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GAO

Report to the Chairman, Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries, House of Representatives

October 1988

OCEAN RESEARCH FLEET

Contracting Practices for Repair of NOAA Ships

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RELEASED

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Resources, Community, and
Economic Development Division

October 31, 1988

The Honorable Mike Lowry
Chairman, Subcommittee on
Oceanography
Committee on Merchant Marine
and Fisheries
House of Representatives

Dear Mr. Chairman:

In a letter dated February 11, 1988, you asked us to review several aspects of the operation and maintenance of the National Oceanic and Atmospheric Administration's (NOAA) research fleet. Key areas of concern involved whether allegations of poor maintenance and repair and poor contracting practices for vessels based in the Seattle, Washington, area were justified.

On the basis of discussions with your office, we agreed to do the following with regard to your key concerns:

- monitor NOAA's and the Department of Commerce's implementation of actions recommended by Commerce's Office of the Inspector General (OIG) to resolve allegations of NOAA's procurement of substandard power packs[1] for the Seattle-based fleet and to correct contracting weaknesses affecting the Seattle fleet at NOAA's Pacific Marine Center and
- obtain information on the status of NOAA's plans to have legislation introduced clarifying how labor rate provisions in the Davis-Bacon Act apply to NOAA ship repair contracts.

Other aspects of your request, which involve the condition of the research fleet and its ability to meet current and future mission requirements, are being reviewed separately. We will report the results of that work at its completion.

[1]A power pack consists of a cylinder liner and head, piston, valves, and various other parts that are assembled as a complete unit. The purpose of a power pack is to facilitate rapid replacement of a cylinder unit in large engines used in ships.

Results in Brief

In March 1988 the OIG issued two reports, one examining allegations that the Pacific Marine Center had improperly accepted and paid for substandard power packs, and the other evaluating the Western Administrative Support Center's contracting activities, including management of ship repair contracts. Pursuant to an OIG recommendation, NOAA arranged for an independent inspection of power packs. The inspection found that a sample of four power packs met specifications for used parts, with the exception of one part, which was replaced, and that the packs were suitable for use. The OIG also recommended a number of changes in contracting procedures, including requiring appropriate inspection checkpoints. Commerce prepared plans to implement the recommendations in both audit reports. The OIG reviewed the plans and found them acceptable.

The Department of Commerce has drafted legislation that will specify that the Walsh-Healey Act, rather than the Davis-Bacon Act, will apply to NOAA ship repair contracts. This proposed legislation has been forwarded to several congressional committees for their consideration.

Background

NOAA, an agency within the Department of Commerce, operates a fleet of 23 research and survey vessels. Scientists from NOAA, other federal agencies, and academic institutions use these ships to collect data on the chemical, physical, biological, and geological characteristics and behavior of the oceans, the seafloor, the Great Lakes, and the ocean-atmosphere interface. These research programs support marine navigation, marine resource development, business and economic activity, protection of life and property, and increased scientific knowledge.

The Pacific Marine Center (Marine Center), located in Seattle, manages and provides support to 12 of these research vessels. It provides shore facilities and personnel to conduct, maintain, and support NOAA's Pacific Ocean operations and programs. The Marine Center contracts out for all maintenance and repair services because it has no in-house industrial capability other than routine maintenance service provided by each ship's crew. Assisting the Marine Center in arranging for the services is Commerce's Western Administrative Support Center (Support Center), located in Seattle. The Support Center was established to provide administrative services to Commerce field offices in the western region. Although Marine Center engineers develop the contract specifications for the ship repair work, contracting officers from the Support Center's procurement division execute and administer the Marine Center contracts and are responsible for ensuring that the contracts comply with

the federal regulations for procurement. Marine Center engineers may serve as the contracting officer's technical representatives in monitoring a contractor's performance or as a limited contracting officer in authorizing contract changes.

Issues Related to Substandard Power Packs and Contracting Weaknesses

In March 1988 the OIG issued two audit reports, one examining allegations that the Marine Center had improperly accepted and paid for substandard diesel power packs supplied by a diesel engine repair firm, and the other evaluating whether the Support Center was accomplishing its contracting activities in accordance with federal procurement policies and regulations.

In its report on the allegations, the OIG found several problems in the administration of contracts relating to the power packs, such as the technically nonresponsive nature of the contractor's bid, inadequate technical specifications for the work to be performed, lack of an inspection checkpoint system to determine contract compliance at critical work stages, use of an inappropriate contractual method, and lack of proper approval to authorize the obligation of funds. The OIG also felt that no conclusion could be drawn regarding the acceptability of the power packs without an additional, independent inspection and recommended that such an inspection be conducted. The OIG also recommended a number of changes in contracting procedures. The changes included (1) requiring that all contracts for engine repair and overhaul provide for adequate technical specifications and appropriate inspection checkpoints and (2) establishing review and control processes to ensure that unauthorized obligations of funds are not initiated. (The allegations, together with the OIG's findings and recommendations, are explained in detail in app. I.)

On July 8, 1988, Commerce's Under Secretary for Oceans and Atmosphere responded to the audit report with a plan containing corrective actions that either had been or would be taken on all of the OIG recommendations. An independent inspection of an additional sample of power packs had already been conducted, which found that the power pack component parts, with the exception of one part that was replaced, met dimensional specifications for used parts and were suitable for use.

The OIG's audit report evaluating the Support Center's contracting activities had a specific section that dealt with the Support Center's management of ship repair contracts. The OIG found three areas in which Support Center procurement staff had not adequately managed ship

repair contracts: timeliness of solicitations for bids, technical errors in administering contracts, and excessive and inappropriate modifications under many contracts. The OIG made a number of recommendations to correct these problems, and on July 6, 1988, Commerce's Under Secretary for Oceans and Atmosphere submitted a plan for addressing them. (App. I describes the OIG report in greater detail.)

The OIG concurred with the proposed plans to implement recommendations contained in the reports on the Marine Center's acceptance of the power packs and on the Support Center's contracting activities. The OIG plans to conduct a routine follow-up review at a future date to determine whether the corrective actions have been adequately implemented.

Our discussions with Support Center and Marine Center officials and our review of related documentation, during April 1988 through July 1988, showed that they are actively pursuing corrective actions.

Application of Davis-Bacon or Other Labor Rate Provisions to Ship Repair Contracts

The Davis-Bacon Act (40 U.S.C. 276a) requires that for each contract over $2,000 to which the United States is a direct party for construction, alteration, or repair of public buildings or public works, minimum wages and fringe benefits must be based on prevailing wages for corresponding classes of workers employed on similar projects in the area.[2] Traditionally, Commerce and NOAA have not applied this provision to ship repair contracts. Instead, they have applied the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45). This act provides that any contract entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles, or equipment in any amount exceeding $10,000 shall include a stipulation for payment of not less than the prevailing minimum wages for similar work in the locality. The Department of Labor has advised Commerce that the provisions of the Davis-Bacon Act apply to ship repair contracts. Labor has also advised NOAA that the provisions of the Service Contract Act (41 U.S.C. 351-58) apply to the repair of diesel engines aboard NOAA ships. The Service Contract Act contains provisions for prevailing-rate minimum wages and fringe benefits for contracts of $2,500, or more, that provide services to the federal government. (See app. II for a further description of Labor's position.)

[2]GAO has commented on the act and its administration in several reports, including The Davis-Bacon Act Should Be Repealed (HRD-79-18, Apr. 27, 1979), Analysis of the Grace Commission's Major Proposals for Cost Control: A Joint Study by the CBO and GAO (Feb. 1984), and Compendium of GAO's Views on the Cost Saving Proposals of the Grace Commission (GAO/OGC-85-1, Feb. 19, 1985).

Commerce applies the provisions of the Service Contract Act to engine repair contracts, but maintains that applying the Davis-Bacon Act to other ship repair contracts would result in costly and time-consuming procedures that are unnecessary and burdensome. Commerce has proposed legislation that will provide for the Walsh-Healey Act, rather than the Davis-Bacon Act, to cover contracts for the construction or repair of NOAA vessels. In August 1987 the Department of Labor told the Office of Management and Budget that it had no objection to the proposed bill. This legislation was forwarded in July 1988 for consideration to the Senate Commerce, Science, and Transportation Committee, the House Merchant Marine and Fisheries Committee, and the House Judiciary Committee.

Scope and Methodology

In order to better understand the allegations and contracting weaknesses and how the OIG recommendations were intended to resolve and correct them, we reviewed the two cited OIG reports and interviewed officials of NOAA's Pacific Marine Center, Commerce's Western Administrative Support Center, OIG regional and headquarters officials, and contractor and union representatives in Seattle's marine repair industry. We also reviewed numerous memoranda, letters, reports, and contract files from those organizations pertaining to the allegations and weaknesses discussed in the OIG reports. We reviewed Commerce's action plans for implementing the OIG recommendations and the independent inspection reports summarizing the results of the inspection of additional power packs. In order to determine Commerce's responsiveness to the OIG recommendations, we discussed the action plans and the inspection reports with OIG officials.

We interviewed officials at the Departments of Commerce and Labor to understand the controversy over which labor rate statutes apply to NOAA ship repair contracts. We also reviewed documentation discussing Commerce's and Labor's positions regarding the applicability of the statutes to NOAA ships and reviewed NOAA's draft legislation that specifies which statutes apply to NOAA ships.

We conducted our monitoring efforts between April and July 1988. Our work was conducted in accordance with generally accepted government auditing standards. We discussed the facts in this report with NOAA and OIG officials, who generally agreed with the information.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days from the date of this letter. At that time, we will send copies to Senator Brock Adams; the Director, Office of Management and Budget; the Secretaries of Commerce and Labor; and other interested parties.

Major contributors to this report are listed in appendix III. Should you need further information, please contact me at (202) 376-9715.

Sincerely yours,

Flora H. Milans

Flora H. Milans
Associate Director

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Abbreviations

EMD	General Motors Electromotive Division
GAO	General Accounting Office
NOAA	National Oceanic and Atmospheric Administration
OIG	Office of Inspector General

Issues Raised in Department of Commerce's Office of Inspector General Reports

In March 1988 the Department of Commerce's Office of the Inspector General (OIG) issued two reports on matters involving the maintenance and repair and contracting activities for the National Oceanic and Atmospheric Administration (NOAA) research vessels managed and operated by the Pacific Marine Center (Marine Center) in Seattle, Washington. These reports resulted from (1) allegations by a Seattle-based diesel engine repair firm that the Marine Center improperly accepted and paid for substandard diesel engine power packs supplied by another diesel engine repair firm and (2) an evaluation to determine whether Commerce's Western Administrative Support Center's (Support Center) contracting activities were being accomplished in accordance with applicable federal procurement policies and regulations.

Diesel Engine Power Packs

On March 18, 1988, Commerce's OIG issued an audit report examining allegations by Quality Diesel Engines, Inc., a Seattle-based diesel engine repair firm, that the Marine Center had improperly accepted and paid for substandard diesel power packs supplied by another diesel engine repair firm, Commercial Sales, Inc., of Tacoma, Washington. Under the terms of the contract, which was administered by the Support Center and dated October 10, 1985, Commercial Sales was to provide parts for 24 power packs taken from the engines aboard NOAA ships. The engines were General Motors Electromotive Division (EMD) 657C diesels. On November 20, 1985, the Support Center modified the contract to require Commercial Sales to assemble the parts into 24 complete power packs. The total value of the contract, including the modification, was $56,318.

At the time the Support Center contracted with Commercial Sales to assemble the power packs, the Marine Center had a separate contract with Quality Diesel Engines to provide, on an as-needed basis, labor, materials, and parts for the general repair and overhaul of shipboard diesel equipment. The Marine Center used this contract to obtain the inspection of four of the power packs by Quality Diesel Engines. According to the Chief of the Marine Engineering Branch, Pacific Marine Center, such inspections normally occur as the result of the project engineer's judgment, pending the availability of resources. The Chief of the Marine Engineering Branch also stated that the Marine Center did not suspect that something was wrong with the parts. Citing such problems as a rusted head, non-EMD parts, and unacceptable clearances, Quality Diesel Engines concluded that the power packs failed to meet commercial standards and were unacceptable for use.

The Marine Center disagreed with the evaluation. According to the Marine Center, Quality Diesel Engines' inspection report indicated conditions that were "superficial and inconsequential." The Chief of the Engineering Branch, Pacific Marine Center, believed that the rust was not as serious as Quality Diesel Engines implied, adding that the seriousness of rust is a judgmental decision. With regard to the non-EMD parts, NOAA acknowledged that an administrative error occurred in not detecting that Commercial Sales' bid specified furnishing non-EMD parts; however, NOAA maintained that once NOAA had signed the contract with Commercial Sales, barring latent defects, fraud, etc., NOAA was bound by that contract. With regard to the quality of the rebuilt power packs, which would include acceptable clearances, the Marine Center stated that EMD publishes service data to dimensionally "qualify" or "requalify" units; however, various contractors may lack the technical expertise or documentation to complete rebuilding parts to factory specifications. The Marine Center added that the issue of the quality of the rebuilt power packs was an isolated incident; and because of the extremely competitive nature of the diesel engine overhaul business, such conflicting interpretations of quality between two contractors is inevitable. The Marine Center had inspected the power packs and determined that they met acceptable standards and were usable. Therefore, they were accepted and final payment was made to the contractor.

The OIG review found that no conclusion could be drawn regarding the acceptability of the power packs without an additional, independent inspection. The OIG stated in its report that while the Marine Center claimed that the inspection report findings by Quality Diesel Engines were erroneous, none of the power packs had ever been used and remained in a NOAA warehouse. The OIG stated further that the issue to be resolved was whether or not the Marine Center had improperly accepted and paid for substandard power packs purchased under a government contract. The OIG concluded that the issue of the power packs' acceptability could be resolved only through independent inspection of the remaining power packs.

The OIG also found several problems in the Support Center's administration of both the contract for procurement of the power packs from Commercial Sales and the contract for as-needed engine repairs from Quality Diesel Engines. These problems were the following:

- The power pack contract was awarded to Commercial Sales even though its response to the Invitation for Bids was technically nonresponsive because the contractor stated that certain parts to be furnished would

be manufactured in Japan. The Invitation for Bids specifically required EMD parts.

- The Support Center engine repair contracts and delivery orders contained inadequate technical specifications for the assembly and inspection of the work to be performed.
- Support Center engine repair contracts had not used an inspection checkpoint system to determine contract compliance at critical stages of the work.
- The Support Center used an inappropriate contractual method for as-needed diesel engine repair work.
- The Marine Center improperly ordered the inspection of the four power packs without obtaining the approval of the Support Center contracting officer.

The OIG recommended that the Director of the Marine Center

- arrange for an independent and impartial inspection of an additional sample of the remaining power packs;
- include, for repair and overhaul of shipboard diesel equipment, detailed technical specifications together with the appropriate criteria for each stage of engine repair;
- include inspection checkpoints in all engine repair contracts to permit either the Marine Center or its representative to review the status of work at various stages prior to contract completion; and
- establish controls to ensure that unauthorized obligations of funds are not initiated.

In addition, the OIG recommended that the Director of the Support Center

- closely review the Marine Center's repair and overhaul contracts for shipboard diesel equipment to ensure that adequate technical specifications and appropriate inspection checkpoints are included,
- implement the use of indefinite-delivery contracts as provided for in the Federal Acquisition Regulations and terminate the use of blanket purchasing arrangements, and
- establish a review process to ensure that Marine Center staff do not initiate unauthorized obligations of funds.

On July 8, 1988, Commerce's Under Secretary for Oceans and Atmosphere responded to the audit report with a plan containing corrective actions that either had been taken or that would be taken on all of the OIG recommendations. Among the corrective actions taken, NOAA

arranged for the independent inspection of an additional 4 of the 24 power packs by the EMD factory distributor for the West Coast. NOAA requested the EMD representative to open, inspect, and report on each of the power packs. The EMD inspection report stated that one of the power packs had a defective liner, surface rust was evident on component parts, and most component parts used in the overhaul of the power packs could not be identified as genuine EMD parts. The EMD inspection report concluded that "It is our opinion that the power pack assemblies inspected are suitable for use; however, we cannot make any projections as to how long (how many hours) the components will last." The EMD representative who wrote the report told us that the rust was strictly surface or cosmetic and would not affect performance of the power packs, the defective liner was replaced, and the fact that the parts were not genuine EMD parts was not a criterion that concerned NOAA. He added that all piston ring clearances and valve-to-head clearances met EMD specifications for used parts and that the parts met all other EMD dimensional specifications. Further, it would be necessary for a laboratory to conduct months of extensive metallurgical testing to determine how many hours of wear the parts had left, and he did not think that such testing would be worth the cost.

The OIG concurred with Commerce's actions proposed for implementation of the audit report's recommendations and planned to conduct a routine follow-up review at a future date to determine whether the corrective actions identified in the action plan have been adequately implemented.

Support Center Management of Ship Repair Contracts

On March 8, 1988, Commerce's OIG issued an audit report evaluating whether the Support Center's contracting activities were being accomplished in accordance with applicable federal procurement policies and regulations. One specific section of the report dealt with the Support Center's management of ship repair contracts. The OIG found three areas in which Support Center procurement staff had not adequately managed ship repair contracts. First, solicitations for bids often had not been conducted in a timely manner. Second, several technical errors had been made in administering these contracts, such as the lack of legal reviews, an inaccurate description of work to be performed, and the lack of preaward surveys. In addition, excessive and inappropriate modifications had been allowed under many contracts.

To correct the problems related to ship repair contracts, the OIG recommended that the Director of the Support Center

- establish and announce procurement lead times in accordance with department administrative orders to ensure that as many potential bidders as possible are made aware of an upcoming contract, and are given adequate time to request a copy of the solicitation and to prepare a responsive bid;
- require Marine Center officials to provide a justification for other than full and open competition;
- require Support Center contracting officers to thoroughly and completely review all ship repair contract modifications for inappropriate use of modifications;
- require a complete justification from Marine Center officials whenever repair work that should have been part of the bid-upon work package is authorized under a modification;
- establish a training program for contracting officer technical representatives relative to their duties and responsibilities;
- discipline contracting officer technical representatives who do not properly use their authority and carry out their duties; and
- conduct a conference between the Director of the Marine Center, the Chief of the Support Center Procurement and Grants Division, and their subordinates to discuss the problems that have occurred in ship repair contracts and direct specific and workable contractual solutions to those problems.

On July 6, 1988, Commerce's Under Secretary for Oceans and Atmosphere submitted a plan for addressing the recommendations in the OIG audit report. The plan contained the following actions taken or to be taken on matters related to ship repair contracts:

- NOAA's Director of Administration notified assistant administrators and staff office directors of procurement lead times by memorandum dated April 13, 1988. This announcement was forwarded to all Support Center customers in a memorandum dated May 23, 1988.
- Marine Center officials are required to provide a justification for other than full and open competition for all solicitations that allow less than the mandated time for bidding. This is in addition to those solicitations directed to a single source of supply. This recommendation was implemented in fiscal year 1987 as a result of questions raised by the OIG during the review of files.
- By memorandum dated June 3, 1988, the Director of the Support Center directed Procurement and Grants Division personnel to thoroughly and completely review all ship repair contract modifications for inappropriate use of modifications. Specific guidelines are being developed to distinguish between changes and additional work.

- By memorandum dated May 4, 1988, the Chief of the Support Center's Procurement and Grants Division advised Marine Center officials that documentation would be required to support all modifications issued by limited contracting officers and modification requests submitted to the contracting officer. Specific requirements for documentation to support modifications will be developed during 1988. Those limited contracting officers who consistently fail to comply with these requirements will have their authority rescinded.
- NOAA established a training program for contracting officer technical representatives in a memorandum dated May 14, 1987. The Support Center sponsored three training sessions in January 1988, which were attended by 49 program personnel. Fifteen other participants attended an additional training session conducted in June 1988.
- The Support Center will rescind or deny the authority of those contracting officer technical representatives who do not use it properly and carry out their duties. Specific instructions on roles and responsibilities and the consequences of failing to perform them are to be issued in 1988.
- A conference between the Director of the Support Center, the Director of the Marine Center, the Chief of the Support Center Procurement and Grants Division, and their subordinates was conducted on April 22, 1988. A specific list of areas requiring additional discussion and resolution was provided to the Marine Center by memorandum dated May 4, 1988. On June 22, 1988, the Chief of the Support Center's Procurement and Grants Division told us that a plan was being developed to resolve the issues identified in the May 4, 1988 memorandum.

The OIG concurred with Commerce's actions proposed for implementation of the audit report's recommendations and planned to conduct a routine follow-up review at a future date to determine whether the corrective actions identified in this action plan have been adequately implemented.

Discussions with Commerce officials in Seattle indicated that they are actively pursuing corrective actions. For example, the Marine Center Engineering Branch Chief responsible for ship repairs told us that one of his staff engineers had revised diesel engine repair contracts to include inspection checkpoints as the OIG recommended. Further, according to the Chief of the Support Center's Procurement and Grants Division, the OIG reports made the Support Center realize that contracting officers needed to be better supported in their efforts to enforce compliance with

contract regulations. He said that all of Commerce's Administrative Support Center Directors, at a June 1988 meeting, emphasized proper acquisition procedures and procurement compliance.

Controversy Over Labor Rate Statutes Applicable to NOAA Ship Repair Contracts

The Departments of Commerce and Labor disagree about which labor rate statute should apply to NOAA contracts for the construction and repair of NOAA ships.

Pertinent Statutes and Their Provisions

The labor rate controversy involves the applicability of three labor rate statutes to NOAA ship repair contracts. These three statutes are as follows:

- The Walsh-Healey Public Contracts Act (41 U.S.C. 35-45),
- The Service Contract Act (41 U.S.C. 351-58), and
- The Davis-Bacon Act, (40 U.S.C. 276a).

All three statutes have provisions establishing rates for labor performed under government contracts. The three laws vary, however, in the types of work to which they apply, the dollar amount of contracts to which they apply, and the way in which the labor rates are to be determined. These differences are summarized in table II.1.

Table II.1: Labor Rate Provisions in Three Federal Contract Statutes

Statute	Type of work	Contract amount	Basis of rate
Walsh-Healey Public Contracts Act (41 U.S.C. 35-45)	Manufacturing/furnishing of materials, supplies, articles, or equipment to the federal government	More than $10,000	Prevailing minimum wages in the industry and the area as determined by the Secretary of Labor[a]
Service Contract Act (41 U.S.C. 351-58)	Furnishing of services to the federal government	More than $2,500	Prevailing minimum wages and fringe benefits in the locality for service workers as determined by the Secretary of Labor
Davis-Bacon Act (40 U.S.C. 276a)	Construction, alteration, or repair of public works or buildings	More than $2,000	Prevailing minimum wages and fringe benefits for laborers and mechanics in locality for similar work as determined by the Secretary of Labor

[a]Since a U.S. Court of Appeals decision in 1964, the Department of Labor has not issued any wage determinations and in effect is not enforcing the prevailing wage determination provisions of the Walsh-Healey Act. In the absence of wage determinations, employees working on contracts subject to the act must be paid the minimum wages specified in the Fair Labor Standards Act of 1938.

The Department of Commerce and NOAA have traditionally applied the provisions of the Walsh-Healey Act to NOAA ship repair contracts including contracts for repairs of shipboard diesel engines. On March 20, 1985, however, the Department of Labor, which has responsibility for administering and enforcing the wage rate statutes, advised NOAA that contracts for the repair of shipboard diesel engines are subject to the

Service Contract Act. In addition, on October 10, 1985, Labor notified NOAA that it determined a NOAA solicitation for dockside ship repair was subject to the provisions of the Davis-Bacon Act.

NOAA, Commerce, and Labor Positions on Statutes

Although NOAA now applies the provisions of the Service Contract Act to shipboard diesel engine contracts, NOAA maintains that the application of the Davis-Bacon Act to other NOAA ship repair contracts would result in costly and time-consuming procedures that are unnecessary and burdensome to the successful operation of the NOAA fleet. NOAA cited the following specific conditions affecting the application of the act to NOAA ships:

- NOAA believes that, in addition to the differences in wage rates, the Davis-Bacon Act puts increased administrative burdens on both the contractors and the agency by requiring the submission and monitoring of weekly payroll reports.
- Although the Davis-Bacon Act requires Labor to establish prevailing wage determinations in the area of the contract's performance, Labor does not have wage rate determinations for shipyard personnel. NOAA maintains that the crafts and skills of shipyard employees are unlike construction and production workers in other fields for which Labor has developed wage rates.

In October 1986 Commerce requested the Solicitor of Labor to review the interpretation of these statutes and argued that of the three, only the Walsh-Healey Act should apply to NOAA ships. Specifically, Commerce argued that, for the following reasons, NOAA ships should be included as "naval ships" subject to the Walsh-Healey Act:

- NOAA vessels are similar to Department of Navy vessels in that they (1) are subject to transfer to the military in time of national emergency, (2) are commanded by officers of the NOAA Corps who are commissioned members of the uniformed services and have ranks identical to officers in the U.S. Navy, (3) operate on the high seas, and (4) are serviced and maintained at shipyards located in coastal areas.
- Many shipyards under contract to NOAA are also contractors to the U.S. Navy, and the application of different labor rate statutes would create labor problems at ship repair yards if NOAA and Navy vessels were subject to different wage determinations.

Commerce also noted that Labor considers Coast Guard vessels, which are under the authority of the Department of Transportation, to be covered by the Walsh-Healey Act.

Commerce also argued that its ships did not satisfy the definition of public works as used in the Davis-Bacon Act. Specifically, the history of the Davis-Bacon Act shows that the act is concerned with construction projects involving real property and that Labor's regulations implementing the act also support an interpretation restricting public works to real property. According to Commerce, neither Labor nor the ship contractors have significant experience in applying the Davis-Bacon Act to ship work. Commerce stated that the job classifications used to make wage determinations through the act reflect the act's application to building and construction and do not fit ship crafts.

Commerce recommended that if Labor decided that the Service Contract Act and Davis-Bacon Act apply to NOAA ship repair contracts, Labor should suspend implementation of its decision and initiate a formal rulemaking. Commerce noted that a formal rulemaking would enable Labor to consider all issues raised by the decision, including the potentially disruptive effects of the decision on the government, the public, the shipyards, and the shipbuilding industry.

The Solicitor of Labor responded to Commerce on July 28, 1987, that he believed Labor's previous position was legally sound. According to the Solicitor, Labor's long-standing published Walsh-Healey Act interpretations made it clear that ships operated by civilian agencies are not included within the category of "naval vessels." The Solicitor noted that Labor had made a special ruling in the case of Coast Guard vessels because of the special relationship of the Coast Guard to the Navy. The Solicitor also cited legal interpretation supporting Labor's position that ships are held to be "public works" and, therefore, subject to the Davis-Bacon Act.

Status of Proposed Legislation Clarifying the Applicability of the Statutes

In his July 1987 response, the Solicitor noted that Commerce had prepared a draft bill that would subject contracts for the "construction, alteration, overhaul, repair, furnishing, or equipping" of NOAA ships to the Walsh-Healey Act. The Solicitor stated that Labor would not oppose the draft legislation to the extent that it simply replaced Davis-Bacon with Walsh-Healey coverage. This was echoed by the Secretary of Labor in comments made to the Director of the Office of Management and Budget on August 11, 1987, in response to requests for comment on the proposed legislation. According to the Secretary, Labor did not oppose legislation to provide equal treatment among naval and NOAA ships by applying the Walsh-Healey Act, instead of the Davis-Bacon Act, to the construction and repair of NOAA ships. The Secretary noted, however,

that Labor was concerned that the draft legislation, as explained in the statement of purpose, placed NOAA in a more favorable position than the Navy because it would make NOAA ships subject only to the Walsh-Healey Act and not to the Davis-Bacon Act or the Service Contract Act. Under existing law, Navy ships are subject also to the Service Contract Act. The Secretary stated,

"The statement of purpose implies that the draft bill would extend Walsh-Healey Act coverage not only to structural repair, which is otherwise subject to the Davis-Bacon Act, but also to maintenance and engine repair, which is covered by the Service Contract Act, even when performed on naval vessels."

NOAA responded to the Secretary of Labor's concerns by revising its draft bill in May 1988 to delete all references to the applicability of the Service Contract Act to maintenance work in the statement of purpose. The Office of Management and Budget has approved Commerce's draft legislation, which provides for Walsh-Healey coverage of contracts for the construction or repair of NOAA vessels, and has forwarded it to the Senate Commerce Committee, the House Merchant Marine and Fisheries Committee, and the House Judiciary Committee for their consideration.

A NOAA procurement official told us in August 1988 that NOAA is applying the provisions of the Service Contract Act to contracts for engine repairs (as Labor advised in March 1985) and the Walsh-Healey Act to other ship repair contracts.

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