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

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Attention: George F. Galland, Esquire

Gentlemen:

We refer to your letter of June 22, 1972, and earlier letters, on behalf of the Dillingham Corporation of Honolulu, protesting award by the Military Sealift Command of a contract under which towage of an empty barge belonging to the United States Navy would be performed by a foreign-flag tug. It is your view that use of the tug is unlawful under 10 U.S.C. 2631. The section provides:

> "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." Act of April 28, 1904, ch. 1766, 33 Stat. 518, as amended, 70A Stat. 146, 10 U.S.C. 2631.

The award in question was made pursuant to MSC Request for Proposals No. N0003372R0020, dated February 14, 1972. The request for proposals is subtitled "Towage Service" and requests offers for towage of a non-propelled refrigerator barge (BR-6568) from Manila to Rio Vista, California. The typewritten text of the request asks for offers of "U.S. Flag tugs" but a handwritten interlineation between the words "U.S. Flag" and the word "tugs" inserts the words "AND F.F." in printed capitals, presumably indicating that offers are requested for either U.S.-flag tugs or foreign-flag tugs.

PUBLISHED DECISION
52 Comp. Gen. _____

Dillingham Corporation, through Hawaiian Tug and Barge Company, submitted an offer of a U.S.-flag tug at a cost of $95,000. Award of the contract was made to Lasco Shipping Company of Portland, Oregon, for use of a foreign-flag tug at a price of $64,665, the lowest price obtained under the request for proposals, and the contract reportedly has been executed.

In your letter of March 3, 1972, you ask that we investigate the regularity and sufficiency of the interlineation purporting to open the bidding to tugs of foreign registry. While it would have been preferable that the typewritten text of the request for proposals show that it was directed to both U.S.-flag and foreign-flag tugs, we think the handwritten notation was not so confusing as to mislead prospective offerors. Furthermore, since the request clearly reserved the right to the Government to reject any or all offers, and since the award actually made was in the form of a negotiated contract purportedly entered into under appropriate procurement regulations, we do not believe that the notation prejudiced the rights of prospective offerors so as to vitiate the procurement if it was otherwise correct. The real question of course is whether the procurement was in violation of the 1904 Act.

It is your view that for the purposes of the proposed tow the barge is not itself an instrumentality of transportation but a piece of Navy cargo; i.e., a supply item of the Navy. From this premise, you argue that the towing tug is the transporting vessel and under the quoted statute must be a vessel of the United States unless findings are made that will trigger statutory exceptions.

Counsel for MSC takes the position that the 1904 Act does not apply to a contract for towage of an empty barge and argues that the term "supplies" does not include barges and other vessels. Counsel points out that the definitions section of Title 10, Section 101, defines "supplies" as including "material, equipment, and stores of all kinds." The term "equipment" is not defined in the section. However, in the procurement chapter of Title 10, Chapter 137, Section 2303(b) provides that the chapter covers all property (other than land) including, among other listed specific classes of property, "vessels" and "equipment." Since "vessels" and "equipment" are separately listed as classes of property covered by the procurement chapter, and since the term "vessels" is not specifically included in the definition of "supplies" in the definitions section of Title 10, it is concluded that the word "supplies," as used in the 1904 Cargo Preference Act, does not include vessels.

We are not convinced that the term "supplies," as used in the 1904 Cargo Preference Act, excludes vessels if they are vessels capable of being transported by sea under transportation contracts envisaged by the statute. As originally enacted, the statute covered "supplies of any description" and the plain meaning to be accorded such words would seem to be broad enough to include some classes of vessels.

The first sentence of the statute provides that 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. Under the contract in question, the barge surely would be transported by sea in the sense that it would be towed from one port to another and we think it conceivably could be considered to be a "supply" bought for the use of the Navy. However, the further language of the statute indicates that the reference in the first sentence to transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps is to transportation by sea under contracts of affreightment and not to transportation by sea under contracts for ordinary towage.

The second sentence of the act provides that if the President finds that the freight charged by United States vessels is excessive or unreasonable, contracts for transportation may be made as otherwise provided by law. It is noteworthy that the statutory phrase is "freight charged" and not "freight or towage charged," and that the phrase used in the original act was "rates of freight charges by said vessels." Finally, the last sentence of the act, the so-called McCumber Amendment, provides that charges--and in light of the preceding sentence this can only mean freight 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. It would be extremely difficult, if not impossible, to apply the amendment provision in the case of contracts for towage because towage charges usually are lump-sum charges determined in relation to all the peculiar facts and circumstances surrounding a given tow, including such factors as the amount of steaming required to reach the tow, the possibility or probability of a return tow, etc. On the other hand, freight charged under contracts of affreightment is usually computed at some weight or measurement rate basis related to the amount of cargo carried or the amount of space occupied by the cargo, and thus it would be a relatively simple matter to determine whether the freight charged the Government for a particular cargo is the same as, or greater than, the freight that would be charged a private person for transportation of like cargo.

Towage is said to be the employment of one vessel to aid in the propulsion or to expedite the voyage of another where there is no circumstance of peril, such service being rendered pursuant to contract. P. Dougherty Co. v. United States, D.C. Del., 1951, 97 F. Supp. 287, 291. The word "towage" means both the act of towing and the price paid for towing. Webster's New International Dictionary, Second Edition. A "towage service" is said to be one which is rendered for the mere purpose of expediting a vessel's voyage without reference to any circumstance of danger. Kittelsaa v. United States, D.C. N.Y., 1948, 75 F. Supp. 845, 846; Sacramento Nav. Co. v. Salz, 273 U.S. 326 (1927); The Roanoke, D.C. Cal., 1913, 209 F. 114, 115.

On the other hand, it is said that a contract to transport goods constitutes a contract of "affreightment," although there is towage service connected therewith. The Nettie Quill, D.C. Ala., 1903, 124 F. 667, 670, Sacramento Nav. Co. v. Salz, 273 U.S. 326 (1927). And the word "freight" is defined as the price paid for transportation of goods. Webster's New International Dictionary, Second Edition. The cases of Hartford Accident & Indemnity Co. v. Gulf Refining Co., D.C. La., 1954, 127 F. Supp. 469, 475, and The Independent, C.C.A. La., 1941, 122 F. 2d 141, 143, serve to illustrate the difference between a contract of affreightment and a contract of towage.

In the Hartford case, a contract to transport petroleum products in barges towed and owned by the promissor was held to be not a contract of "towage" but a contract of "affreightment" with a private carrier, to which rules as to negligence of a tug owner under a contract of towage are inapplicable. But in the case of The Independent, it was held that a contract whereby a towing company agreed to lease barges to an oil company at a certain rate per month and to furnish a tug to tow the barges at a certain rate for each trip, and whereby no receipt or bill of lading was issued by the towing company and the oil company retained custody and control of the oil until it was delivered to its customer, was one of "charter" of barges and a separate contract for towing whenever called upon to do so, and was not a contract of "affreightment." No case has come to our attention where towage of an empty vessel was held to constitute transportation of goods under a contract of affreightment.

The difference between contracts of affreightment and contracts of towage is illustrated by numerous cases involving constructions of the Harter Act, which was enacted over a decade before passage of

the 1904 Cargo Preference Act. The Harter Act reads, in relevant part:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel * * *." Act of February 13, 1893, c. 105, Section 3, 27 Stat. 445, 46 U.S.C. 192.

The limitation of liability contained in this act has been held by the courts to apply only to contracts of affreightment. Thus, where the contract with the towing vessel was one for delivery of cargo under a contract of affreightment, the limitation of liability was upheld. The Nettie Quill, D.C. Ala., 1903, 124 F. 667; Sacramento Nav. Co. v. Salz, 273 U.S. 326 (1927). But where the contract was one for ordinary towage, the limitation of liability was denied. The Murrell, D.C. Mass., 1911, 200 F. 826; The Coastwise, D.C. Mass., 1915, 230 F. 505, 509.

In addition to the distinction between contracts of affreightment and contracts of towage drawn by the Harter Act cases, a further distinction between the towing of vessels and the transportation of merchandise by water is illustrated by the cabotage laws, 46 U.S.C. 316 and 46 U.S.C. 883, the former pertaining to towage of vessels in coastwise waters of the United States and the latter pertaining to the transportation of merchandise in similar waters. The precursors to these current statutes were enacted before the 1904 Cargo Preference Act, that is, the Act of July 18, 1866, c. 201, Section 21, 14 Stat. 183, and Act of February 17, 1898, c. 26, Section 1, 30 Stat. 248, and it must be concluded that the legal distinction between contracts for ordinary towage and contracts for transportation of merchandise was known to the Congress at the time the 1904 Cargo Preference Act was enacted.

For the reasons stated, we believe the preference granted United States vessels by the 1904 Cargo Preference Act is limited to

transportation by sea of military supplies under contracts of affreightment and does not extend to towage of empty vessels under ordinary towage contracts. The contract here in question clearly was one of towage and we believe therefore that payment of the contract price from appropriated funds was proper.

Very truly yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States