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The Honorable Helen Delich Bentley House of Representatives

Dear Mrs. Bentley:

This is in response to your letter, dated January 24, 1986, requesting a legal opinion from our Office concerning the authority of the United States Maritime Administration (MARAD) to revise a regulatory provision governing financial assistance MARAD is authorized to provide for ship construction under Title XI of the Merchant Marine Act, 1936, 46 U.S.C. Secs. 1271-1280.

Specifically, your letter questioned MARAD's authority to amend its so- called Buy American regulation, set forth at 46 C.F.R. Sec. 298.11, by adopting one of several proposed alternatives that would allow the use of foreign materials and components in vessels constructed with vessel obligation guarantees authorized under Title XI of the Merchant Marine Act. The various alternatives MARAD was considering to amend 46 C.F.R. Sec. 298.11, ranging from the partial to the complete elimination of the Buy American requirement as it applied to Title XI assistance, were set forth in a notice of proposed rulemaking published in the Federal Register on March 21, 1985. 50 Fed. Reg. 11397. Subsequent to our receipt of your letter, MARAD published a final rule in the Federal Register on March 6, 1986, adopting one of the proposed alternatives. 51 Fed. Reg. 7790. The alternative MARAD adopted completely eliminated the Buy American requirement as it applied to financial assistance MARAD furnishes under Title XI.

It is our view for the reasons set forth hereafter that MARAD's action in revising its regulation in this fashion is not prohibited by statute and is within MARAD's administrative discretion.

BACKGROUND

Under Title XI of the Merchant Marine Act, 46 U.S.C. Secs. 1271-1280, the Secretary of Transportation (acting through the Administrator of MARAD) is authorized to guarantee the debt obligations of shipowners who are United States citizens for the purpose of financing the construction, reconstruction or reconditioning of United States flag vessels. Pursuant to 46 U.S.C. Sec. 1274, guarantees can be granted for up to 75 percent or 87-1/2 percent of the vessel's cost depending on the type of vessel involved. In the event of default on the loan by the shipowner, the United States will pay the holder of the guaranteed obligation the unpaid principal and interest on the obligation.

In 1978, MARAD promulgated a regulation, set forth at 40 C.F.R. Sec. 298.11(a)

requiring that any vessel financed by guarantees issued under Title XI of the Act meet the following criterion:

"United States construction. The Vessel shall be constructed, reconstructed or reconditioned entirely in a shipyard or shipyards of the United States, within the meaning of section 505 of the Act, and, where practicable, only from articles, materials and supplies of the growth, production or manufacture of the United States * * *. If an applicant for Guarantees elects to use foreign-source materials or components in the Vessel, the cost thereof shall not be included in the Actual Cost of the Vessel used as the basis for determining the amount of Guarantees, * * * except if the Secretart shall approve an application for waiver * * *."

Under the regulation, a shipowner receiving Title XI assistance could still elect to use shipbuilding materials and components of foreign manufacture. However, unless a waiver of the Buy American requirement was obtained, the cost of foreign materials and components could not be included in the vessel's cost which is used as the basis for determining the amount of the debt that MARAD could guarantee. A waiver could only be obtained under the regulations if MARAD determined either that the materials involved could no be purchased in the United States or that the use of American materials would cause an unreasonable delay in the ship's construction.

When MARAD proposed, on March 21, 1985, to revise 40 C.F.R. Sec. 298.11 by adopting one of several possible alternatives that would relax or eliminate the Buy American requirements, it stated that there was no statutory Buy American provision that applied to vessels built with Title XI financing. 50 Fed. Reg. Sec. 11398 (1985). MARAD's explanation of the proposed revision said that it had been MARAD's long-standing policy that ships built with financing guarantees under Title XI be subject to a Buy American requirement modeled on the statutory Buy American requirement that applied to vessels built with the aid of construction-differential subsidies under section 505 of the Merchant Marine Act, 40 U.S.C. Sec. 1155. MARAD further explained that because of changing circumstances, it had become necessary to adopt a less restrictive Buy American policy that would allow the purchase of less costly vessel materials and components from foreign sources and which would thereby benefit the domestic shipbuilding industry. The three alternatives MARAD proposed at that time were (1) to relax the Buy American requirement from 100 percent to 50 percent, (2) to relax the Buy American requirement from 100 percent to 25 percent, and (3) to eliminate the Buy American requirement entirely.

On March 6, 1986, MARAD adopted the third alternative which eliminated any Buy American requirement for vessels financed under Title XI. 51 Fed. Reg. 7790 (1986). As revised, 46 C.F.R. Sec. 298.11(a) reads as follows:

"United States Construction. A vessel financed by obligation guarantees for which a Letter Commitment is issued on or after April 7, 1986 is considered to be of United States construction if:

(1) It is built entirely in a shipyard or shipyards of the United States within the meaning of section 505 of the Act;

(2) All components of the hull and super-structure are fabricated in the United States; and

(3) The vessel is assembled entirely in the United States."

Analysis

The issue to be resolved is whether there is any statutory provision in the Merchant Marine Act which makes vessels constructed with Title XI financing subject to a Buy American requirement and whether MARAD has the administrative discretion to adopt the revised regulation.

We have examined the provisions contained in Title XI of the Merchant Marine Act, 46 U.S.C. Sec. 1271-1280. While a variety of requirements and conditions of eligibility are set forth in Title XI, including restrictions on the citizenship of applicants (who must be American citizens) and the registration of vessels (which must be documented under the laws of the United States), there is nothing in Title XI that suggests that vessels constructed with Title XI financing are subject to Buy American requirement.

The only statutory Buy American requirement in the Merchant Marine Act that applies to vessel construction [1] is set forth in section 505 of the Act, 46 U.S.C. Sec. 1155. This section reads as follows:

"All construction in respect of which a construction-differential subsidy is allowed under this Title shall be performed in shipyard of the United States * * *. In all such construction the shipbuilder, subcontractors, materialmen, or suppliers shall use, so far as practicable, only articles, materials and supplies of the growth, production, or manufacture of the United States * * *."

MARAD has stated that the Buy American requirement that was formerly contained in 46 C.F.R. Sec. 298.11 was a matter of policy, modeled on the statutory Buy American provision in 46 U.S.C. Sec. 1155, that applies to assistance MARAD furnishes under Title V of the Merchant Marine Act. Construction-differential subsidies authorized under Title V of the Merchant Marine Act are made to citizens or shipyards of the United States, to aid in the construction of new vessels to be used in foreign commerce, by equalizing the domestic and foreign cost of vessel construction. 46 U.S.C. Secs. 1151-1152.

Having considered the express language in 46 U.S.C. Sec. 1155, which provides that the Buy American requirement set forth therein applies to vessels built with construction-differential subsidies under Title V, we agree with MARAD's position that this requirement does not, as a matter of law, apply to vessels financed under a separate title of the Merchant Marine Act in a completely different manner. Clearly, guarantees of debt obligations under Title XI are not the same as construction-differential subsidies under Title V. If the Congress had intended to establish a statutory Buy American requirement applicable to vessels constructed with Title XI financing it could easily have done so. However, since the Congress did not do so, it would be unreasonable for us to hold that a statutory requirement governing assistance under Title V applies, as a matter or law, to assistance furnished under Title XI.

Accordingly, it is our view that there is no statutory provision anywhere in the Merchant Marine Act requiring that vessels constructed, reconstructed, or reconditioned with financing furnished by MARAD under Title XI of the Act be built in compliance with the so-called Buy American requirement. [2]

The remaining issue concerns the extent of MARAD's authority, in the absence of

an applicable statutory requirement or prohibition, to promulgate and later to revise the regulation in question as it did in this case. Under section 1109 of the Merchant Marine Act, 46 U.S.C. Sec. 1279(b) the Secretary of Transportation (who acts through the Administrator of MARAD) is authorized to "make such rules and regulations as may be deemed necessary or appropriate to carry out the purposes and provisions of this Title." As a general rule, agencies charged with the statutory responsibility of administering a Government program that are given broad-rule making authority, such as exists here, are accorded great deference with respect to the promulgation and interpretation of regulations implementing the program. Ordinarily, regulations are deemed to be within an agency's statutory authority and consistent with congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose. 58 Comp.Gen. 635, 638 (1979), and B-201706, March 12, 1981. Moreover, authority to promulgate or issue regulations necessarily includes the authority to amend them subsequently. B-202568, September 11, 1981.

In accordance with those general standards, and considering the fact that the Merchant Marine Act neither prohibits nor requires the application of a Buy American requirement for vessels constructed with Title XI assistance, we believe that MARAD had the administration discretion to impose that requirement in the first place and then to remove it as changing circumstances in the domestic shipbuilding industry warranted.

Finally, we note that the procedure followed by MARAD in revising the regulation in question comports with the rulemaking requirements imposed by the Administrative Procedures Act, 5 U.S.C. Sec. 553. [3] As required by 5 U.S.C. Sec. 553(a)(2), MARAD published a notice of proposed rulemaking in the Federal Register and invited all interested parties to comment. 50 Fed. Reg. 11392 (1985). As further required by 5 U.S.C. Sec. 553(c), when the final rule was published, MARAD summarized the various comments that it had received and explained why it chose the particular alternative that was adopted. 51 Fed. Reg. 7790 (1986).

Unless released earlier by your Office, this opinion will be released in 30 days.

Sincerely yours,

Acting Comptroller General of the United States

1. Sectin 606 of the Merchant Marine Act, 46 U.S.C. Sec. 1176, provides that, whenever practicable, an operator of a vessel receiving an operating-differential subsidy under Title VI of the Act, for subsistence of officers and crew, shall use only articles, materials and supplies grown, produced, or manufactured in the United States.

2. Of course, this does not mean that if a vessel was built with the aid of a construction-differential subsidy under Title V, and was also eligible for and received financing under Title XI, that the Buy American requirement in section 505 of the Merchant Marine Act, 46 U.S.C. Sec. 1155, would not still apply in accordance with the terms of that section.

3. We note that MARAD also complied with the procedural requirements imposed by the Regulatory Flexibility Act, 5 U.S.C. Sec. 601-612, since the final rule published by MARAD contained the certification of the Administrator, as required

by 5 U.S.C. Sec. 605(b), that the rule would not have a significant economic impact on a substantial number of small entities.