U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUN 29 1990

The Honorable Charles A. Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Re: In the Matter of Chemtek Systems, Inc.,
Case No. 87-PCA-3

Dear Mr. Bowsher:

The Respondent Chemtek Systems, Inc., has been found to have violated the requirements of the Walsh-Healey Public Contracts Act. 41 U.S.C. §§ 35-45 (1982). I do not find that the circumstances of the case warrant granting the Respondent relief from the ineligible list sanction provided in Section 3 of the Act. 41 U.S.C. § 37. Accordingly, pursuant to the provisions of Section 3, the Respondent's name - Chemtek Systems, Inc. - should be placed upon the list of persons and firms ineligible to be awarded Government contracts.

A copy of the Administrative Law Judge's Decision and Order, which has become final, is enclosed. Please note that although Pacific Ship Repair & Fabrication, Inc. (formerly known as Arcwel Corporation) is listed in the caption of the ALJ's order, that name should not be placed on the ineligible list as the result of this proceeding.

Sincerely,

Elizabeth Dole

Elizabeth Dole

Enclosure

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Date: MAR 27 1990
Case No. 87-PCA-3

In the Matter of

U.S. DEPARTMENT OF LABOR
Plaintiff

v.

PACIFIC SHIP REPAIR & FABRICATION, INC.
(formerly known as Arcwel Corporation)
and

CHEMTEK SYSTEMS, INC.

Respondents

David L. Bain, Esq.
1625 Rigel Street
San Diego, California 92113
For Respondent Arcwel Corporation

Norman S. Naifach, Esq.
Office of the Solictor
U.S. Department of Labor
71 Stevenson Street, Room 1110
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For the Department of Labor

Before: VIVIAN SCHRETER-MURRAY
Administrative Law Judge

DECISION AND ORDER

This is a proceeding under §5 of the Walsh-Healey Public Contracts Act, 41 U.S.C. §35 et seq., hereinafter referred to as the Act, and the rules and regulations promulgated thereunder, 41 C.F.R. §50-201.1 et seq. The Act requires those who enter into certain contracts, described by statute, to perform work for the United States Government to adhere to specifically prescribed representations and stipulations pertaining to qualifications of contractors, minimum wages, overtime pay, safe and sanitary working conditions of workers employed on the contract, the use of child labor or convict labor on contract work and the enforcement of such provisions. 41 CFR §50-206.1

A complaint, filed by the Office of the Solictor, United States Department of Labor (hereinafter DOL) on August 27, 1987, alleges that respondent, Pacific Ship Repair & Fabrication, Inc. (formerly known and hereinafter referred to as Arcwel) was awarded contracts by the United States Navy for the overhaul and repair of certain naval vessels; that such contracts were subject to the Act; that Arcwel entered into secondary contracts with respondent Chemtek Systems, Inc. (hereinafter Chemtek) pursuant to which Chemtek performed work called for by the primary contract; that Chemtek failed to pay employees employed in the performance of work on said primary contracts their minimum wages and overtime compensation as required by the contract and the Act; that Chemtek was a "substitute manufacturer" within the meaning of the Act; and that consequently Arcwel is jointly liable with Chemtek for the violations.

Arcwel responds by denying that Chemtek is a "substitute manufacturer" and instead insists that Chemtek is a "subcontractor" within the meaning of the Act and that, as such, is not obligated to conform to the requirements of the Act and, therefore, Arcwel is not liable for any violations. Arcwel also asserts that this proceeding is barred by the two year statute of limitations contained in §6(a) of the Portal-to-Portal Act. 29 U.S.C. §255.

Stipulations

Respondent Arcwel and the plaintiff stipulated to the following pertinent facts:[1/]

In 1984 and 1985 Arcwel and the government of the United States entered into three contracts for the repair and overhaul of three naval vessels, namely the U.S.S. Kitty Hawk, the U.S.S. Fort Fisher and the U.S.S. Schenectady. The contract and job order numbers, contract dates and amounts are as follows:

CONTRACT NO.	JOB ORDER	DATE	AMOUNT
N62791-75-C-0035 (USS Schenectady)	ARC 4-85	10-18-84	$4,076,368.00
N00024-85-H-8107 (USS Kitty Hawk)	ARC 33-85	06-20-85	$ 681,868.00
N00024-85-H-8017 (USS Fort Fisher)	ARC 34-85	06-25-85	$ 36,077.00

1/ See, Revised Stipulations and Order (Arcwel), filed July 7, 1989.

Each of these primary contracts involved the construction, alteration, furnishing or equipping of naval vessels and were subject to and contained the representations and stipulations required by the Walsh-Healey Public Contracts Act.[2]/ Arcwel entered into secondary contracts with respondent Chemtek pursuant to which Chemtek undertook to perform and did perform work called for by the primary contracts. Chemtek was engaged in the business of performing tank cleaning and flushing services on U.S. Navy ships. Pursuant to the contracts between Arcwel and Chemtek, Chemtek was required to perform tank cleaning and flushing services pursuant to specifications contained in the primary contracts. Chemtek performed tank cleaning, flushing and related services for Arcwel on the USS Schenectady, the USS Kitty Hawk and the USS Fort Fisher between June 15, 1985 and July 26, 1985.

Plaintiff and Harold S. Taxel, Bankruptcy Trustee for respondent Chemtek, stipulated to the following facts:[3]/

Following an investigation of Chemtek by representatives of DOL's Wage and Hour Division, it was alleged that Chemtek owed 87 of its employees $25,962.81 in unpaid minimum wage and overtime compensation required by the Act. This amount related to work allegedly performed between June 15, 1985 and July 26, 1985 by the Chemtek employees in question on ships undergoing repair and/or overhaul pursuant to U.S. Government contracts awarded to Arcwel. Chemtek, for purposes of this proceeding only, acknowledges that the employees in question failed to receive wages due them by Chemtek for their performance of the work which is the subject of this proceeding.

On July 30, 1985 Chemtek filed a petition in bankruptcy, entitled In re Chemtek Systems, Inc., in the U.S. Bankruptcy Court for the Southern District of California. Thereafter, on November 7, 1985, said proceeding, originally filed under Chapter 11 of the Bankruptcy Act, was converted to a Chapter 7 proceeding. Proofs of claim in bankruptcy were filed by some but not all of the Chemtek employees in question covering unpaid wages due them during the period in question. All such employees have been listed by Chemtek as unsecured priority wage claimants in Schedule A-1 filed by Chemtek in the bankruptcy proceeding.

2/ The required stipulations are printed at 41 CFR §50-201.1. See, also, Federal Acquisition Regulations, 48 CFR §52.222-20.

3/ See, Stipulation and Order, filed August 8, 1989.

Chemtek takes no position as to whether it was a "substitute manufacturer" or a "subcontractor" but stipulates that if it is determined to be a "substitute manufacturer" it may be deemed to have violated the Act and the regulations promulgated pursuant thereto by failing to pay the employees in question the minimum wage and overtime compensation amounts alleged due. Chemtek also stipulates that it may be deemed jointly and severally liable with respondent Arcwel for such underpayments in the event such "substitute manufacturer" determination is ultimately made, provided, however, that plaintiff is not free to seek to collect any part of such underpayments from Chemtek other than through the aforesaid bankruptcy proceeding (unless the said proceeding is dismissed). Chemtek further stipulates that it may be placed on the list of debarred bidders for U.S. Government contracts pursuant to §3 of the Act if it should be determined to be a "substitute manufacturer".

At the hearing, plaintiff and respondent Arcwel further stipulated that should plaintiff prevail in this proceeding the dollar amounts computed due individual employees of Chemtek, as set forth in Plaintiff's Exhibit 13, as well as the total amount reflected in that exhibit of $26,313.02 4/, will be deemed due to the individual employees in question from Arcwel. (TR p.6) It was also stipulated that the services provided by Chemtek to Arcwel under the job orders in issue were services not performed by Arcwel and were services done by third parties, which was the regular practice in the industry in San Diego in June and July, 1985. (TR pp. 131-32).

Findings of Fact and Conclusions of Law

The events giving rise to this proceeding occurred between June 15, 1985 and July 25, 1985. It was during this period that the Chemtek employees performed the work under the U.S. Navy - Arcwel prime contracts for which they were allegedly underpaid in violation of the Act. A complaint, initiating this proceeding and naming Arcwel and Chemtek as respondents, was filed by DOL with the Office of Administrative Law Judges on August 27, 1987. As the complaint was filed more than two years after the alleged violations, Arcwel argues that this proceeding is barred by the statute of limitations codified at §6(a) of the Portal-to-Portal Act. 29 U.S.C. §255(a).

4/ It is noted that this sum is different from and greater than the amount stipulated to by Chemtek and sought in the Amended Complaint. As respondent Arcwel stipulates that the amounts set forth in Plaintiff's Exhibit 13 are the amounts due to the employees, it is deemed to have waived any objection to the discrepancy and the Complaint shall be deemed amended to conform to the stipulated amount.

Section 6 of the Portal-to-Portal Act provides as relevant herein:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act ..., the Walsh-Healey Act [41 U.S.C. §35 et seq.], or the Bacon-Davis Act...--
>
> (a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; 29 U.S.C §255 5/

Accordingly, if this proceeding is an action to enforce a cause of action for unpaid minimum wages or unpaid overtime compensation under the Walsh-Healey Act, it is forever barred as having been commenced more than two years after the cause of action accrued.6/ Arcwel contends that this proceeding is such an action and is consequently barred.

The case law, however, supports the plaintiff's position that §6 of the Portal-to-Portal Act does not apply to administrative proceedings initiated by DOL before an Administrative Law Judge pursuant to §5 of the Walsh-Healey

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5/ The Department of Labor does not contend that the subject violations were willful. Plaintiff's Pretrial Statement, p.20, note 16.

6/ A cause of action for unpaid compensation accrues under the Walsh-Healey Act at each regular payday immediately following the work period during which the alleged violations occurred. Unexcelled Chemical Corporation v. United States, 73 S.Ct. 580 (1953); Mitchell v. Lancaster Milk Co., 185 F.Supp. 66 (D. Pa.1960).

Act.[7] The Walsh-Healey Act attempts to regulate and specify the conditions of employment of employees of manufacturers performing work on government contracts in excess of $10,000 by requiring that specified representations and stipulations be included in each contract subject to the Act. Among the stipulations are those, alleged to be breached here, requiring that certain minimum wages and overtime compensation be paid to employees working under the contract. 41 U.S.C. §§35(a),(b). Upon breach of any of the required stipulations a contractor becomes liable to the United States for any amount due to any employee engaged in the performance of the contract.[8]

Section 2 of the Act provides two methods by which any amounts due the United States by reason of Walsh-Healey violations may be recovered by the United States. The United States may withhold any sums due from monies owing to the contractor under any contract subject to the Walsh-Healey Act or

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[7] Section 5 of the Walsh-Healey Act states in part:

> Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35 to 45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. ...[A]nd shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35 to 45 of this title. 41 U.S.C §39

[8] A contractor breaching the child labor or convict labor provisions may also become liable to the United States for liquidated damages. In addition, the United States may cancel any contract wherein the Walsh-Healey stipulations are breached and recover from the contractor any additional costs incurred thereby. 41 U.S.C. §36. A breaching contractor is also subject to debarment. 41 U.S.C. §37.

the Attorney General may sue in the name of the United States to recover any amounts due. 41 U.S.C. §36.9/

Since §5 of the Act provides for administrative hearings upon complaint of a breach or violation of the stipulations and §2 provides for suit by the Attorney General to recover sums due under the Act, it is apparent that Congress intended to provide alternative enforcement procedures, administrative and judicial, for Walsh-Healey violations. United States v. Gulf States Asphalt Company, Inc., 472 F.2d 933, 935 n.2 (5th Cir. 1973). The Supreme Court has expressly held that Sections 6 and 7 of the Portal-to-Portal Act are addressed "to lawsuits in the conventional sense" and apply, insofar as the Walsh-Healey Act is concerned, only to those suits contemplated by §2 of the Act, namely those brought by the Attorney General.10/ Unexcelled Chemical Corporation v. United States, 73 S.Ct. 580, 584 (1953). The Court made it clear that neither an administrative proceeding nor the complaint which initiates it, is an "action" for purposes of Sections 6 and 7 of the Portal-to-Portal Act and neither will toll the statute. Id. This proceeding is conducted pursuant to §5 of the Walsh-Healey Act and as it does not toll the statute of limitations of the Portal-to-Portal Act, neither is it barred by that statute.11/ Unexcelled Chemical, supra, 73 S.Ct. at 584;

9/ The pertinent language of §2 of the Act provides:

> ... Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in sections 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. 41 U.S.C. §36.

10/ The United States has filed suit against respondents in the United States District Court for the Southern District of California, Case No. CV-87-1038-G(M), alleging the same underpayments at issue here, in order to toll the statute of limitations of 29 U.S.C. §255. The District Court proceeding has been stayed pending completion of this administrative proceeding.

11/ Significantly much of the relief sought is administrative in nature. A portion of the disputed sum is already held by the Navy through the withholding of money due Arcwel under the contracts. The determination here that Arcwel is liable for Chemtek's underpayments permits the Government to distribute, pending exhaustion of any appeal, the withheld amounts to the affected employees without further recourse to the judicial process. Also, the debarment of Chemtek, which flows from the Decision and Order made here, is accomplished through purely administrative means.

Glenn Electric Co. Inc. v. Donovan, 755 F.2d 1028, 1034 n.7 (3rd Cir. 1985); Ready-Mix Concrete Company v. United States, 130 F.Supp 390, 393 (Ct.Cl. 1955).

The Walsh-Healey Act contemplates that contractors subject to its provisions may enter into secondary contracts necessary to the accomplishment of the primary contracts. It was recognized that while secondary contracts are necessary they should not be a means of circumventing the provisions and purpose of the Act. Accordingly, rulings and interpretations promulgated by the Secretary of Labor pursuant to authority granted by §4 of the Act[12/] attempt to distinguish between those secondary contractors who are subject to the Act and those that are beyond its scope. In essence, the regulations impose the obligations of the Act on those secondary contractors defined as "substitute manufacturers" but not on those meeting the criteria of a "subcontractor".[13/] The parties agree that if Chemtek is adjudged to be a "substitute manufacturer" then Arcwel is jointly liable with Chemtek for Chemtek's violations under the three prime contracts, pursuant to Rulings and Interpretations No. 3, §32(a) which states:

> "When a contractor undertakes a contract subject to the Public Contracts Act, he assumes an obligation to manufacture or furnish the commodities required under the labor standards of the Act. He may not relieve himself of this obligation merely by shifting the work to another. If, for example, a contractor is awarded a contract subject to the Act as a manufacturer, that contractor is liable jointly with the substitute manufacturer for any acts or omissions on the part of a

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12/ The pertinent language of §4 states:

> "The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35 to 45 of this title."41 U.S.C §38

See also, 41 CFR 50-206.2.

13/ The regulations promulgated pursuant to the Walsh-Healey Act are printed at 41 C.F.R. Parts 50-201 to 50-210. In addition, the Secretary of Labor, through the Administrator, Employment Standards Administration, Wage and Hour Division has issued Rulings and Interpretations No. 3 Under the Walsh-Healey Public Contracts Act (R & I No.3) which is incorporated into the regulations by reference. 41 C.F.R. 50-206.3. The regulations at issue here are found in Rulings and Interpretations No. 3.

substitute manufacturer which would have constituted violations of the contractor's contract if he had performed the contract in his own plant and had committed such acts or suffered such omissions in connection with that performance.

Arcwel contends that Chemtek was not subject to the stipulations required by the Act because Chemtek was an exempt "subcontractor" pursuant to Rulings and Interpretations No. 3, §30(a) which provides:

> If a manufacturer buys materials, supplies, articles, or equipment to be used in manufacturing the commodities required by the Government contract, and if it is the regular practice in the industry engaged in the manufacture of the commodities called for by the contract to purchase such materials, supplies, articles, or equipment and not to manufacture them, the vendor of such goods is considered a "subcontractor" and the work performed by him is not deemed subject to the Public Contracts Act. Under like circumstances, the performance of services (for example, machining operations) by one other than the primary contractor, is not considered work subject to the Public Contracts Act.

Arcwel argues that as it is stipulated that it is the regular practice of the San Diego ship repair industry to engage the services of a tank flushing company like Chemtek when overhauling a naval vessel, Chemtek is an exempt subcontractor for purposes of the Act.

The plaintiff argues that Chemtek does not qualify as an exempt subcontractor under §30(a). It points out that the "regular practice of the industry" only becomes relevant if the secondary contractor is a vendor of "materials, supplies, articles, or equipment to be used in manufacturing the commodities required by the Government contract" or a supplier of services "under like circumstances." DOL argues that, regardless of the regular industry practice, Chemtek is not a "subcontractor" under this definition but is rather a "substitute manufacturer" as defined in §31(a) which provides:

> When a contractor holding a contract under the Public Contracts Act for the manufacture of materials, supplies, articles, or equipment causes another party to produce all or some of the commodities called for by the contract, the producer of those commodities, not produced by the primary contractor, is deemed to be a "substitute manufacturer".

Cursory reading of these regulations would seem to suggest that Chemtek is plausibly covered by either. It appears that this seeming contradiction arises because these regulations were drafted with suppliers of commodities in mind rather than ship repairers who supply primarily services. The Walsh-Healey Act by its terms applies only to contracts for "the manufacture or furnishing of materials, supplies, articles and equipment". 41 U.S.C §35. Other legislation, primarily the Service Contract Act, 41 U.S.C. §351 et seq., and the Davis-Bacon Act, 40 U.S.C. §276(a) et seq., attempt to serve the same function as the Walsh-Healey Act, that is, to regulate labor conditions of government contractors, with regards to those who contract to provide services to the Federal Government. However, by Act of Congress the Walsh-Healey Act was made specifically applicable to "each contract for the construction, alteration, furnishing, or equipping of a naval vessel". 10 U.S.C. §7299; see, Rulings and Interpretations No.3, §7(b). As the subject contracts were for the alteration of naval vessels, the Walsh-Healey stipulations were included in the prime contracts in question. 14/ Unfortunately no regulations specifically addressing the Act's application to ship repair have been formulated. Instead, it is necessary to take regulations which speak in terms of producing and supplying commodities and apply them to contracts which deal essentially with performing services.15/ Not surprisingly, in this unsuitable context the applicable regulations give rise to some confusion.

According to the Rulings and Interpretations, to be an exempt "subcontractor" a secondary contractor must (1) supply the prime contractor with materials or services "to be used in

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14/ As the prime contracts in question contained the Walsh-Healey stipulations and it was additionally stipulated that the contracts were subject to the Act, the question of whether a contract for repair or overhaul of a vessel is one for the "construction, alteration, furnishing, or equipping of a naval vessel" is not before me, although counsel for Arcwel raised this question briefly at the hearing. (TR pp.15-16). See, In re Anderson and Cristofani, 9 Wage & Hour Cas. (BNA) 86, (1949) (Act applies to contract for repair of naval vessel as terms "construction and alteration" include repair work).

15/ Rulings and Interpretations No. 3, §7(d) states:

> The application of the Public Contracts Act to secondary contractors engaged in the construction, alteration, furnishing, or equipping of a naval vessel is explained in sections 30 through 34, below.

manufacturing the commodities" (or performing the services) required by the Government contract and (2) it must be the regular practice in the prime contractor's industry to purchase such materials or services rather than manufacture or perform them in-house. (emphasis added). A non-exempt "substitute manufacturer" is a secondary contractor who produces "all or some of the commodities called for" by the prime contract. (emphasis added). The "commodities" (services) required or called for in the Navy-Arcwel prime contracts are the maintenance, service and repair items enumerated in the job orders and specifications issued by the Government contracting officer to Arcwel including the cleaning of tanks and flushing of systems which were at times prerequisites to the performance of repair or other services. This case turns on whether the services provided by Chemtek were "used in manufacturing", that is to say, incorporated by Arcwel in its performance of the maintenance, service and repair items specified in the prime contract or whether Chemtek's performance was substituted, in part, for that of Arcwel on items "called for" by the prime contract. Although, as previously indicated the language of either definition may arguably be construed to accommodate the Arcwel-Chemtek relationship, a clear distinction may be made in the instant case. Arcwel did not perform and was not prepared to perform requisite tank cleaning and flushing services. Accordingly, Chemtek's performance of such services was not and could not be an integrated part of the services performed by Arcwel. It follows that as Arcwel was contractually obligated to provide tank cleaning and flushing services, it could do so only by substitutionary measures.

The services Chemtek provided under the contracts, tank cleaning and flushing, involve highly technical procedures utilizing specialized equipment and uniquely trained workers. (TR p.107). Before a shipboard tank or other space can be repaired it is necessary that the tank or space be certified "gas free" and safe for workers to enter. (TR p.80). In order to be certified gas free by a marine chemist it is necessary to clean the tank or space. The gas free certification was required either expressly in the contract or by state and federal safety regulations.(TR p.81). It was for the purpose of obtaining gas free certification that Chemtek cleaned tanks used for storing fuel oil, lube oil, jet propulsion fuel, fresh water, feed water and other fluids. (TR p.54). In addition, Chemtek cleaned other spaces such as engine rooms, shaft alleys, floor plates, auxiliary spaces, pump rooms and bilges. Chemtek used high pressure washing equipment, pneumatic tools, such as needle guns and sanding discs, and vacuum drying systems to accomplish its jobs. (TR pp.79,84). Only after Chemtek had completed its job could the gas free certificates required by the contract be

obtained. Chemtek also chemically flushed and cleaned piping, engines and other machinery after repairs had been completed. (TR pp.53,90-91). This flushing and cleaning was necessary for Arcwel to comply with the specifications of the prime contract.

Arcwel stipulated that pursuant to the secondary contracts between Arcwel and Chemtek, Chemtek undertook to perform and did perform work called for by the primary contracts and that Chemtek was required to perform tank cleaning and flushing services pursuant to specifications contained in the primary contracts. Arcwel argues, however, that Chemtek was a subcontractor because the tank cleaning and flushing services provided were not the primary purpose of the repair contract but were rather incidental to the primary purpose and because it was the regular practice of the industry to engage a secondary contractor to provide tank cleaning and flushing services.

The record shows that the services provided by Chemtek were required by the prime contracts between the Navy and Arcwel. In soliciting bids for the repair of naval vessels, the Navy's Supervisor of Shipbuilding, Conversion and Repair provided interested bidders with the specifications of the items which the Navy sought to have repaired or overhauled. The specifications for a single contract item are listed as numbered paragraphs and an item might require dozens of specification paragraphs spread over several pages. (See, PX 9). Such specifications were necessarily voluminous when, as in the case of the U.S.S. Schenectady, hundreds of items were covered. (See, PX 6). After receiving the specifications, Arcwel provided interested secondary contractors, such as Chemtek, with copies of the specifications. John Leach, a former coordinator and production manager for Chemtek, testified that typically Chemtek's estimators studied the specifications prepared by the Navy and bid on those items or portions of items which were within its area of expertise. (TR p.67). The bid solicitations contained many items where some part of the specifications could be performed by Chemtek even though the greater part of the item would be performed by the prime contractor. At all times when making its bid to Arcwel, Chemtek was considering the requirements of the Navy. The Navy solicited a bid from Arcwel for all of the work contemplated by the specifications incorporated in the solicitation, including the work ultimately performed by Chemtek employees. When Arcwel was awarded a contract it contained stipulations which obligated Arcwel to meet the Walsh-Healey requirements for all the work performed pursuant to the specifications. To the extent that Chemtek employees were performing work required by the specifications, Arcwel was

obligated to assure that Chemtek also complied with the requirements of the Act.[16]/

The master job order issued to Arcwel by the Navy pursuant to the contract for repairing the U.S.S. Schenectady lists some 168 items with reference to specifications. (PX 6). Those items are listed and briefly described on some 23 pages. (PX 6). Each purchase order issued by Arcwel to Chemtek refers to a specific item listed in the master job order and briefly describes the service Chemtek is to perform. (PX 10). Similar purchase orders were issued for the U.S.S. Kitty Hawk and the U.S.S. Fort Fisher. Many of the purchase orders direct Chemtek to perform portions of an item and list specific paragraphs of the specifications to be accomplished by Chemtek. Some purchase orders expressly direct Chemtek to perform an entire contract item. Where Chemtek is directed by a purchase order to accomplish gas free conditions in an area, such services are called for by the contract because acquiring gas free certification is a prerequisite to completing the specified repair item. (TR p.73). All purchase orders require Chemtek to notify the Arcwel Quality Assurance department in advance of inspections of Chemtek's work by SUPSHIPS personnel. (PX 10). SUPSHIPS is the Naval agency which oversees ship repair contracts. (TR p.100). Arcwel was required to arrange for Navy inspection and obtain Navy approval of Chemtek's work before Arcwel could proceed on an item. All work performed by Chemtek employees occurred on board the naval vessels.

The evidence and stipulations of the parties establish that Chemtek, pursuant to its agreements with Arcwel, assigned its employees to perform certain specified jobs and purchase order items called for by the Government's prime contracts with Arcwel. Clearly, Arcwel satisfied a portion of its contractual obligations to the Government by substituting Chemtek's services for its own promised performance. Rulings & Interpretations No. 3, §31(a) is most logically construed to mean that when, as here, requirements are spelled out in the specifications of the prime contract, a secondary contractor becomes a substitute manufacturer when it performs that contract work for the prime

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16/ The general rule for employees subject to the Act is set out in Rulings and Interpretations No. 3, §35(a):

> All employees (except those in bone fide executive, administrative, or professional capacities and office, custodial, and maintenance employees) who, after date of the award, are engaged in <u>any operation preparatory or necessary to or in performance</u> of the Government contract are subject to the Act.(emphasis added).

contractor. In re Far West Engineering Co., 14 WH Cases 222 (1959). Thus, when Chemtek employees performed work on the very items called for in the contracts and with the understanding that the services provided would discharge part of Arcwel's obligations under the prime contract, Chemtek acted as a substitute manufacturer and as such became subject to the provisions of the Act.

The stipulation that Arcwel does not perform the type of services provided by Chemtek and that it is the regular practice of the industry to engage secondary contractors for these services does not alter the result. Every contract subject to the Act must contain a representation and stipulation by the prime contractor that it is either "the manufacturer of or a regular dealer in" the commodities (services) to be manufactured or used in the performance of the contract. 41 U.S.C. §35(a). The reason for requiring this stipulation is stated in 41 C.F.R. §50-206.50 as follows:

> The legislative history makes it clear that this statutory requirement is intended, among other things, to eliminate the award of contracts to "bid brokers" and to provide labor standards protection for the employees who actually engage in the manufacture or furnishing of the goods to the Government, by requiring, among other things, that the Government award contracts only to bona fide manufacturers or regular dealers. (emphasis added)

It is not suggested that Arcwel acted as a "bid broker" or that it intentionally misrepresented its ability to perform the contract, but it is clear that by stipulation Arcwel represented that it was to be the supplier of all items specified in the contract. As the primary contractor on each of the three contracts, contracting with the Government in its own name and on its own account, Arcwel assumed the obligation to manufacture or furnish all the contract "commodities" included in the contract specifications in compliance with the labor standards of the Act and the corresponding contract stipulations. Commensurate with that obligation, Arcwel is liable for the breaches of the contracts committed by Chemtek. In re Metalcraft Manufacturing & Sales Corp. 15 WH Cases 557 (1962). The fact that Arcwel was never a "manufacturer" or "regular dealer" of tank cleaning and flushing services and does not itself perform those services, does not relieve it of its responsibility and ultimate liability for any failure to fully perform, satisfy and comply with all terms and conditions of the prime contracts. See, 41 C.F.R.

§50-206.50(a)(1).[17]/

The engagement of Chemtek had no effect on Arcwel's obligations, under the Act, with regard to the Walsh-Healey labor standards provisions. R & I No.3, §32(a). Through the substitute manufacturer rulings, "[p]ersons 'employed by the (prime) contractor' may be, in carefully defined situations, persons other than those on the prime contractor's payroll." United States v. Davison Fuel and Dock Company, 371 F.2d 705,712 (4th Cir. 1967). The Government's interest in compelling application of labor standards on Government contracts is broader than concern for the workers on the particular job. The overall objective is to protect local labor markets from adverse impact in the nature of depressed wages in areas where Government contracts provide a major source of employment. Accordingly, compliance with the Walsh-Healey provisions is a significant part of the bargained for performance.

Arcwel is not a manufacturer who was awarded a Government contract and then subcontracted the manufacture or servicing of a part to be incorporated in the end product called for by the contract. Arcwel is a firm without equipment or employees qualified to perform certain essential work under the prime contracts which it was awarded and therefore contracted with another (Chemtek) to perform those services as a substitute for Arcwel's promised performance. Tank cleaning and flushing services performed by Chemtek were at times necessary prerequisites or sequels to Arcwel's performance of repair services but entirely distinct from and and in no sense a "part" of the repair services. Here Chemtek performed specific items called for by the prime contract. A prime contractor may not escape Walsh-Healey responsibility by contracting with another to perform work it has contracted to perform itself. Davison Fuel, supra, 371 F.2d at 712.

In the instant case, general contract principles produce the same result notwithstanding "the regular practice of the industry" as stipulated by the parties. Such stipulation

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17/ 41 C.F.R.§50-206.50(a)(1) states in pertinent part:

> A breach of this required stipulation (i.e. that contractor is a bona fide manufacturer or regular dealer) is a violation of the Act; however, a contractor who has been awarded a contract in spite of its failure to qualify as a manufacturer or regular dealer is not relieved of its obligation to comply with the other requirements of the Act and regulations, which are also contract stipulations.

suggests that the Navy apparently contemplated Arcwel's delegation of certain specific contractual duties which Arcwel was incapable of performing and, if not initially, subsequently assented to such substitution as is necessarily implied by the Navy's acceptance of Chemtek's performance in lieu of Arcwel's performance of specific items in the prime contract. Such secondary contract, however, does not discharge Arcwel's obligations under the prime contract unless such substituted performance fully satisfies all relevant terms and conditions of the prime contract. Arcwel's secondary or subcontract with Chemtek to perform specific services for the Navy is a third party creditor beneficiary contract upon which, by operation of law, Arcwel becomes a surety as to Chemtek. Under the majority rule, adopted by the Restatement,[18] the third party creditor with knowledge of such secondary contract may proceed against Chemtek and Arcwel for any breach of the prime contract, and though limited to one recovery, need not make an election between them, the third party right having irrevocably vested, under the majority view,[19] when the Navy assented to Chemtek's performance.[20]

The Walsh-Healey Act is remedial wage and hour legislation designed to effectuate congressional policy "that the Federal Government should procure and use only goods produced under safe and fair working conditions." George v. Mitchell, 282 F.2d 486, 493 (D.C. Cir.1960). The Act will be interpreted to further its purpose "to obviate the possibility that any part of our tremendous national expenditures ... go to forces tending to depress wages and purchasing power and offending fair social standards of employment." Perkins v. Lukens Steel Co., 310 U.S. 113, 128, 60 S.Ct.869, 877, 84 L.Ed. 1108 (1940).

It is clear that Chemtek's performance pursuant to the secondary contract with Arcwel was a substitute for Arcwel's promised performance on the prime contract as Arcwel intended it to be. It follows that, in this context, Chemtek is a "substitute manufacturer" and I so find, consistent with applicable provisions of the Act and other relevant legal authority.

Wherefore, it is,

18/ Restatement of Contracts §141.

19/ For collected cases, see, Williston on Contracts §393; Corbin on Contracts §792.

20/ See, 21 ALR 462; 53 ALR 178.

ORDERED: 1. The U.S. Navy shall, as the contracting agency, forthwith pay over to the Wage & Hour Division of the U.S. Department of Labor (DOL), from any and all sums withheld by the contracting agency at the request of DOL from Defendent Pacific Ship Repair & Fabrication, Inc. (Arcwel) on any and all contracts of Arcwel with the U.S. Government in the amount of $26,313.02; or if such sum is not available, any and all sums withheld though in lesser amount;

2. Defendent Arcwel and Defendent Chemtek (subject to Chemtek's presently pending U.S. Bankruptcy Court proceeding) shall forthwith pay over to DOL the sum of $26,313.02, less any and all amounts paid over to DOL by the U.S. Navy, as specified in paragraph 1. of this Order;

3. DOL shall make back wage distribution to Defendent Chemtek's employees (as listed in Plaintiff's Exhibit 13, incorporated herein by reference) or to their estates, as appropriate, of the proceeds received from the U.S. Navy and from respondents, or either of them. In the event of plaintiff's inability to locate an employee or of an employee's refusal to accept back wage payment, the amount due such employee shall, after a period of one year, be transferred to the U.S. Treasury as miscellaneous receipts.

It is hereby,

RECOMMENDED:

1. That the Secretary of Labor take the necessary action to relieve Defendent Pacific Ship Repair & Fabrication, Inc. (Arcwel) from the application of the ineligible list provisions of §3 of the Walsh-Healey Public Contracts Act (41 U.S.C. §37);

2. That Defendent Chemtek Systems, Inc. not be relieved from the application of the eligible list provisions of §3 of the Walsh-Healey Public Contracts Act.

This Decision and Order shall become the final decision of the Secretary of Labor unless a petition for review is filed under 41 CFR §50-203.11, before the expiration of the time provided for the filing of such petition.

VIVIAN SCHRETER-MURRAY
Administrative Law Judge