Interim DoD Rule on Vessel Chartering May Give Evaluation Preference for Repairs Made in U.S. Yards

By Brian A. Bannon

On August 28, 2007, the Department of Defense published an interim rule implementing Section 1017 of the National Defense Authorization Act for Fiscal Year 2007. 72 Fed. Reg. 49204. Section 1017 requires the Secretary of Defense to issue an acquisition policy that establishes, as a criterion to be considered in awarding vessel transportation contracts, the extent to which the offeror had overhaul, repair, and maintenance work for "Covered Vessels" performed in shipyards located in the United States and Guam. Covered Vessels are defined as those vessels owned, operated, or controlled by the offeror and qualified to engage in the coastwise and non-contiguous (between the United States mainland and Puerto Rico, Alaska, Hawaii, and other U.S. Pacific Islands) trade.

The House Report accompanying Section 1017 states that the provision is intended as an interim measure while Congress conducts hearings into the Coast Guard standard governing the amount of work that may be done to a vessel before it is considered rebuilt. The Report states:

the committee includes an interim provision to address concerns that vessels engaged in the coastwise trades, including the domestic offshore trades, are undergoing repairs and modifications in shipyards located outside the United States.

H.R. Rpt. 109-452, at 375 (2007). The genesis of Congress' concern is stated to be that:

the Coast Guard has one test for when a vessel is initially considered to be "built" in the United States for the purposes of engaging in the coastwise trades, and another test for when a vessel is deemed "rebuilt" outside the United States, and thus losing its right to engage in the coastwise trades.

Id. The Report concludes that:

To resolve this issue, and to be fair to proponents and opponents of the practice of repairing and overhauling coastwise eligible vessels in foreign shipyards, the committee intends to conduct a hearing or series of hearings in the near-term. The committee recognizes this is a very complicated issue with significant policy ramifications, and thus chose to address this issue through an interim legislative provision in this Act.

Id. Given the significance of the rebuilt vessel standards, which have many vocal proponents and opponents, the U.S. maritime industry should monitor these hearings closely. As it is, Section 1017 favors opponents of current standards as the section applies to any repairs to Jones Act vessels even if such repairs would have no effect on Jones Act qualification.

Irrespective of the magnitude of Congress' concern or the need to address the concern through an interim measure, Section 1017 is hardly a model for clarity in legislative drafting. The provision does not describe any specific evaluation preference to be given to offerors meeting the established criterion (i.e., having had their Jones Act vessels repaired in U.S. shipyards), nor does the provision provide any guidance as on how achieving the criterion is to be evaluated, if at all. Moreover, the criterion is not limited to the vessels being offered to the military, but applies generally to all vessel(s) owned, controlled, or operated by the offeror. Finally, the section provides no time frame to which the criterion is to be applied, be it repair work performed during the last 12 weeks, months, or years.

Details were left to the Department of Defense, which was to implement Section 1017 through the interim rule to be published by no later than June 1, 2007. Given Section 1017's lack of clarity, it is not surprising that it took until August 28, 2007, for the interim rule to be published.

While DoD was able to apply some nominal clarity to Section 1017, the interim rule is almost as vague as is Section 1017, and in some respects may be inconsistent with the legislation. The term "overhaul, repair, and maintenance," is defined as work requiring a pierside shipyard period greater than or equal to 15 calendar days. 72 Fed. Reg. 49206, DFARS § 252.247.7026; and the term "shipyard" is defined as "fixed facilities with drydocks and fabrication equipment capable of building a ship, defined as watercraft typically suitable or intended for other than personal or recreational use." Id. at 49207, DFARS § 252.247.7026.

To qualify for the preference, it appears the work must have been done in a qualifying shipyard, as opposed to being done by a qualifying shipyard, as offerors must submit a description of the "qualifying shipyard work performed, as opposed to repair work "performed by a qualifying shipyard." Nothing in the legislation appears to so limit the work, as its stated purpose is to protect and preserve the industrial base. That purpose is served if the shipyard performed the work at a state pier or in a facility without a drydock.

Ship owners do not fair much better in terms of clarity. According to the interim rule, offerors must include with their offers specific information on all Jones Act qualifying vessels for which overhaul, repair, and maintenance work has been performed during the current calendar year, up to the date of proposal submission, and the preceding four calendar years. The fact that the evaluation period goes at least four years should be of some concern to ship owners. The Coast Guard has not ruled that individual repairs to Jones Act vessels should be aggregated for purposes of applying the rebuilt vessel rule. Ship now face the prospect of now possibly being penalized if they had repairs made in foreign yards, although their vessels remained fully Jones Act qualified.

Also, a Covered Vessel is defined to mean a vessel "owned, operated or controlled by the offeror," raising the question of whether the offeror may claim credit for - or be penalized for - repairs done to a vessel it has sold prior to the date of the offer. Similarly, nothing in the interim rule requires the offeror to disclose if it had the repair work performed, itself, or whether the work was performed by a previous owner. Section 1017 strongly suggests that the evaluation criterion is to apply only to qualifying work performed by the offeror, itself, and not a previous owner or charterer.

The solicitation clause effecting the interim rule is designated "Evaluation Preference For Use Of Domestic Shipyards." However, the clause provides no preference at all. Rather, it requires offerors to submit a significant amount of information on repair work performed on Covered Vessels. Offerors must submit the following information:

(1) the name of vessel;

(2) a description of qualifying shipyard work performed;

(3) the name of shipyard that performed the work;

(4) the inclusive dates when the work was performed; and

(5) the cost of the work performed.

No guidance is provided on how the information will be evaluated. The interim rule states only that the Contracting Officer will "use the information to evaluate offers in accordance with the criteria specified in the solicitation." This suggests either that no evaluation preference will be given or that the criteria against which the information will be evaluated will vary from solicitation to solicitation. Shipyards may view the former result as meaningless and ship owners may view the latter result as ominous, as they have no way of predicting what protective measures should be taken.

Comments on the interim rule are due on or before October 29, 2007, to be considered in the formation of the final rule. Comments may be submitted by email at dfars@osd.mil citing DFARS Case 2007-D001.

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