

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

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FILE:B-211156

DATE: May 2, 1983

MATTER OF: Department of the Navy's T-AHX Hospital Ship program: Applicability of statutory limitation of payment.**DIGEST:**

Section 802 of the Merchant Marine Act of 1936, 46 U.S.C. § 1212, does not apply to the Navy's purchase of hospital ships converted from existing vessels for which construction-differential subsidies were given. Section 802, which specifies a valuation formula for construction differential subsidy vessels purchased or requisitioned by the Government, was intended only to apply to those vessels purchased or requisitioned under Presidential proclamation of national defense need or of national emergency under section 902 of the Act, 46 U.S.C. § 1242.

By letter dated March 25, 1983, the Commander of the Naval Sea Systems Command has requested our opinion on whether section 802 of the Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1212, restricts the amount that the Navy may pay for hospital ships converted from existing vessels. Section 802 specifies a formula, to be included in maritime construction-differential subsidy contracts, limiting the amount that the Government may pay for the "purchase or requisition" of vessels for which construction-differential subsidies have been given. For the reasons discussed below, we conclude that the restrictions of section 802 do not govern the Navy's purchase of the ships in question. We do not here address, however, the general merits of the Navy's T-AHX program; nor do we address the merits of the two proposals submitted for its implementation.^{1/}

BACKGROUND

The Naval Sea Systems Command, to fulfill a stated need for a 2000-bed floating hospital facility, has entered into a negotiated procurement for hospital ships, to be newly constructed or converted

^{1/} The T-AHX program will be examined in detail in an upcoming audit report prepared at the request of the Chairman of the Subcommittee on Defense, House Committee on Appropriations.

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from existing vessels. Two ships are considered necessary, although the Navy's present plans, due to funding limitations, are to purchase one ship and retain an option for the second. Final contract award will be made on a fixed-price basis, with compensation adjustments.

After an initial qualifying round, the Navy requested two offerors to submit design proposals for the hospital ships. Both offerors had proposed to provide ships converted from existing commercial vessels. In each case, the vessels proposed for conversion were originally built with construction-differential subsidies (CDS) given under authority of title V of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1151-1161.

The T-AHX design (Phase II) solicitation included price proposal requirements, although the Navy will not request price proposals until after reviewing each offeror's designs. The original solicitation, issued January 27, 1983, required offerors to describe any Maritime Administration subsidies against the unconverted ships, to "separately identify * * * the purchase price of the unconverted ships using the formula set forth in 46 U.S.C. Section 1212," and to certify that price proposals do not include amounts for unconverted vessels "in excess of the limits set forth in 46 U.S.C. Section 1212." These requirements were all deleted by solicitation amendment no. A001, March 15, 1983. The revised solicitation expressed the view that the Navy, in accepting delivery of a hospital ship, would not be taking delivery of a CDS vessel, because of the vessel's altered form. The Navy has alternatively expressed the view that section 802 of the Merchant Marine Act of 1936 (36 U.S.C. § 1212) is not applicable to this particular procurement. The Navy, however, has requested our view of section 802 before proceeding with contract award.

Prior to issuing an opinion, we requested the views of the Maritime Administration. By letter dated April 13, 1983, the Administrator of the Maritime Administration transmitted to us the opinion of his Chief Counsel that, based on its statutory language and legislative history, section 802 was only applicable to purchases or requisitions made under authority of section 902 of the Act, 46 U.S.C. § 1242.

DISCUSSION

Section 802 of the Merchant Marine Act of 1936, as amended, provides:

"Every contract executed by the Secretary of Transportation under authority of title V of this Act shall provide that--

"In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Secretary of Transportation, whichever is the greater. Such determination shall be final. In computing the depreciated value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the [Internal Revenue Service] for income-tax purposes.

"The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof." 46 U.S.C. § 1212, as amended by Maritime Act of 1981, Pub. L. No. 97-31, § 12 (120), 95 Stat. 151, 164. (Emphasis added.)

The Navy has put forward two alternate theories in support of its position that section 802 is inapplicable to the present case. First, the Navy argues that, notwithstanding the absence of any express limitation, the words "purchase or requisition" in the provision were intended to apply only to those purchases or requisitions made under Presidential proclamation of national defense need

or of national emergency under the authority of section 902 of the Merchant Marine Act, 46 U.S.C. § 1242. Second, the Navy argues that any hospital ship provided would not be a CDS vessel, but would be, in effect, a new vessel, material for which might have been acquired from older CDS ships. Because we agree with the Navy's first argument, we find it unnecessary to consider the merit of its second argument. Our opinion is based on the language of section 802 in the context of the entire statute, and on the legislative history of the provision.

In our decision 36 Comp. Gen. 566 (1957), we considered the question of whether section 802 constituted a limitation on the valuation of CDS vessels acquired by the Maritime Commission under the trade-in authority of section 510 of the Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1160. We held that section 802 did not act as a pricing limitation to section 510 trade-ins. While our decision was limited to vessels acquired by trade-in, our reasoning in that case is relevant to the present discussion. We stated:

"Examination of the legislative history of section 802 clearly establishes that it is a corollary of section 902, 46 U.S.C. 1242, which authorizes the 'requisition or purchase [of] any vessel or other watercraft owned by citizens of the United States' '[w]henver the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President.'" 36 Comp. Gen. 566 (1957) (emphasis in original).

We have reexamined section 802 and its legislative history and again conclude that it is only applicable to the purchase or requisition of CDS vessels under section 902.^{2/}

As originally enacted, the Merchant Marine Act of 1936 authorized two methods by which the United States Maritime Commission (now the Secretary of Transportation) could acquire vessels: by

^{2/} Section 902 provides, in pertinent part:

"(a) Compensation; restoration; consequential damages. Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Secretary of Transportation to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. * * * When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. * * *

"(b) Determination of value of vessel. When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act [46 U.S.C. § 1212], and in determining the value of any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded."

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46 U.S.C. § 1242, as amended by Maritime Act of 1981, Pub. L. No. 97-31, § 12 (131), 95 Stat. 151, 165.

purchase of trade-in vessels replaced by newly-constructed subsidized vessels (section 507), and by requisition or purchase of any watercraft under a national defense or national emergency proclamation of the President (section 902). See 46 U.S.C. §§ 1157, 1242. Each provision specified the valuation method to be used to determine payment: trade-in vessels under section 507 were to be acquired at a "fair and reasonable" valuation not exceeding the owner's costs less depreciation. 46 U.S.C. § 1157. Vessels purchased or requisitioned pursuant to a national defense or national emergency proclamation under section 902 were to be acquired for "just compensation" if a non-subsidized vessel, and under the formula specified in section 802 if subsidized. The section 802 formula differed from the valuation language of section 507 in two principal ways: it specifically excluded the cost of national defense features, and it required the deduction of any construction-differential subsidy on the vessel. Section 802 was later amended to allow, as an alternative, valuation at reasonable scrap value. Act of June 23, 1938, Public law 75-705, § 33, 52 Stat. 953, 962. No corresponding change was made to the valuation method specified in section 507.

In later amendments to the Merchant Marine Act, several other methods of vessel acquisition were authorized. Section 510, added in 1939, authorized the acquisition of "obsolete" vessels for credit, with valuation set at "fair and reasonable" rates, determined after consideration of the scrap, book, and market values of vessels traded in. See 46 U.S.C. § 1160(a)-(d). It was this provision that we specifically held in 1957 to be independent of any valuation or payment limitation included in section 802. 36 Comp. Gen. 566 (1957). Similarly, section 215, added in 1938, provided general authority to acquire American-built vessels deemed necessary to serve the foreign trade. See 46 U.S.C. § 1125. Payment was to be made in an amount not to exceed by more than 5 percent the owner's costs less depreciation, with a specific exclusion of any cost of national defense features paid by the Government, and of any construction-differential subsidy. *Id.*

The Congress, in the Merchant Marine Act, thus specified a number of different instances for which the acquisition of vessels would be authorized. Each authorizing provision contains language purporting to identify the payment or valuation method to be used by the Government in its acquisition. In light of this, we believe that the payment limitations of section 802, although broadly worded, were not intended to govern all purchases of subsidized vessels. Thus, we agree with the Chief Counsel of the Maritime Administration, who has stated that an expansive reading of section 802

"conflicts with other provisions of the Act that contain specific formulas for the purchase price the Government pays for acquiring vessels." It is arguable that the language of section 802 could be read together with any of the payment or valuation language of other provisions: it would simply have the effect of limiting the calculation of an owner's original costs where the vessel in question had received a construction-differential subsidy. However, upon examination of the circumstances leading to the enactment of section 802, we think that the more persuasive view is that the section applies only to payments made under authority of section 902.

Both the House- and Senate-reported versions of the bill later enacted as the Merchant Marine Act of 1936 proposed to authorize the requisition or purchase, for the national defense or in time of national emergency proclaimed by the President, of vessels receiving maritime loans, subsidies or ocean mail contracts. H.R. 8555, 74th Cong., 1st Sess. (June 20, 1935) (reported in H.R. Rep. No. 1277, 75th Cong., 1st Sess. 26, 33 (1935)); H.R. 8555, 74th Cong., 1st Sess. (July 29, 1935) (reported in S. Rep. No. 1226, 74th Cong., 1st Sess. 3 (1935)). Both versions contained language to ensure that subsidy payments were taken into account in determining the value of requisitioned vessels: the House-reported version merely stated that consideration should be given to the subsidy at the time of valuation; the Senate-reported version was considerably more specific. It set out a subsidy-recovery requirement to be included as a contract term for all vessels receiving maritime financial aid. The Senate's language had been included at the request of Senator Bone, who had insisted that the bill specifically prevent maritime subsidies from being used as a source of profit during wartime. 79 Cong. Rec. 10,256 (1935). That version, which formed the basis for several other Senate versions, provided, in pertinent part, this amendment to the Merchant Marine Act of 1928:

"Sec. 702. (a) The following vessels [those receiving Federal loans, ocean-mail contracts, or maritime subsidies] may be taken over and purchased or used by the United States for national defense or during any national emergency declared by proclamation of the President, or when in the opinion of the President a national emergency is imminent, under the following conditions:

* * * * *

"(b) In the event the United States should purchase, acquire, or use any vessel or vessels covered by the above * * * the owner shall be paid the fair actual value

of the vessel at the time of taking, or paid the fair compensation for its use based upon such fair actual value, but in neither case shall such fair actual value be enhanced by the causes necessitating the taking. * * *

"(c) Every contract executed under the Merchant Marine Act, 1935, for the payment of financial aid in respect to any vessel or vessels shall contain a provision (which provision shall continue in force and effect during the entire economic life of such vessel or vessels and be binding on all owners of such vessel or vessels) permitting any such vessel or vessels to be taken over by the United States by condemnation or purchase, or be used by the United States for national defense or during any national emergency declared by proclamation of the President upon the following terms and conditions:

"(1) In the event the United States should purchase or in anywise acquire ownership of such vessel or vessels, the then owner shall be paid therefore the fair actual value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon) less the depreciated amount of construction subsidy theretofore paid incident to the construction [or] reconditioning of such vessel or vessels."

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H.R. 8555, § 1103, 74th Cong., 1st Sess. (July 29, 1935).

Several later bills, intended to be introduced as substitutes for H.R. 8555, contained almost identical provisions. See S. 3376, 74th Cong., 1st Sess., § 1103 (July 29, 1935); S. 3500, 74th Cong., 2d Sess., § 903 (February 24, 1936) (reported in S. Rep. No. 1721, 74th Cong., 2d Sess. (1936)).

Subsection (c) of the above-quoted provision of H.R. 8555 can be clearly recognized as the origin of section 802 of the Merchant Marine Act of 1936. It is equally apparent that the contract provision in subsection (c), although worded as broadly as the present section 802, was applicable only to purchases or requisitions made under the emergency authority of the proposed section 702. This was emphasized by the accompanying Senate Report:

"Section 1104 of the House bill, which deals with the requisition of vessels, is amplified by the Senate amendment to contain the principle of establishing by contractual relations with the owner of the vessel at the time that Government aid is granted, the terms and conditions under which such vessel may be requisitioned by the Government in a national emergency." S. Rep. No. 1226, 74th Cong., 1st Sess. 3 (1935) (emphasis added).

In 1936, a substitute amendment for H.R. 8555 offered by Senator Guffey separated, apparently for the first time, the contract provision later enacted as section 802 and the emergency requisition authority later enacted as section 902. H.R. 8555, 74th Cong., 2d Sess. § 53 (April 24, 1936). This format was duplicated in the final compromise version of the bill, introduced in the Senate as a substitute amendment on June 18, 1936. 80 Cong. Rec. 9,885 (1936); H.R. 8555, 74th Cong., 2d Sess. (June 13, 1936). While there was no accompanying explanation for the separation of the two provisions, the purpose was apparently to place the price limitation, included since the Senate-reported version in 1933 as a contract clause, into the title of the bill devoted to "contract restrictions." There appears to have been no intention by this change to depart in any substantive way from previous versions of the bill. This view is supported by the record of debate in both houses of the Congress prior to the passage of the bill.^{3/}

Based on the foregoing, we conclude, as we did in 36 Comp. Gen. 566 (1957), that section 802 of the Merchant Marine Act of 1936

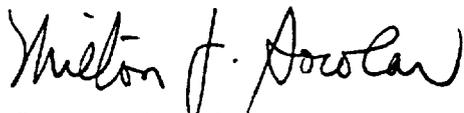
^{3/} For example, a colloquy between Senators Bone and Copeland on the Senate floor demonstrates that both understood that section 802 and 902 were together intended to respond to Senator Bone's initial concerns over wartime profiting by ship owners. 80 Cong. Rec. 9,920-21 (1936). Shortly thereafter, by an amendment offered by Senator Bone, section 902 was clarified to refer specifically to section 802. 80 Cong. Rec. 10,077 (1936). Similarly, in expressing his support for the bill during the House debate, Congressman Sirovich stated that:

"* * * this measure takes the profits out of war by making it mandatory for the Government of the United States to take over ships in emergencies or in times of war and only gives its owner back the actual money that he put in." 80 Cong. Rec. 10,575 (1936).

was intended to be read as a corollary of section 902, applicable only to those purchases or requisitions made "whenever the President shall proclaim that the national defense makes it advisable or during any national emergency declared by proclamation of the President." 46 U.S.C. § 1242(a). See also 41 Comp. Gen. 181 (1961).

Notwithstanding our conclusion as to the applicability of section 802, it could be argued that any CDS contract restriction which, by its own terms, applies to any "purchase or requisition" by the United States, would effectively bind the owner of the vessel in transactions not necessarily contemplated by the drafters of the statute. The contractual restriction, however, is identical to, and cannot be disassociated from, the language set out by the statutory provision. It is included as boilerplate language in every CDS contract to effect the purposes of that provision: to prevent excessive profits by the owners of requisitioned vessels in time of war or national emergency. In our view, such contractual restrictions should be interpreted in a manner consistent with the statutory provision itself.

For the reasons discussed above, we are of the opinion that the Navy is not restricted by the payment limitations of section 802, or of CDS contract restrictions imposed pursuant to section 802, in its purchase of hospital ships converted from existing CDS vessels.

for 
Comptroller General
of the United States