

(1) The Contractor has entered into an arrangement to obtain and operate under that MSP Operating Agreement a replacement vessel for that Participating Fleet Vessel; and

(2) The Secretary determines that the replacement vessel will be eligible to be included in the MSP Fleet under § 296.11(a).

(f) In the event that a Participating Fleet Vessel will be unavailable to participate in the MSP on October 1, 2005, due to an unforeseen casualty to the vessel, a Contractor may offer an eligible replacement vessel. The replacement vessel must subsequently be approved by MARAD and DOD. The replacement vessel must operate under an MSP Operating Agreement in sufficient time to meet the 180 minimum operation days required during the fiscal year to avoid being in default of the MSP Operating Agreement.

#### § 296.22 Other vessels.

(a) *Third Priority.* To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, and the second priority, Participating Fleet Vessels, in § 296.21, the third priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a), and that, during the period of that MSP Operating Agreement, will be:

(1) Owned and operated by one or more persons that are Section 2 Citizens; or

(2) Owned by a person that is eligible to document the vessel under 46 U.S.C. chapter 121 and operated by a person that is a Section 2 Citizen.

(b) *Fourth Priority.* To the extent that appropriations are available after applying the first priority in § 296.20, the second priority in § 296.21, and the third priority in paragraph (a) of this section, the fourth priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a).

#### § 296.23 Discretion within priority.

The Secretary—

(a) Subject to paragraph (b) of this section, may award MSP Operating Agreements within each priority as the Secretary considers appropriate; and

(b) Shall award MSP Operating Agreements within a priority—

(1) In accordance with operational requirements specified by the SecDef;

(2) In the cases of the Priorities III and IV, according to the applicants' records of owning and operating vessels; and

(3) Subject to the approval of the SecDef.

(c) The Secretary does not have discretion to override the priority requirements with respect to the initial award of MSP Operating Agreements.

#### § 296.24 Subsequent awards of MSP Operating Agreements.

(a) Until October 1, 2005, if, for any reason, after the award of an MSP Operating Agreement, the Applicant is unwilling or unable to commence operations pursuant to the terms of the MSP Operating Agreement, MARAD may, pursuant to the priority criteria, award that MSP Operating Agreement to an Applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement.

(b) After October 1, 2005, MARAD intends to ensure that all available MSP Operating Agreements are fully utilized at all times, in order to maximize the benefit of the MSP. Accordingly, when an MSP Operating Agreement becomes available through termination by the Secretary, expiration of a temporary MSP Operating Agreement or early termination by the MSP contractor, and no transfer under 46 U.S.C. 53105(e) is involved, MARAD will reissue the MSP Operating Agreement pursuant to the following criteria.

(1) The proposed vessel must meet the requirements for vessel eligibility in 46 U.S.C. 53102(b);

(2) The applicant must meet the vessel ownership and operating requirements for priority in 46 U.S.C. 53103(c); and

(3) Priority will be assigned in accordance with operational requirements specified by the SecDef.

(c) MARAD will use the following procedures in reissuing an MSP Operating Agreement. MARAD and USTRANSCOM will determine if the applications received on October 15, 2004 form an adequate pool for award of a reissued MSP Operating Agreement.