment, as explained by Representative Tollefson during the debate preceding its adoption by the House of Representatives, indicates that it was intended to prevent the construction of midbody sections of ships in foreign shipyards and then having them

towed across the ocean and finished in domestic shipyards.<sup>1/</sup> The intent was to impose the same limitation on naval vessels that applied at that time to commercial vessels under the Merchant Marine Act of 1936. However, the legislative history makes it clear that this limitation was not intended to prohibit emergency repairs in foreign shipyards, and more importantly, construction of naval vessels in foreign shipyards. Statements of Representative Tollefson, id.

The second proviso quoted (known as the "Byrnes Amendment" after its sponsor) first appeared in the SCN appropriation for fiscal year 1968. Pub. L. No. 90-96, Sept. 29, 1967, 81 Stat. 238. The purpose of the amendment was to close the loophole in the Tollefson Amendment that permitted paying for construction of an entire naval vessel in a foreign shipyard even though it precluded paying just for construction of the major components of a naval vessel in a foreign shipyard. The Byrnes Amendment was enacted after the Navy had awarded contracts for the purchase of a total of nine ocean minesweepers from shipyards in Great Britian during fiscal years 1966 and 1967. Seven more minesweepers were proposed for funding in fiscal year 1968.

At that time, the American shipbuilding industry was suffering economically. Foreign competition was able to build vessels at lower cost, with the result that business went overseas for commercial construction. It was feared that if the Navy also had vessels constructed overseas, the situation would be exacerbated.<sup>2/</sup>

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<sup>1/</sup> 110 Cong. Rec. 8782-83 (1964) (statements of Representative Tollefson). See also the Department of Defense Appropriations, 1965: Hearings Before the Subcommittee of the Senate Committee on Appropriations, Part 2, 88th Cong., 2d Sess., 779-80 (statement of Cyrus Vance, Deputy Secretary of Defense in commenting on the Tollefson amendment).

<sup>2/</sup> See Department of Defense Appropriations for Fiscal Year 1968, Hearings before the Subcommittee of the Senate Appropriations Committee on H.R. 10738, Part 1, 90th Cong., 1st Sess., 88, 375 (1967) (statement of Robert S. McNamara, Secretary of Defense; 113 Cong. Rec. 23429-30 (statement of Senator Brewster). See also Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations for 1968, Hearings Before a Subcommittee of the Appropriations Committee, Part 3, 90th Cong., 1st Sess. 807-08 (1967), concerning building merchant vessels in foreign shipyards.

Representative Byrnes introduced his amendment with the clear goal of protecting the American shipbuilding industry from the effects of foreign competition in the interest of national defense. The purpose was the maintenance of an American shipbuilding capability and know-how in case of war or national emergency. He argued:

"\* \* \*I suggest to this House that we should have the responsibility of at least having seven of the 16 [minesweepers] constructed in yards here so that we can maintain in this country an expertise with regard to the construction of this type of vessel and so that we do not lose the know-how and experience in building this type or class of vessel." 113 Cong. Rec. 15581 (1967).

Expressing this same sentiment, Representative Garmatz pointed out that

"We cannot count on Britain or Japan to build our warships or our merchant ships in case of an emergency. We can only rely on our own strengths and skills, and we must keep these skills alive." 113 Cong. Rec. 15581 (1967).

Opposition to the Byrnes Amendment was voiced on the grounds that it would adversely affect our relations with our allies who were purchasing military hardware from the United States but from whom the United States was purchasing very little. This, it was argued, was resulting in an imbalance of trade in favor of the United States which could have adverse future effects. See Senate Report No. 494, of the DOD Appropriation Bill for 1968, 90th Cong., 1st Sess. 48-49 (1967); 113 Cong. Rec. 23419 (1967) (statement of Senator Symington). However, this argument, like the argument that the amendment would result in higher costs to the Government, appears to have been unpersuasive since the amendment passed in spite of these objections.

Section 7309 of title 10 of the United States Code, as amended by Pub. L. No. 98-473, October 12, 1984, 98 Stat. 1837, 1941, provides:

"Restriction on construction of naval vessels in foreign shipyards

"(a) Except as provided in subsection (b), no naval vessel and no vessel of any other military department and no major component of the hull or superstructure of any such vessel, may be constructed in a foreign shipyard.

"(b) The President may authorize exceptions to the prohibition in subsection (a) when he determines that it is in the national security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date the notice of such determination is received by Congress."

Section 7309 was originally added to title 10 by section 1127 of Pub. L. No. 97-252, Sept. 8, 1982, 96 Stat. 758-59, the DOD Authorization Act, 1983. The purpose of this provision, among other things, was to enact into permanent law the prohibitions contained in the Tollefson-Byrnes Amendments. 127 Cong. Rec. H8007 (daily ed. Nov. 4, 1981) (statement of Representative Bennett); H.R. Rep. No. 305, 97th Cong., 1st Sess. 2 (1981).

During the floor debates on this legislation, it was pointed out that this provision was intended to maintain a strong and viable shipbuilding industry to meet the critical needs of the national defense. However, it was also pointed out that it:

"\* \* \* would not prohibit repair of naval vessels overseas. It does not pertain to the purchase of standard shipboard equipment, weapons, ammunition, or similar items for naval vessels. The legislation would not prohibit the leasing of foreign-built vessels. Finally, the legislation does not address any aspects of the acquisition, supply, or repair of commercial vessels."

127 Cong. Rec. H8007 (daily ed. Nov. 4, 1981) (statement of Representative Bennett). See also H.R. Rep. No. 305, 97th Cong., 1st Sess. 3 (1981), providing a similar explanation of this proposal.

It is clear from their history that the prohibitions contained in the Tollefson-Byrnes Amendments and 10 U.S.C. § 7309 were enacted to facilitate the national defense by maintaining a domestic shipbuilding expertise in the United States in case of war or other national emergency, thereby reducing our dependence upon foreign shipbuilders. NAVSEA agrees with this

general characterization of the purpose of the legislation.<sup>3/</sup> However, the Congress has placed limits on the scope of the prohibitions which must be taken into account.

The Tollefson-Byrnes Amendments expressly apply only to expenditures by the Navy from the SCN appropriation. While the SCN appropriation is available for acquisition, construction or conversion of naval vessels, the Tollefson amendment applies only to construction or conversion, while the Byrnes amendment applies solely to construction. Thus authority for acquisition of vessels by means other than through construction or conversion is implied.<sup>4/</sup> This conclusion is supported by the legislative history, discussed above, which demonstrates that neither leasing of foreign-built vessels nor acquisition of foreign-built commercial vessels was viewed by the proponents and supporters of these limitations as being within their scope.

Furthermore, the Congress has been restrained in its approach to legislating proscriptions in this area. First it adopted the Tollefson Amendment, prohibiting only construction of midbody sections of ships in foreign shipyards, leaving many recognized exceptions. Then it adopted the Byrnes Amendment, adding only the further prohibition on having an entire vessel constructed in a foreign shipyard. Finally, it adopted 10 U.S.C. § 7309, making permanent the prohibitions in the Tollefson-Byrnes Amendments by preserving the existing limitations but providing authority for the President to make exceptions to these limitations in the interests of national security.

In summary, we think that the limitations on the use of the SCN appropriation crafted by the Congress have been carefully drawn to preclude only Government contracts for construction or conversion of naval vessels. Therefore, the prohibitions in the Tollefson-Byrnes amendments and 10 U.S.C. § 7903 do not prevent the purchase of existing foreign-built

<sup>3/</sup> See Hearings on Military Posture and H.R. 5968, Department of Defense Authorization for Appropriations for Fiscal Year 1983, Part 4, before the House Armed Services Committee, 97th Cong., 2nd Sess. 345-46 (1982) (prepared statement of Vice Admiral Earl B. Fowler, Jr., USN Commander, Naval Sea System Command).

<sup>4/</sup> By purchase, lease, or transfer, for example. See 10 U.S.C. § 2233(a)(1).

naval vessels, since they require neither construction nor conversion. Thus our answers to questions 1 and 3 are in the negative.

It follows from this interpretation that the Navy could not contract directly for construction of a naval vessel in a foreign shipyard. We also hold that the Navy is prohibited from contracting with an American shipyard for delivery of a vessel which has yet to be constructed when the shipyard proposes to subcontract the entire construction of the vessel to a foreign shipyard. To hold otherwise would render the prohibitions meaningless.

It is our understanding that while the keel has been laid on one floating drydock, no further construction has taken place and apparently will not continue until this matter is resolved. NAVSEA makes the point that title will not pass until delivery and acceptance of the completed vessel and the risk of loss remains with the seller until then. Therefore, NAVSEA states, it is not contracting for construction but only for a finished vessel. The question, it says, is "when does 'existence' begin for purposes of the prohibition?" We would answer that whenever NAVSEA enters into a firm contract for a vessel that does not yet exist, it is actually contracting for construction of the vessel and committing SCN funds to accomplish this. It is immaterial whether the contractor will build the vessel itself or utilize a subcontractor to do the work. If the work is to be done in a foreign shipyard, the prohibition is violated. Moreover, the fact that title will not pass until the finished work is inspected and accepted is of no particular significance. Such a provision is quite common in construction contracts. Similarly, the fact that no progress payments will be made, while a little more unusual, does not tip the scale. It is consistent with our finding that the contract contemplated in question 2 is a construction contract that no payment will be made until the finished vessel is inspected and delivered.

We conclude, therefore, that NAVSEA may not contract for a floating drydock which is not yet built unless the construction is to take place in a United States shipyard.

*for*   
Comptroller General  
of the United States