U.S. Department of Transportation
Federal Highway Administration

Memorandum

SUBJECT: Cargo Preference Act and Federal-aid Projects

Date: DEC 08 2015

FROM: Thomas G. Echikson, Chief Counsel

Reply to:
HCC-1
HCC-30

TO: Walter C. Waidelich, Jr.
Associate Administrator for
Infrastructure

We have received a number of inquiries regarding the applicability of the cargo preference requirements contained in the Cargo Preference Act of 1954[1] (CPA) and implementing regulations (46 CFR Part 381) to the Federal-aid highway program as a result of a 2008 amendment to the Act. We find that the 2008 amendment of the CPA had the effect of making the cargo preference requirements applicable to the Federal-aid highway program. It is, therefore, necessary to notify our recipients of this change in policy as soon as possible and to provide guidance to facilitate implementation of these requirements.

Prior to 2008, the CPA required Federal agencies to assure that at least 50% of the gross tonnage of equipment, materials, or commodities transported on ocean vessels be carried across the ocean on U.S.-flag vessels whenever the U.S. Government procured "for its own account" or furnished "to or for the account of any foreign nation" such equipment, materials, or commodities.[2] The FHWA applied these requirements to the Federal-aid highway program from July 24, 1979, until February 19, 1988, through various notices and instructions. We applied the requirements to foreign shipments that resulted from purchases made by contractors or subcontractors for use on a Federal-aid highway contract. The requirements did not apply to items of foreign origin that were delivered to U.S. suppliers prior to the grantee's purchase (i.e., purchase of materials from existing inventories).

On February 2, 1988, the U.S. Department of Justice's Office of Legal Counsel issued an opinion finding that Congress did not intend the CPA to reach federally-financed State procurements and, therefore, CPA did not apply to imported cement and clinker procured by highway construction contractors for the account of States.[3] As a result of this opinion, FHWA Deputy Administrator Farris issued a memorandum on February 19, 1988, revoking all

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[1] 46 U.S.C. § 55305, as amended.
[2] Pub. L. No. 83-664, 68 Stat. 832 (1954).
[3] Memorandum for Wendy L. Gramm on the Application of the Cargo Preference Act of 1954 to Imported Cement and Clinker Used in Federal Aid Highway Projects, p.4, USDOJ-OLC (Feb. 2, 1988).

instructions mandating the application of the cargo preference requirements to the Federal-aid highway program and requiring the removal of cargo preference specifications from plans, specifications, and estimate (PS&E) authorizations for Federal-aid projects.[4] Our Agency has not applied the cargo preference requirements to the Federal-aid highway program since this time.

On October 14, 2008, the President signed the Duncan Hunter National Defense Authorization Act of 2009.[5] Section 3511 of that Act amended the CPA by stating that the requirements apply to cargoes financed "in any way with Federal funds for the account of any persons unless otherwise exempted."[6] We consulted with the Maritime Administration (MARAD)—the Federal agency with oversight responsibilities over the cargo preference program—on the meaning and scope of the term "any persons" in this amendment. MARAD's position is that the term "any persons" includes States, local, and Tribal governments if they will be recipients of Federal financial assistance. There is no basis for distinguishing between recipients of Federal financing for purposes of meeting the CPA's objective to ensure U.S.-flag vessels and their skilled crews are available for national defense, emergency response, and commercial carriage of vital trade. A narrower reading that excludes State, local, and Tribal governments from the term "persons" would undermine the CPA's objective because it would potentially cut off a substantial amount of Federally-financed cargoes from the requirements. In addition, this broader definition in the maritime context would not be unique since other chapters in Title 46 (46 U.S.C. § 3701) have defined "persons" to include State, local, and Tribal governments. We agree with MARAD's interpretation and give deference to its position, as MARAD is the lead agency for implementation of CPA. As a result, recipients of the Federal-aid highway program must now meet the requirements of the CPA and its implementing regulations. The DOJ OLC opinion, therefore, is no longer applicable and the 1988 Farris memorandum is no longer in effect.

Because of this policy change stemming from the CPA amendment, we recommend prompt action in revising Form FHWA-1273 to include references to the CPA and the regulations in 46 CFR Part 381. My office believes that the recommended clause in 46 CFR §§ 381.7(a)-(b) (attached) are appropriate for use in the Federal-aid highway program until FHWA-specific ones are developed and coordinated with MARAD. The clause in 46 CFR § 381.7(b) should be included in all Federal-aid highway projects' contract specifications.

If you have any questions about this matter, please contact the Assistant Chief Counsel for Program Legal Services, Jennifer Mayo, at (202) 366-1523.

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[4] Memorandum to Regional Federal Highway Administrators regarding Cargo Preference Act—Attorney General Opinion (Feb. 19, 1988).
[5] Pub. L. No. 110-417, 122 Stat. 4356, 4769 (Oct. 14, 2008).
[6] Id. at § 3511.

Attachment.

Title 46 - Shipping

Volume: 8
Date: 2014-10-01
Original Date: 2014-10-01
Title: Section 381.7 - Federal Grant, Guaranty, Loan and Advance of Funds Agreements.
Context: Title 46 - Shipping. CHAPTER II - MARITIME ADMINISTRATION, DEPARTMENT OF TRANSPORTATION. SUBCHAPTER J - MISCELLANEOUS. PART 381 - CARGO PREFERENCE-U.S.-FLAG VESSELS.

§ 381.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements.

In order to insure a fair and reasonable participation by privately owned United States-flag commercial vessels in transporting cargoes which are subject to the Cargo Preference Act of 1954 and which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs, the head of each affected department or agency shall require appropriate clauses to be inserted in those Grant, Guaranty, Loan and/or Advance of Funds Agreements and all third party contracts executed between the borrower/grantee and other parties, where the possibility exists for ocean transportation of items procured, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors. The clauses required by this part shall provide that at least 50 percent of the freight revenue and tonnage of cargo generated by the U.S. Government Grant, Guaranty, Loan or Advance of Funds be transported on privately owned United States-flag commercial vessels. These clauses shall also require that all parties provide to the Maritime Administration the necessary shipment information as set forth in § 381.3. A copy of the appropriate clauses required by this part shall be submitted by each affected agency or department to the Secretary, Maritime Administration, for approval no later than 30 days after the effective date of this part. The following are suggested acceptable clauses with respect to the use of United States-flag vessels to be incorporated in the Grant, Guaranty, Loan and/or Advance of Funds Agreements as well as contracts and subcontracts resulting therefrom:

(a) *Agreement Clauses.* "Use of United States-flag vessels:

"(1) Pursuant to Pub. L. 664 (43 U.S.C. 1241(b)) at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds granted, guaranteed, loaned, or advanced by the U.S. Government under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned United States-flag commercial vessels, if available.

"(2) Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (a)(1) of this section shall be furnished to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590."

(b) *Contractor and Subcontractor Clauses.* "Use of United States-flag vessels: The contractor agrees—

"(1) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

"(2) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment

of cargo described in paragraph (b) (1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

"(3) To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract."

(Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91-469 (84 Stat. 1036) and Department of Commerce Organization Order 10-8 (38 FR 19707, July 23, 1973)) [42 FR 57126, Nov. 1, 1977]