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## Decision

**Matter of:** Maersk Line, Limited

**File:** B-406586; B-406586.2

**Date:** June 29, 2012

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Thomas C. Papson, Esq., and John W. Sorrenti, Esq., McKenna Long & Aldridge LLP, for the protester.

Janis P. Rodriguez, Esq., and Jay R. Gordon, Esq., Department of Transportation, Maritime Administration, for the agency.

Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that solicitation for ship managers for Ready Reserve Force vessels unduly restricts competition by limiting competition to contractors qualifying as a specific category of United States citizen is denied where the requirement is mandated by applicable agency regulations.

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### DECISION

Maersk Line, Limited, of Norfolk, Virginia, protests the terms of request for proposals (RFP) No. DTMA98R20120001, issued by the Department of Transportation, Maritime Administration (MARAD), to obtain ship manager services for three Ready Reserve Force (RRF) vessels. Maersk argues that one of the solicitation's minimum eligibility requirements, which restricts the competition to a specific category of United States citizen, violates applicable procurement laws and regulations.

We deny the protest.

### BACKGROUND

The National Defense Reserve Fleet (NDRF) was established under Section 11 of the Merchant Vessel Sales Act of 1946 (the 1946 Act) to serve as a reserve of

vessels for national defense and national emergency purposes.<sup>1</sup> The NDRF is comprised of vessels owned by the U.S. government in the custody of MARAD, an agency that administers laws creating and maintaining the U.S. merchant marine. Agency Report (AR), at 2. In 1976, the RRF was established as a subset of the NDRF to support the rapid worldwide deployment of U.S. military forces.<sup>2</sup> Section 11 was amended in 1989 to statutorily establish the RRF as an NDRF component.<sup>3</sup>

The RRF, now comprised of nearly 50 vessels, is a key element of strategic sealift--it is structured to transport military unit equipment during initial surge for U.S. forces deployed anywhere in the world. RFP § C.1.1.2. RRF vessels, most of which are cargo vessels, are maintained for activation within 4-20 days. AR, at 4. Most recently, RRF vessels were activated in support of Operations Enduring Freedom and Iraqi Freedom between 2002 and 2008. RRF vessels were also activated in 2010 as part of relief efforts associated with the earthquake in Haiti.

NDRF vessels (including RRF vessels) are maintained and operated by private firms pursuant to contracts awarded by MARAD for ship manager services. The instant solicitation, issued on February 15, 2012, contemplates the award of a fixed-price/cost-reimbursable performance-based service contract for ship manager services on three RRF vessels. RFP §§ C.1.2, C.1.3, G.2. Under the anticipated contracts, ship managers are to maintain the vessels in fully mission capable readiness status and to efficiently activate and operate the vessels in support of national emergencies and defense objectives. RFP § C.1.3.1. The RFP sets forth an approximately three-year period of performance. RFP §§ B, F.4.

The solicitation contains three mandatory eligibility requirements, one of which is at issue here.<sup>4</sup> RFP § M.3. The solicitation states: "As required by 46 C.F.R. 315.5(a)(1), the Offeror must be a Citizen of the United States as defined in 46 C.F.R. 315.3(b), 50 App. U.S.C. section 1736(g) and 46 U.S.C. section 50501(a)-(c)." RFP §§ M.3.1.1; H.16. The referenced statutes and regulations define a "citizen of the United States" as follows:

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<sup>1</sup> The Merchant Ship Sales Act of 1946, ch. 82, 60 Stat. 41 (1946), is codified, as amended, at 50 App. U.S.C. §§ 1735 et seq. (2006 & Supp. IV 2010).

<sup>2</sup> Ready Reserve Force Pamphlet, Oct. 1, 2009, at iii.

<sup>3</sup> Pub. L. No. 101-115, § 6, 103 Stat. 691, 693 (1989).

<sup>4</sup> The other mandatory eligibility requirements are that (1) offerors must have experience within the last five years as an operator or owner/operator of at least one of the several specified types of vessels, and (2) offerors must have an irrevocable line of credit of a specified amount per vessel. RFP § M.3.

*Citizen of the United States* means a person . . . including any Person . . . who has a controlling interest in such person . . . and any parent corporation . . . of such Person **at all tiers of ownership**, who, in both form and substance **at each tier of ownership**, satisfies the following requirements -- . . . A corporation organized under the laws of the United States or of a State, the controlling interest of which is owned by and vested in Citizens of the United States and whose chief executive officer, by whatever title, chairman of the board of directors and all officers authorized to act in the absence or disability of such persons are Citizens of the United States, and no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens.

46 C.F.R. §§ 315.3(b) (emphasis added).

This definition is derived from section 2 of the Shipping Act of 1916, and is incorporated by reference in the 1946 Act.<sup>5</sup> In some contexts, companies considered to be U.S. citizens under this definition are referred to as “section 2 citizens.” To establish citizenship in accordance with this definition, the solicitation requires each offeror to provide documentation showing that the offeror and each of the offeror’s parent companies, “at every tier of ownership,” are citizens of the United States. RFP §§ L.6.2.1, L.6.2.1.1.

For offerors that meet the mandatory eligibility requirements, MARAD will consider various evaluation factors to determine a competitive range and awardees. MARAD intends to award two contracts to offerors that provide the best value to the government; the RFP included a small business cascading evaluation preference for one vessel. RFP § M.12.1. Proposals were to be submitted by April 9.

On April 5, MARAD executed a justification and approval (J&A) for other than full and open competition, citing the RFP’s mandatory eligibility requirements. The J&A relied on two bases. The first basis was MARAD’s statutory exemption from the Federal Property and Administrative Services Act of 1949 (FPASA), as amended by the Competition in Contracting Act of 1984 (CICA), and implemented by the Federal Acquisition Regulation (FAR). Under that exemption, MARAD states that it need only comply with the FAR to the maximum extent practicable consistent with the purposes of its programs. J&A, at 7, citing 40 U.S.C. § 113(e)(15). MARAD states

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<sup>5</sup> Section 3(g) of the 1946 Act provides, in pertinent part, that “Citizen of the United States includes a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 2 of the Shipping Act of 1916, as amended.” 50 App. U.S.C. § 1736(g). Section 2 of the Shipping Act of 1916, ch. 451, § 39 Stat. 728, 729 (1916), is codified as amended at 46 U.S.C. § 50501 (2006).

that the section 2 citizenship requirement is required by its regulation implementing the NDRF and RRF programs, and is consistent with the 1946 Act. J&A, at 7, 2-4, citing 50 App. U.S.C. §§ 1735, 1936(g), and 1744 (the 1946 Act's declaration of policy, definitions, and authorization for the NDRF and RRF, respectively), and its regulation at 46 C.F.R. Part 315. As a result, MARAD has determined that the requirements are necessary or appropriate for carrying out its programs and that it has followed the FAR to the maximum extent practicable consistent with the purposes of those programs. Id. The second basis was CICA's industrial mobilization exemption. J&A, at 6, citing 41 U.S.C. § 3304(a)(3)(A).

On the same day MARAD executed the J&A, Maersk filed its initial protest in our Office challenging the section 2 citizenship requirement as violative of CICA's full and open competition requirements.<sup>6</sup> After the J&A was posted on FedBizOps, Maersk supplemented its protest to argue that none of the authorities cited in the J&A supported MARAD's use of the requirement in this solicitation. Specifically, Maersk argues that MARAD's FPASA exemption does not apply here, and that, even if it does, the agency has not shown that complying with CICA would impair or affect its authority to conduct the NDRF and RRF programs. In this regard, Maersk asserts that MARAD has misread the 1946 Act in promulgating its regulation, and that its regulation therefore exceeds MARAD's authority and cannot be the basis for invoking the FPASA exemption. Maersk also argues that MARAD has not provided current factual support for its use of CICA's industrial mobilization exemption.<sup>7</sup>

## LEGAL FRAMEWORK OF THE READY RESERVE FORCE

When World War II ended, the United States government was left with a surplus of war-built vessels. The Merchant Ship Sales Act of 1946 was enacted to address the disposition of these vessels in order to build and support a privately-owned U.S. merchant marine and for other purposes.<sup>8</sup>

Section 2 of the 1946 Act, its declaration of policy, states:

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<sup>6</sup> Maersk is a U.S. corporation organized and existing under the laws of the State of Delaware. It is wholly owned by Maersk, Inc., a corporation organized and existing under the laws of the State of New York. Maersk is indirectly owned by A.P. Moller-Maersk A/S, a Danish corporation and Maersk's ultimate parent. Protest, at 2. Maersk is a "documentation citizen"—a U.S. company with officers and directors who are U.S. citizens—but does not qualify as a section 2 citizen because its ultimate parent is a Danish corporation. Id., at 9.

<sup>7</sup> In citing this CICA exemption, MARAD relied on the comments it received during its 1993 rulemaking concerning the then-state of the U.S. maritime industry and the national security and industrial mobilization interests discussed below.

<sup>8</sup> 1946 Act, supra; H. Rep. No. 79-831, at 2-3 (1945).

- (a) **It is necessary for the national security** and development and maintenance of the domestic and the export and import foreign commerce **of the United States that the United States have an efficient and adequate American-owned merchant marine** (1) sufficient to carry its domestic water-borne commerce and a substantial portion of its water-borne export and import foreign commerce and to provide a shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times; (2) capable of serving as a naval and military auxiliary in time of war or national emergency; (3) **owned and operated under the United States flag by citizens of the United States**; (4) composed of the best-equipped, safest, and most suitable types of vessels; constructed in the United States and manned with a trained and efficient citizen personnel; and (5) supplemented by efficient American-owned facilities for shipbuilding and ship repair, marine insurance, and other auxiliary services.
- (b) It is hereby declared to be the policy of this Act to foster the development and encourage the maintenance of such a merchant marine.

Section 2, 1946 Act, codified at 50 App. U.S.C. § 1735 (emphasis added). Again, section 3(g) of the 1946 Act defined “citizen of the United States” by reference to the definition in section 2 of the Shipping Act of 1916.<sup>9</sup>

Most of the 1946 Act’s provisions concerned the disposition of vessels to private parties.<sup>10</sup> In each of these provisions, the Act’s definition of “citizen of the United States” limited the class of persons who could purchase, charter, or exchange a war-built vessel. Section 4 provided that “[a]ny citizen of the United States” could apply to purchase a war-built vessel. Section 5 provided that “[a]ny citizen of the United States” could apply to charter certain war-built vessels for a certain use. Section 6

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<sup>9</sup> This declaration of policy paralleled the one in the Merchant Marine Act of 1936, ch. 858, title I, § 101, 49 Stat. 1985, 2016 (1936); section 905(c) of that act also incorporated by reference the definition of “citizen of the United States” in section 2 of the Shipping Act of 1916, as amended.

<sup>10</sup> The 1946 Act’s provisions for the sale of war-built vessels have been repealed; the subsections of the charter and exchange provisions referencing “citizens” have also been repealed. The remaining provisions of the 1946 Act are section 2, the declaration of policy; section 3, the definitions; and section 11, the authorization of the NDRF and RRF. 50 App. U.S.C. §§ 1735, 1736, and 1744. All of the definitions have been repealed except “Secretary” and “Citizen of the United States.”

provided that any person “not a citizen of the United States” could apply to purchase certain war-built vessels if the U.S. Maritime Commission (MARAD’s predecessor agency) made certain determinations, including that the vessel was “not necessary to the defense of the United States.” Section 7 required the Commission to give preference to “citizen applicants” over “non-citizen applicants” in exercising its powers with respect to the sale and charter of war-built vessels.”

However, to ensure that the United States would have vessels available for any future emergency, the 1946 Act also established “an inactive merchant-vessel reserve” to augment the “active merchant marine”, which would only be used to promptly address security needs. S. Rep. No. 79-807, at 2, 21 (1945). Accordingly, section 11 of the 1946 Act established a U.S.-owned national defense reserve fleet to be preserved and maintained by what is now MARAD for the purpose of national defense. 50 App. U.S.C. § 1744; H. Rep. No. 831, supra, at 13-14. This fleet is comprised of vessels the government has determined should be retained for the national defense, as well as vessels that were not sold under the act’s other provisions. Section 11 did not include an express citizenship requirement.

In 1951, however, MARAD promulgated a regulation that established the eligibility requirements for general agents, agents and berth agents to “manage and/or conduct the business of vessels of which the United States is owner or owner pro hac vice.” 16 Fed. Reg. 2,888 (Apr. 3, 1951). This regulation implemented the NDRF program and required ship managers to meet the citizenship requirements set forth under section 2 of the Shipping Act of 1916. Id.

As previously discussed, in 1989, Congress amended section 11 to provide statutory authority for the RRF within the NDRF. The amendment listed various uses for vessels in the fleet, but did not address the RRF ship manager program. Pub. L. No. 101-115, supra.

As explained by the agency, numerous RRF vessels were activated during Operations Desert Storm and Desert Shield in the early 1990s. Various management problems exposed by these activations gave rise to concern that the general agents operating the vessels needed greater management expertise and technical experience. AR, at 4; see H.R. Rep. No. 103-182 (1993), 1993 WL 324674, at 12 (discussing oversight hearings on these problems). As a result of these concerns, in 1991, Congress again amended section 11 by adding a new subsection that specifically addressed the RRF ship manager program. Among other things, the amendment included eligibility requirements for RRF vessel managers:

(d) Ready Reserve Force Management.—

...  
(2) Vessel Managers.—

- (A) Eligibility for Contract.—A person, including a shipyard, is eligible for a contract for the management of a vessel in the Ready Reserve Force if the Secretary determines, **at a minimum**, that the person has—
  - (i) experience in the operation of commercial-type vessels or public vessels owned by the United States Government; and
  - (ii) the management capability necessary to operate, maintain, and activate the vessel at a reasonable price.
  
- (B) Contract Requirement.—The Secretary of Transportation shall include in each contract for the management of a vessel in the Ready Reserve Force a requirement that each seaman who performs services on any vessel covered by the contract hold the license or merchant mariner’s document that would be required under chapter 71 or chapter 73 of title 46, United States Code, for a seaman performing those services while operating the vessel if the vessel were not a public vessel.

Fiscal Year 1991 Coast Guard Authorization Act, Pub. L. No. 102-241, § 57, 105 Stat. 2208, 2234-35 (1991), codified at 50 App. U.S.C. § 1744(c) (emphasis added).<sup>11</sup>

In 1993, MARAD proposed to change its policy with respect to the section 2 citizenship requirement. 58 Fed. Reg. 9,135 (Feb. 19, 1993). The proposed change would have eliminated the requirement that an agent be a section 2 citizen so that, for example, a documentation citizen would be deemed eligible for appointment. *Id.*, at 9,136. MARAD did not include this change in its final rule, however. 58 Fed. Reg. 44,283 (Aug. 20, 1993). MARAD explained that, after reviewing the comments received in response to the proposed rule, it concluded “there could be some potential risk to the national interest from relying on noncitizen operators whose governments may not be totally sympathetic to the position of the United States in time of war or national emergency, which is sufficient to militate against adoption of the policy change.” *Id.*, at 44,285.

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<sup>11</sup> Under subsection (d)(2)(B), officers on vessels documented under the U.S. flag must be citizens of the United States, and up to 25 percent of the unlicensed crew may be permanent resident aliens. AR, at 22 n.28.

The current regulation, duly promulgated in 1993 through notice and comment,<sup>12</sup> incorporates the section 2 citizenship requirement established by the 1951 regulation, and states as follows:

- (a) *Eligibility*. The Director shall restrict the appointment as Agent to qualified applicants. Each applicant shall establish that eligibility according to procedures that may be obtained from MARAD and shall:
- (1) Be a Citizen of the United States, as defined in § 315.3(b) of this part;
  - (2) Demonstrate the necessary ability, experience and resources as an operator of vessels or ports, or shoreside husbander of vessels; and
  - (3) Continue to meet all such requirements throughout the term of the appointment.

46 C.F.R. § 315.5.<sup>13</sup>

In December 2011, MARAD held a stakeholders meeting regarding the RRF ship manager contract program. Among the meeting topics was the section 2 citizenship requirement. 76 Fed. Reg. 76,811 (Dec. 8, 2011). MARAD states that it is reviewing the existing regulation to see if it needs to be revised or revoked; that review may result in a rulemaking addressing the current citizenship requirements for companies managing vessels in the RRF. J&A, at 5, 6. MARAD explains that it has the authority to change this longstanding policy and its implementing regulation, but may not do so without developing an adequate administrative record and a reasonable rationale for such a change. *Id.*, at 5.

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<sup>12</sup> The 1946 Act places responsibility for operation of the NDRF with the Secretary of Transportation, who has delegated that authority to MARAD. 50 App. U.S.C. § 1744, 49 U.S.C. § 109, 49 C.F.R. §§ 1.45, 1.66; see also *Curran v. Laird*, 420 F.2d 122, 128 (D.C. Cir. 1969) (in reviewing Secretary's decision not to withdraw ships from NDRF, court held Section 11 authorizes a span of executive actions--pertaining to the fleet's establishment, expansion, curtailment, "maintenance," and use--that are committed to agency discretion.) The 1946 Act authorized the Secretary to promulgate regulations with respect to whether "affiliated interests" included those associated with citizen applicants; MARAD's regulations implementing section 2 of the Shipping Act of 1916 are at 46 C.F.R. Part 355. MARAD also has the general authority to promulgate rules and regulations with respect to its programs. 49 U.S.C. § 322(a), 49 C.F.R. § 1.45, 1.66.

<sup>13</sup> Section 315.3(a) defines "agent" as including these ship managers; section 315.3(b) defines citizen of the United States as a section 2 citizen.



## DISCUSSION

In response to Maersk's argument that MARAD's section 2 citizenship requirement violates CICA, MARAD contends that permitting a foreign corporation to manage its RRF vessels would be inconsistent with the national security and industrial mobilization purposes of the 1946 Act, the NDRF and RRF programs authorized by that Act, and MARAD's implementing regulation. In addition, MARAD essentially argues that since the section 2 citizenship requirement is expressly mandated by agency regulation, it inherently reflects a legitimate minimum need and is not "unduly" restrictive of competition.<sup>14</sup> See CESEC Skyline, LLC, B-402520, B-402520.2, May 3, 2010, 2010 CPD ¶ 101 (holding that solicitation requirement necessary to meet statutorily imposed deadlines are not unduly restrictive of competition). As set forth below, we agree with the agency.

CICA mandates full and open competition in government procurements obtained through the use of competitive procedures, so that all responsible sources are permitted to compete. 41 U.S.C. §§ 3301(a), 107. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. Innovative Refrigeration Concepts, B-272370, Sept. 30, 1996, 96-2 CPD ¶ 127 at 3. Where, as here, a requirement relates to national defense or human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. Vertol Sys. Co., Inc., B-293644.6 et al., July 29, 2004, 2004 CPD ¶ 146 at 3. Moreover, CICA provides several exceptions to the general requirement for competition, such as when it is necessary to award the contract to a particular source to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization. 41 U.S.C. § 3304(a)(3)(A).

The solicitation's section 2 citizenship requirement is clearly set forth in 46 C.F.R. §§ 315.3, 315.5. As explained above, this requirement, drawn from a 1951 regulation and, thus, in existence for more than 60 years, requires ship managers to meet the citizenship requirements set forth in section 2 of the Shipping Act of 1916, and incorporated by reference in the 1946 Act. Throughout its protest, Maersk

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<sup>14</sup> The parties largely focus on the propriety of MARAD's J&A. However, because it is apparent that the solicitation's citizenship requirement is derived from MARAD's reasonable interpretation of the 1946 Act and its implementation of its long-standing regulation, in our view, the question of the propriety of the J&A is a tangential one. Because the requirement reflects a legitimate agency need, its inclusion does not violate CICA's competition mandates notwithstanding the fact that it may preclude firms that are able to meet the requirement, such as Maersk.

essentially attacks the validity of these regulations as providing a legitimate basis for the solicitation's incorporation of the section 2 citizenship requirement. These attacks, however, are misplaced.

First, Maersk asserts that the regulations are inconsistent with CICA because they authorize MARAD to procure vessel manager services only from section 2 citizens. This argument, however, puts the cart before the proverbial horse. CICA allows agencies to include restrictive requirements to the extent they are necessary to satisfy the agency's legitimate needs. Maersk's contention that the section 2 citizenship requirement, as set forth by MARAD's regulations, is contrary to CICA simply assumes that the requirement is without a legitimate basis. However, the legitimacy of the requirement is to be determined independent of the provisions of CICA, which does not mandate agency requirements.

Second, Maersk argues at great length that the section 2 citizenship requirement set forth in MARAD's regulations is not authorized by the 1946 Act. Essentially, the protester is asking our Office to invalidate the section 2 citizenship requirement set forth in these regulations, which have a history dating back to 1951. As discussed below, we conclude that the agency's incorporation of the section 2 citizenship requirements in its regulations was reasonable and based on a permissible construction of relevant statutes.

MARAD acknowledges that the 1946 Act does not "specifically mandate" that operators of these vessels be "Citizens of the United States." J&A, at 3. However, it is also apparent that the requirement is not inherently inconsistent with the 1946 Act and MARAD maintains that its approach to interpreting the statute takes into account the overall statutory scheme of the 1946 Act and its declaration of policy, definition of "Citizen of the United States," and authorization for the NDRF and RRF programs. Under this approach, MARAD has interpreted the 1946 Act, as amended, as providing it a sufficient basis to include this requirement as one of the minimum eligibility requirements in its implementing regulation. MARAD also contends its interpretation, as set forth in a duly promulgated regulation, is entitled to deference.

Our analysis begins with the interpretation of the relevant statute. In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, our analysis ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); Ashland Sales & Serv. Co., B-401481, Sept. 15, 2009, 2009 CPD ¶ 186 at 4. If, however, the statute is silent or ambiguous with respect to the specific issue, deference to the interpretation of an administering agency is dependent on the circumstances. Chevron, 467 U.S. at 843-45; United States v. Mead Corp., 533 U.S. 218, 227-37 (2001). An agency's interpretation must be reasonable and based on a permissible construction of the statute; such a construction need not be the only one the agency permissibly could have adopted. Chevron, at 843; see also

Conoco, Inc. v. Skinner, 970 F.2d 1206, 1217 (3d Cir. 1992) (interpreting section 2 of the Shipping Act of 1916 for other purposes). Lastly, a determination must be made as to whether the agency's current interpretation is consistent with its previous interpretations. Conoco, supra. An agency's interpretation of a statute it is responsible for administering is entitled to substantial deference, and should be upheld if it is reasonable. Appalachian Council, Inc., B-256179, May 20, 1994, 94-1 CPD ¶ 319 at 16.

Maersk argues that MARAD is not entitled to Chevron deference because Congress has directly addressed the citizenship requirement at issue and unambiguously expressed its intent, citing FDA v. Brown and Williamson, 529 U.S. 120, 132-33 (2000) (if Congress has directly spoken to the precise question at issue, the court must give effect to the unambiguously expressed intent of Congress). In this regard, Maersk contends that the 1946 Act, as enacted, addressed the citizenship requirement by making it applicable only to those provisions concerning the disposition of vessels to private parties, not to the provision authorizing the NDRF (and RRF) programs. Maersk also argues that the 1991 amendments unambiguously expressed Congress' intent not to impose a citizenship requirement on ship managers. Finally, Maersk asserts that even if Chevron applies, MARAD's interpretation must be permissible, and it is not.

We cannot conclude that, in enacting the 1946 Act, Congress addressed the citizenship requirement with respect to the NDRF (and RRF) provision by only making the requirement expressly applicable to the Act's other provisions. We also cannot conclude that, in enacting the 1991 amendments, Congress directly addressed the precise requirement at issue and unambiguously expressed its intent. As a result, we find that Chevron deference applies. We further find that MARAD's interpretation is reasonable.

With respect to the 1946 Act, MARAD asserts that the citizenship requirement in its regulation is consistent with the 1946 Act's declaration of policy. As relevant here, the declaration of policy states that "[i]t is necessary for the national security . . . of the United States that the United States have an efficient and adequate American-owned merchant marine . . . owned and operated under the United States Flag by citizens of the United States . . ." 50 App. U.S.C. § 1735(a). The policy of the Act, inclusive of Section 11, is "to foster the development and encourage the maintenance of such a merchant marine," i.e., a merchant marine owned and operated by citizens of the United States as defined in the 1946 Act. J&A, at 3. MARAD interprets the word "and" in the phrase "owned and operated" to mean that Congress intended that vessels be both "owned" as well as "operated" by citizens. AR, at 21. Because the United States owns the vessels in the NDRF and RRF, they are both "American-owned" and "operated" by citizens, consistent with the declaration of policy.

Maersk argues that MARAD has misread the 1946 Act, which the protester asserts is “utterly silent” concerning citizenship requirements relating to the NDRF and RRF programs. Comments, at 23.

Maersk agrees with MARAD that the 1946 Act’s declaration of policy must be read in the context of the purposes of the act as originally intended, but disagrees with MARAD’s view of those purposes. In Maersk’s view, the purpose of the Act was simply “to provide for the sale of surplus war-built vessels.” Maersk argues that the declaration of policy’s language concerning an “American-owned merchant marine owned and operated under the U.S. flag by citizens of the United States” concerns the vessels that were to be disposed of under the Act’s provisions for the sale, charter, or exchange of these vessels, all of which made express use of the term “citizen of the United States” or “citizen.” Maersk maintains that the declaration of policy does not concern section 11’s authorization of the NDRF and RRF. We do not agree.

Maersk is correct that most of the 1946 Act’s provisions concerned the disposition of these vessels to private parties through sale, charter, or exchange. However, it was not limited to this purpose. In this regard, we note that the preamble to the 1946 clearly explains that the Act is “to provide for the sale of surplus war-built vessels, *and for other purposes.*” As discussed above, the legislative history reinforces the fact that the objectives of the Act were twofold: “(1) The establishment of a firm pricing policy for the sale of war-built vessels, and (2) the establishment of an inactive merchant vessel reserve promptly available for security needs, but frozen as commercial use is concerned.” S. Rep. No. 79-807, supra.

There is also no support for Maersk’s attempt to divorce the declaration of policy’s emphasis on the necessity, for national security, of having an American-owned merchant marine, owned and operated by citizens of the United States, from the national defense purposes of Section 11. The words of a statute must be read in their context and with a view to their overall statutory scheme.<sup>15</sup> See Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989). Moreover, the 1946 Act permitted the sale of vessels to non-U.S. citizens only if certain conditions were met, including that the vessel was not needed for the defense of the United States. Such limitations were designed to protect American operators and the national security. S. Rep. No. 79-807, supra, at 4. As MARAD argues, inasmuch as Congress permitted the sale of vessels to foreigners only if they were not needed for the national defense, it would be “illogical and at cross-purposes” with the Act’s intent to

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<sup>15</sup> A declaration of policy may constitute a sufficient definition of standards to guide an agency’s actions. Meacham Corp. v. United States, 207 F.2d 535, 548 (4th Cir. 1953) (in context of section 2 citizenship requirement, statement of policy in Shipping Act of 1916 that the United States desires to do whatever is necessary to develop its merchant marine constitutes a sufficient definition of standards).

hold that MARAD must permit foreign corporations to manage vessels in the RRF, which are expressly reserved for the national defense. AR, at 23 n.30.

Maersk asserts that the citizenship requirement contemplated by the declaration of policy does not apply here because the vessels are not “owned and operated by citizens of the United States” but, rather, are owned by the U.S. government. As noted above, MARAD interprets the word “and” in the phrase “owned and operated” to mean that Congress intended that vessels be both “owned” as well as “operated” by citizens. AR, at 21. MARAD contends that the protester’s reading would mean that Congress was concerned that private vessels owned by section 2 citizens be operated by section 2 citizens, but was wholly unconcerned with the citizenship of the operators of vessels in the NDRF, whose purpose is national defense. We cannot find MARAD’s reading unreasonable.<sup>16</sup>

MARAD also asserts that, under Maersk’s interpretation, no citizenship requirement would apply to the ship manager program. According to MARAD, this would be contrary to the Act’s purposes and the underlying intent of the regulations, since allowing foreign corporations to maintain and operate these vessels in times of war could be particularly problematic. This is because the national interests of foreign countries to which the foreign operator owes allegiance may not be consistent with the interests of the United States, and foreign nationals are subject to the control and laws of their respective governments.<sup>17</sup> AR, at 22-23. MARAD states that the interests and loyalties of section 2 citizens are more likely to be aligned with those of the U.S. during such crises. As a result, rather than allow companies owned and controlled by citizens of foreign countries to manage the vessels reserved for national emergencies and war, MARAD determined that operating such vessels should be reserved for entities that are section 2 citizens. Id.

Turning to the 1991 amendments to Section 11, MARAD contends that they state a person is eligible for an RRF ship manager contract “if the Secretary determines, **at a minimum**, that the person meets two listed requirements. J&A, at 2, citing 50

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<sup>16</sup> As pointed out above, the only remaining provision from the 1946 Act to which the definition of “citizen of the United States” could apply is section 11.

<sup>17</sup> As an example of the significance of national interests in another context, MARAD points out that incidents concerning “foreign flag balters” during Desert Storm/Desert Shield raised questions about the dependability of foreign flag shipping in future conflicts. AR, Tab 34, “So Many, So Much, So Far, So Fast: U.S. Transportation Command and Strategic Deployment for Operation Desert Shield/Desert Storm (1996), at 136-37, 123. In a number of instances, crews on foreign flag ships carrying U.S. cargo hesitated or refused to enter the area of operations, and one country declined to involve its ships in military transport to the crisis area. Id.

App. U.S.C. § 1744(c)(2) (emphasis added). MARAD states that it construes the inclusion of the words “at a minimum” to mean that Congress granted the Secretary the authority to impose other minimum eligibility requirements in his discretion. This would include the section 2 citizenship requirement MARAD had been imposing for the prior 40 years, of which the Congress was aware. AR, at 18; J&A, at 3-4.

Hence, MARAD states, when issuing its regulation to implement section 11 of the 1946 Act, it reasonably decided to include as one of its mandatory eligibility requirements a requirement consistent with one of the 1946 Act’s underlying policies and its definitions: that a company managing these government-owned vessels be a “Citizen of the United States.” J&A, at 3-4.

Maersk argues that MARAD reads too much into the phrase “at a minimum.” Maersk reads it as only referring to the determination that the Secretary must make as to the two existing requirements, *i.e.*, the Secretary may require that the persons have particular types of experience in operating commercial or public vessels or particular management capabilities to operate such vessels. Comments, at 35-36. Maersk argues that the 1991 amendments directly addressed the question of citizenship and unambiguously did not impose a citizenship requirement on vessel managers. We do not agree.

There is no indication that Congress considered the citizenship of vessel managers in enacting the 1991 amendments. As Maersk itself appreciates, Congress’ interest in vessel managers was driven by managerial problems that arose during Desert Storm/Desert Shield. There is, further, no indication in the legislative history that, by using the words, “at a minimum,” the Congress intended the Secretary’s determinations to be confined to the two specified requirements. MARAD’s position is that Congress was not restricting the eligibility requirements the Secretary could prescribe but simply adding two minimum eligibility requirements to address these managerial problems. AR, at 17. By using the phrase “at a minimum,” MARAD believes Congress contemplated that additional requirements might be added in the Secretary’s discretion. We find MARAD’s interpretation reasonable.<sup>18</sup>

In addition, the 1991 amendment required that all officers and most remaining seamen performing services under any RRF vessel management contract be U.S.

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<sup>18</sup> Maersk contends that the use of the word “person” in the 1991 amendments means that the vessel managers were not required to be a “citizen of the United States.” We do not believe this is the only permissible reading. If, as MARAD contends, the amendment contemplated a nonexclusive list of minimum eligibility requirements, the citizenship requirement of which Congress was aware could be retained or not, in the Secretary’s discretion. In such case, a vessel manager could be a “person” who is a “citizen of the United States.”

citizens. Maersk argues that if Congress had intended to have citizenship requirements for ship managers, it would have so specified at the same time it was specifying citizenship requirements for their crews. We cannot read such intent into Congress' silence. The precise reason for the crew citizenship requirement is not clear, but it is entirely consistent with MARAD's argument that Congress intended that RRF vessels should be "operated" by U.S. citizens, both vessel manager and crew. It would be illogical for Congress to be concerned about the citizenship of the crews of RRF vessels, but not at all concerned about the citizenship of their employers, the ship managers. The same concerns about the potentially divergent interests and loyalties of non-citizens operating vessels reserved for the purpose of national defense are equally applicable to both crew and ship managers.

Finally, as discussed above, for more than 60 years MARAD has interpreted the 1946 Act as authorizing the section 2 citizenship requirement for its NDRF and RRF ship manager contracts. Conoco at 1217, citing Chevron ("[T]he weight of an administrative interpretation will depend . . . upon 'its consistency with earlier and later pronouncements' of an agency.") MARAD has twice signaled a willingness to revisit its interpretation in light of evolving facts and circumstances. 58 Fed. Reg. 9,135, supra; 76 Fed. Reg. 76,811, supra. However, our review of its longstanding existing interpretation affords us no basis to find it unreasonable.

In conclusion, the solicitation's section 2 citizenship requirement, which is clearly mandated by agency regulations, reflects a legitimate agency requirement and is not unduly restrictive of competition.

The protest is denied.

Lynn H. Gibson  
General Counsel