

WELFIELD
PSAD- GP

MAR 7 1972

Commanding General
U.S. Theatre Army Support
Command, Europe
APO U.S. Forces 05058

Dear Sir:

During our current survey of procurement activities in Europe, we looked into selected aspects of the contracts awarded to the Shipping and Coal Company (ShipCo) for delivery of coal from the United States to U.S. Forces in Europe. These contracts are awarded and administered by the U.S. Army Procurement Center, Europe (USARPC). The survey has disclosed a situation which we believe warrants command attention to ensure that U.S. interests are best served. Pertinent details of this situation are discussed below.

The coal contracts provide that the contractor is to purchase coal in the United States and deliver it to U.S. Forces in Europe using vessels provided by the Military Sealift Command (MSC). These vessels are chartered from commercial concerns for a specified period of time or by voyages. Considering the economics of this arrangement, it is imperative that the contractor load and unload the vessels in the shortest possible time. Toward that end, MSC has recommended, and USARPC had included in the contracts a provision requiring the contractor to load and unload the vessels with "utmost dispatch." This is defined in the contract as a combined loading and unloading time for not more than six days (Saturdays, Sundays, and holidays included). Time used by the contractor in excess of the six days is referred as excessive laytime and should result in the contractor reimbursing the United States.

The contractor incurred excessive laytime for shipments during both fiscal years 1971 and 1972. MSC provided USARPC with documentation showing excessive laytime to support a claim against the contractor for \$508,000 under the FY 71 contract. Rather than submit a claim, however, USARPC personnel provided MSC's schedule of excessive laytime to the contractor in September 1971 for his evaluation and comments. He replied in October 1971 that in every case, the reasons for the long laytime were not his fault. He claimed that the delays were caused by such things as (1) close arrivals of vessels; (2) nonavailability of barges because

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of low water; (3) mine and railroad strikes in the United States and dock strikes at the European ports; and (4) a restriction on unloading vessels on weekends and holidays. The contractor also implied that MSC's computed laytime was overstated since it included the time the vessel was waiting for berthing at U.S. loading ports.

On February 16 and 17, 1972, we visited the MSC office in Rotterdam to discuss ShipCo's evaluation of the \$503,000 claim and to review pertinent files. The MSC representative stated that, in his opinion, the contractor's position was not tenable. He said that the claim is well-documented, enforceable, and should have been processed based on the following.

1. Under the contract provisions, as interpreted by MSC, the contractor is responsible for dispatching MSC vessels within six days notwithstanding close vessel arrivals. To the extent that close arrivals cause congestion, it is the contractor's problem, and under the contract terms, the Government should not bear any resultant expense. In any event, the MSC representative said that close arrivals are rare and should not cause too great a problem because the contractor has a choice of two ports of entry -- Rotterdam or Amsterdam.
2. Low water on the Rhine is predictable and with adequate planning the contractor can arrange for the proper number of barges. The MSC representative also said that the contractor can store the coal at Amsterdam when the water reaches a point where storage becomes more economical than to barge.
3. Mine and railroad strikes may have hampered normal turn around slightly. But the MSC representative stated that things of this nature are a normal risk of contracting and with adequate planning should not be a problem. The dock strike in August and September 1970 at Rotterdam and Amsterdam may have affected unloading but the excess laytime computed for those two months was more or less typical of that for the other ten months of fiscal 1971 and continuing into fiscal 1972.
4. Unloading vessels on weekends or holidays is not prohibited by Holland law or labor unions agreements. In the opinion of the MSC representative, the big restriction for weekend and holiday work is the payment of overtime by the contractor. The contractor really has no incentive to use overtime because the contract provision for excessive laytime has not been enforced. We estimated that weekends and holidays account for about 35 percent of the delays.

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5. In response to the contractor's comment that laytime was overstated, the MEC representatives stated that the computation was in line with the contract provisions and was determined jointly by the contractor's agent and the vessel master at the ports of loading and discharging. The contract specifically states that laytime begins when the vessel is berthed, or at anchorage if the reason for not berthing is caused by the contractor. This time is fixed and agreed to by the vessel's master and the contractor for each vessel. Both parties sign a "Notice of Readiness" report stating that the vessel is ready to load or unload. A "Statement of Facts" report is also agreed to by the vessel's master and the contractor. This report shows the exact time it took the contractor to load/discharge the vessel's cargo. The laytime ceases when the vessel has been loaded or discharged.

MEC files showed that from September to December 1970, MEC submitted to USAFME claims applicable to each vessel loading and unloading, on which excessive laytime was used. USAFME responded to the initial claim for September stating that upon completion of investigation, a determination would be made as to what action to take. The files showed no evidence that MEC was consulted on the results of the investigation. After November 1970, the next claim submitted to USAFME by MEC was the \$508,000 claim discussed above, which included all excessive laytime for fiscal 1971. USAFME personnel stated that the contractor's response concerning this claim also was not forwarded to MEC for evaluation and comment.

The Contracting Officer told us in December 1971 that he had not processed the claim resulting from fiscal 1971 shipments because, in his opinion, the contract clause covering excessive laytime is nebulous and therefore may be unenforceable. At that time, he said that he planned to send ShipCo's reply concerning excessive laytime to MEC. After our discussions, however, the contracting officer submitted a request to the USAFME legal counsel for an opinion on whether the provision is enforceable. This determination was requested to be made prior to the fiscal 1973 pre-solicitation conference to be attended on March 1 and 2 by MEC officials and others. On March 3, 1972, we were informed by the contracting officer that the conferees had agreed that the MEC clause was clearly stated and will be used for the fiscal 1973 solicitation. He also stated that the fiscal 1971 claim of \$508,000 will be processed against ShipCo.

Submission of the fiscal 1971 claim to ShipCo should reveal whether the contract provision, as written, is enforceable. If not enforceable, we suggest that it be revised to collect on future claims. In this connection the contractor is also incurring excessive laytime for shipments under the fiscal 1972 contract. Based on computations

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From HSC files on shipments during the first six months, the United States has a potential claim of about \$200,000. We recommend, therefore, that the claims outstanding under the fiscal 1972 contract be processed and that procedures be established so that future claims be processed as each instance of excessive laytime occurs, rather than accumulate them over an extended period of time.

In view of the significant amounts involved in these claims, we believe that effective action on behalf of USAFAC could result in large dollar recoveries. We would appreciate your comments regarding actions planned to process claims presently outstanding and plans for future claims which may arise.

Sincerely yours,

/s/ J. P. Normillo

J. P. Normillo/
Director

cc: USAFAC Comptroller