U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR KATHLEEN A. BUCK
General Counsel
United States Department of Defense

Re: Application of Federal Cargo Preference Act of 1904 to Supplies Bought for the Military to Which the Government Has Not Yet Acquired Title

This memorandum responds to your request for the views of this Office on the question whether the Cargo Preference Act of 1904, 10 U.S.C. 2631 ("Act"), which requires transportation by United States vessels, applies to all supplies for which the Department of Defense has contracted, including supplies to which it does not have title at the time of shipment. The Department of Defense ("DOD") takes the position that the Act applies only to supplies to which the armed forces have title, while the Department of Transportation ("DOT") contends that the phrase applies to all supplies which are destined by contract for the use of armed forces, regardless of the time title is transferred. We conclude that the Cargo Preference Act applies to all supplies for which the armed services have contracted.

ANALYSIS

We turn first, of course, to the language of the statute itself.[1] The Cargo Preference Act of 1904, 10 U.S.C. 2631 ("Cargo Preference Act"), provides as follows:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

[1] See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978).

The original 1904 version of the Cargo Preference Act applied United States flag shipping requirements to "supplies . . . purchased . . . for the use of the Army or Navy."[2] The 1956 recodification of the United States Code substituted the current language of the Cargo Preference Act for the 1904 terminology. In particular, the recodification employed the term "bought for" the military, rather than the phrase "purchased pursuant to law, for the use of" the military. The statute recodifying the Cargo Preference Act stated that "it is the legislative purpose to restate, without substantive change, the law replaced by [the recodification] on the effective date of this Act."[3] This statement reiterates the traditional understanding "that language revisions in codifications will not be deemed to alter the meaning of the original statute." Muniz v. Hoffman, 422 U.S. 454, 467-74 (1975). In short, the language of the 1956 recodification -- including the substitution of "bought for" in lieu of "purchased . . . for the use of" -- must be construed in pari materia with the original language of the 1904 Cargo Preference Act. Accordingly, in analyzing the Cargo Preference Act, this memorandum will refer in tandem to the words of the original 1904 version and to the phraseology employed in the 1956 recodification.[4] The question therefore presented is whether the phrase "supplies bought for the Army, Navy, Air Force or Marine Corps" ("supplies purchased . . . for the use of the Army or Navy") in the Cargo Preference Act applies to items owned by contractors or subcontractors under DOD contracts to which the Government does not have title at the time of shipment.

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[2] The 1904 Act read as follows:

> That vessels of the United States, were belonging to the United States and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable, in which contracts shall be made under the law as it now exists: Provided, That no greater charges be made by such vessels for transportation of articles for the use of the said Army and Navy than are made by such vessels for transportations of like goods for private parties or companies.

33 Stat. 518, 519 (1904).

[3] 70A Stat. 640, 649(a) (1956).

[4] For convenience of exposition, the main text will evaluate the 1956 recodification, while making parallel parenthetical references to the corresponding terms employed in the original 1904 version.

As employed in the Cargo Preference Act, the term "bought for" appears to signify supplies bought "on behalf of" the Armed Forces.[5] (Consistent with this interpretation, the 1904 version of the Cargo Preference Act referred to supplies "purchased . . . for the use of the Army or Navy".[6]) Significantly, there is no indication that this Act is concerned with the status of the legal title of supplies transported by sea for the benefit of the Armed Forces. The Cargo Preference Act contains no limiting language suggesting that its coverage extends only to supplies in which the United States holds title at the time of shipment. Furthermore, such a limitation is also inconsistent with the word "for" in the Act, which is frequently used to denote agency in connection with contracts for the shipment of goods.[7] Moreover, the Act's reference in the passive voice to "supplies bought for" (supplies "purchased . . . for the use of" in the 1904 version) the military implicitly recognizes that private contractors and subcontractors serving as agents of the Government may be the sources of the supplies. This implication -- that the Act applies to situations in which agents of the Government, rather than the Government itself, hold title to the military supplies in transit -- is entirely consistent with the remaining words of the Act.[8] Indeed, if Congress had wished to limit the reach of

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[5] See 36A C.J.S. 946 (1961) (equating the word "for" with the term "on behalf of").

[6] Consistent with the observation that the 1904 Act and the 1956 recodification must be read in pari materia, the term "bought" is equivalent to "purchased." See 5A Words and Phrases 239-240 (1968).

[7] "For" is "frequently used to denote agency, and it may be employed to mean "as agent of" or "in place of". In this sense "for" is defined to mean "in or on behalf of; by; and representing." 36A C.J.S. 946 (1961) (citations omitted). For example, in The Iristo, 43 F.Supp. 29, 33 (S.D.N.Y. 1941), port bills of lading for cargo originating in Canada were signed "for masters and owners" by the charterer of a Norwegian ship. (The charterer had entered into a contract of affreightment with the ship's owner.) Stating that the word "for" generally denotes an agency (citing 26 C.J.S. 791 (1921)), the Court held that the charterer had signed the bills as the "agent" of the ship's owner.

[8] The Department of Defense argues that the word "bought" ("purchased" in the 1904 version) implies a vesting of the right to title. See Office of the General Counsel, DOD, Memorandum of Law Concerning the Cargo Preference Act (Jan. 28, 1987) ("DOD Memorandum"), at 3, n.2, citing 12A C.J.S. "Buy" (1980). But see Office of the General Counsel, DOT, Memorandum of Law Concerning the Cargo Preference Act (Apr. 30, 1987), at 5, n.4 (citing sources indicating that the word "bought" can express a completed transaction in which title has not yet passed to the buyer). Nonetheless, the identity of the title holder clearly does not bear upon the application of the Cargo Preference Act.

the statute to supplies already "owned" by the United States, it could perhaps have phrased the statute to encompass supplies "bought by" ("purchased by") the Military Departments.[9] Significantly, it chose not to do so.

Moreover, the structure of the Cargo Preference Act as a whole lends further support to the conclusion that this statute covers supplies bought for the armed forces even though title has not yet vested in the United States. The Act's second sentence provides that "if the President finds that the freight charged by these [American] vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law." (In the 1904 version, the second clause within the first sentence provided that cargo preference would apply "unless the President shall find that the rates of freight charges by said [United States] vessels are excessive and unreasonable, in which [case] contracts shall be made under the law as it now exists".) The phrase "contracts for transportation" ("contracts" in the 1904 version) is not limited. Accordingly, such contracts would appear to cover all supplies transported by sea, without regard to the identity of the title holder. It follows that the second sentence (second clause of the first sentence in the 1904 version) of the Cargo Preference Act, like the first sentence (first clause of the first sentence) refers to all supplies transported by sea that are bound for the Military Departments.[10]

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[8] (Cont.) The Act covers supplies "bought for" ("purchased for") the Military Departments, without regard to the legal status of those supplies before they reach their ultimate destination.

[9] The Defense Department (DOD Memorandum at 4) stresses that Congress could have applied the Cargo Preference Act to "supplies bought or to be bought" for the Military Departments, had it desired the Act to cover goods to which the Government did not yet hold title. We do not, however, attribute any significance to Congress' failure to employ the phrase "or to be bought." This phrase was unnecessary, given the fact that the reference to supplies "bought for" ("purchased for") the Government encompassed all transported supplies, including supplies to which the Government did not hold title in transit. Thus, while we agree with DOD that Congress did not lightly choose the words of the Cargo Preference Act, and strove to avoid ambiguity (see DOD Memorandum at 4-5), we do not agree that the words enacted into law by Congress apply only to those supplies in which the Government holds title at the time of initial shipment.

[10] DOD argues that the "legislative history [of the Cargo Preference Act] clearly shows that "contracts" meant "contracts issued by the Military Departments under their statutory procurement authority." See DOD Memorandum at 6, citing 38 Cong. Rec. 2598 (1904) (remarks of Senator McComas). Contrary to DOD's assertions, however, Senator McComas' brief statement in no way indicates that cargo preference requirements apply only to contracts

In sum, the language and structure of the Cargo Preference Act strongly support the conclusion that this statute applies to all supplies destined for delivery to the military. The status of the title of such supplies at intermediate steps in the contracting process is of no relevance to the scope of the statute. It follows that the Cargo Preference Act covers supplies purchased under Defense Department contracts even though the Government has not acquired title at the time of shipment.

Finally, the legislative history of the Cargo Preference Act also supports the conclusion that the Act's cargo preference requirements apply to all supplies purchased for the military, including those to which the Government has not yet acquired title.

The paramount purpose of the Cargo Preference Act was to develop a merchant marine capable of meeting American defense needs in times of national emergency. The House Committee on the Merchant Marine and Fisheries, reacting to a shortage of American Merchant ships during the Spanish-American War, stated that "[i]f the United States government itself supports foreign ships when American ships might be employed, Congress must realize that a sufficient supply of the latter cannot be on hand when the government itself needs them."[11] That Committee observed that the Act would "provide the Government for instant use a splendid fleet of vessels ready for any emergency, and in addition will tend to develop and increase the commerce and the merchant marine of our country and continue the profitable employment of our own citizens on the sea and in the construction and repair of our own merchant fleet."[12] Similarly, the Senate Committee on Commerce stated that the "transportation of supplies for the Army and Navy at remunerative rates would be a very material factor in attracting American vessels to this trade, and to give them the exclusive privilege of such transportation would be a wise and legitimate step in the direction of encouragement of our mer-

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[10] (Cont.) directly between the Government and a prime contractor, and not to contracts between subcontractors operating under government contract. Senator McComas' point was merely that existing statutes requiring competitive bidding among American shipowners were not interfered with by the CPA. (The Senator stated that the CPA's only purpose was "to name the class of vessels that are to carry the supplies pursuant to [existing] law". Id.) He in no way addressed the types of contractual arrangements that might be subject to cargo preference. Accordingly, Senator McComas' statement cannot fairly be construed as undermining the plain meaning of the CPA's words.

[11] H. Rep. No. 1893, 58th Cong., 2d Sess. at 3-4 (1904).

[12] Id. at 6.

chant marine."[13]

A niggardly reading of section 2631 would thus not comport with Congress' overriding purpose of managing government procurement so as to maintain an ample merchant marine.[14] Indeed, if

[13] S. Rep. No. 182, 58th Cong., 2d Sess. at 3 (1904). Statements made during the congressional debate do not indicate that the Cargo Preference Act was to reach only certain supplies destined for the military. As DOD points out (DOD Memorandum at 7-8), certain Members of Congress did state that the Act would apply to "goods belonging to the government" (38 Cong. Rec. 2409 (1904) (remarks of Senator Berry)); to "the right to carry the property of the United States to foreign ports" (38 Cong. Rec. 2408 (1904) (remarks of Senator Berry)); to "Government supplies" (38 Cong. Rec. 2475 (1904) (remarks of Senator Hale)); to "freights of this Government" (38 Cong. Rec. 2411 (1904) (remarks of Senator Daniel)); to the "carrying of governmental supplies" (38 Cong. Rec. 2463 (1904) (remarks of Senator Teller)); and to "carrying army and navy articles" (38 Cong. Rec. 2588 (1904) (remarks of Senator Teller)). None of these quoted discussions, however, focused on whether title to the goods should be a prerequisite for the imposition of cargo preference requirements. Rather, the use of such terms as "governmental supplies," "army and navy articles," and the "property of the United States" can readily be understood as describing the final status of the supplies in question, after they have been received by their ultimate user, the military. Accordingly, all of these statements logically can be read as indicating that all goods destined for the military -- without regard to the status of their title in transit -- would be subject to such requirements.

[14] DOD's discussion of the "legislative purpose" of the Cargo Preference Act (see DOD Memorandum at 8-9) fails to set forth any legislative statements that are at odds with this overriding purpose. DOD's conclusory statement that Congress "did not intend to extend the scope of the [Cargo Preference] statute beyond Government-owned supplies" (DOD Memorandum at 9) is unsupported by legislative pronouncements, and ignores the fact that the statute speaks to supplies "bought for" ("purchased for") the Government -- not to "Government-owned supplies." (Moreover, even the phrase "Government-owned supplies" could be interpreted as applying to supplies in which title eventually would be held by, but had not yet passed to the Government.) Furthermore, even assuming, arguendo, that the Cargo Preference Act is an "anticompetitive" legislative grant of privilege that should be construed strictly against the grantee (see DOD Memorandum at 10), the plain wording of that statute prompts the conclusion that supplies to which the Government does not hold title at the time of shipment are covered. Finally, our construction of the Act does not mean that cargo preference requirements would apply (DOD Memorandum at 10) "to every shipment by every supplier or subcontractor at any tier of every nut, bolt or scrap of raw

DOD were required to use the merchant marine only when it had obtained actual title to the goods being shipped, the Act's purpose could be wholly eviscerated (at least insofar as transportation of new supplies are concerned) by the simple expedient of delaying the transfers of title to DOD until the time of delivery. Accordingly, we believe that the legislative history of the Act supports the construction of the language of section 2631 outlined above.[15]

CONCLUSION

For the foregoing reasons, we conclude that the phrase "supplies bought for the Army, Navy, Air Force or Marine Corps"

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[14] (Cont.) material that ultimately finds its way into equipment purchased by the Military Departments." Under our reading of the Act, cargo preference requirements only apply to supplies "bought for" ("purchased for") the Military Departments that are clearly identified as destined for eventual military use at the time of shipment by sea. This rather limited category plainly does not encompass "every shipment" along the distribution chain "of every nut, bolt or scrap of raw material that ultimately finds its way into equipment purchased by the Military Departments." (Indeed, most of the multitudinous shipments described in the DOD Memorandum presumably would not be identifiable as destined for eventual use by the military.)

[15] DOD argues that previous DOD administrative interpretations of the Act justify limiting the Act's coverage to goods to which the United States already holds title (see DOD Memorandum at 10-11, citing DOD procurement regulations). We need not, however, reach this argument and consider the administrative interpretations cited by DOD. DOD cannot through regulation override the clear language of the Cargo Preference Act. See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (an agency's statutory interpretation cannot be accepted where it conflicts with the clear language and legislative history of a statute).

in section 2631 of the Cargo Preference Act applies to all supplies for which the military has contracted, including supplies to which it does not have title at the time of shipment.

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cc: B. Wayne Vance
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