



In the Matter of:

**UNITED STATES DEPARTMENT  
OF LABOR**

**ARB CASE NO. 95-40A**

**(Formerly BSCA Case No. 95-03)**

**COMPLAINANT,**

**ALJ CASE NO. 92-SCA-31**

**v.**

**UNITED INTERNATIONAL  
INVESTIGATIVE SERVICES, INC.**

**DATE: January 10, 1997**

**and**

**WILLIAM GUIDICE,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>**

### **FINAL DECISION AND ORDER**

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C. §§ 351-358 (1994), and its implementing regulations, 29 C.F.R. Parts 4, 6 and 8 (1996). The issue on review of the Administrative Law Judge's (ALJ) Decision and Order (D. and O.) issued on February 28, 1995, is whether Respondents United International Investigative Services, Inc. (UIIS) and William Guidice should be relieved from the ineligible list sanction of SCA section 5(a). Section 5(a) provides:

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<sup>1/</sup> On April 17, 1996, the Secretary of Labor re delegated authority to issue final agency decisions under, *inter alia*, the McNamara-O'Hara Service Contract Act and implementing regulations, to the Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. See 61 Fed. Reg. 19982 for the final procedural revisions to the regulations implementing this reorganization.

The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. *Unless the Secretary otherwise recommends because of unusual circumstances*, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of the publication of the list containing the name of such persons or firms.

41 U.S.C § 354(a)(emphasis added). As discussed *infra*, “unusual circumstances” are described in the regulations. “[D]etermination[s] must be made on a case-by-case basis in accordance with the particular facts present.” 29 C.F.R. § 4.188(b)(1). The ALJ found that unusual circumstances existed in this case. Under the regulations, we may “affirm, modify or set aside, in whole or in part, the decision under review . . . .” 29 C.F.R. § 8.9(b). We may modify or set aside an ALJ’s factual findings “only [upon determining] that those findings are not supported by a preponderance of the evidence.” *Id.* See *American Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1408-1409 (10th Cir. 1984). We agree with the ALJ that Respondents should be relieved from the ineligible list sanction.

## BACKGROUND

Respondents UIIS and president and chief executive officer William Guidice provide armed and unarmed security guard services under a variety of contracts with both private and government entities. In 1970, at 17 years of age, Guidice enlisted in the United States Marine Corps. The ensuing military service included two tours as a machine gunner in Vietnam. Upon leaving the Marine Corps in 1979, Guidice worked for a security company in California, and in 1980 he started his own business (UIIS). At first, Guidice performed private sector services -- “just basically apartment guards and construction sites.” Hearing Transcript (T.) 752. In late 1985, however, Guidice bid on between ten and 12 federal government contracts and was awarded “[a]lmost every one of them.” T. 753. These contracts included a Department of Energy contract in Boulder City, Nevada; the Hoover Dam project; an Environmental Protection Agency contract in Narragansett, Rhode Island; a contract with the Army Corps of Engineers in Huntington, West Virginia; a Social Security Administration contract in Boston, Massachusetts; a Navy Department contract in New London, Connecticut; the New Boston Air Force Tracking Station contract in Amherst, New Hampshire; contracts in Colts Neck, New Jersey, Barbers Point, Hawaii, and Cincinnati, Ohio; a Naval station contract at Newport, Rhode Island; and Veteran Administration contracts in San Francisco, California. T. 753-760. As the ALJ found, “UIIS was caught off guard when it was awarded ten contracts by the federal government in one year . . . .” D. and O. at 13. It is uncontroverted that “Guidice was inexperienced in the bidding procedures and the amount of effort involved in the start up of many contracts all over the country at one time.” *Id.* at 14.

During the 1985-1986 period, UIIS's office staff consisted of Guidice and three other employees. Guidice was unable to obtain increased capitalization and relied on the contracts for funding. Difficulties encountered by UIIS regarding inadequate payments and even nonpayment by the contracting agencies were legion. *See, e.g.*, T. 768-824. The ALJ found:

[Guidice] spent most of the year from late 1985 until late 1986 traveling from one contract site to another interviewing, training and putting the contracts on line. He had prepared a budget encompassing all of his contracts and the anticipated payments. According to that budget, he would have been able to make all required payments with no cash flow problems. However, because of an increase in start up costs, other unexpected costs and problems with prompt payment on some of the contracts, UIIS ran into cash flow problems. The start up costs were greater than expected because the prior contractors walked off [the jobs prematurely]. In addition, UIIS was having payment problems with the New Boston contract, the wrong wage determination had been used to determine the bid and the Air Force had not followed through on its promise to modify the contract to pay these amounts.

D. and O. at 14 (citations omitted). In February 1987, UIIS filed for Chapter 11 bankruptcy. UIIS emerged from bankruptcy in January 1988 -- 60 days after nonpayment by the Air Force under the New Boston contract had been rectified. During this start-up period, UIIS violated the SCA on a number of occasions. In all instances,

[t]he company and its representatives were cooperative with the DOL investigators and promptly corrected any problems that were found . . . . The monies that were owed due to the investigations were in most instances paid prior to conclusion of the investigation . . . and all of the monies owed had been paid by the time of filing of this action.

*Id.* at 16.

Since the early 1990's, UIIS has operated profitably and in compliance with the SCA. The First Interstate Bank authorized it a substantial line of credit. UIIS's staff has been educated in government contracting requirements. Guidice has learned to make more realistic bids; communication with managers has improved; he has delegated authority more extensively; and he has retained an outside accounting firm to keep the books, deduct benefits and determine pension contributions. T. 897-901. The ALJ found that at the time of the hearing, "Guidice . . . no longer had the financial problems of the earlier years. UIIS's administrative staff had been expanded and a separate payroll company had been employed to administer the multiple payrolls. . . . These positive changes provide sufficient assurances that the company will comply with the Act in the future." D. and O. at 17.

## DISCUSSION

The SCA is a demanding statute. *A to Z Maintenance Corp. v. Dole*, 710 F. Supp. 853, 855-856 (D.D.C. 1989). As condition for award of Federal contracts, it requires performance consistent with specified standards.<sup>2/</sup> The sanction for noncompliance is debarment. Only “innocent” or “petty” violations may invoke exception to the sanction. *Federal Food Service, Inc. v. Donovan*, 658 F.2d 830, 834 (D.C. Cir. 1981). The sanctions issue is governed by regulatory section 4.188, 29 C.F.R. Relief is not in order (1) where a contractor’s conduct in causing or permitting the violations is *willful, deliberate* or *aggravated* or (2) where the violations are a result of *culpable* conduct.<sup>3/</sup> “Culpable neglect or conduct is more than just acting in a negligent manner. It requires conduct which is beyond negligence, but short of specific intent[,] ‘less than gross carelessness, but more than the failure to use ordinary care, it is a culpable want of watchfulness and diligence . . . .’” *In the Matter of J & J Merrick’s Enterprises, Inc.*, Case No. 94-09, BSCA Dec., Oct. 27, 1994, slip op. at 5, quoting *Cass v. Ray*, 556 A.2d 1180, 1181-1182 (N.H. 1989). Culpability exists absent a “good reason, according to the standards of ordinary conduct,” for the negligence. *Id.* Relief also is not in order where the contractor has a history of similar violations, where it has violated the provisions of the SCA repeatedly or where previous violations were serious.<sup>4/</sup>

Here, Complainant alleged that UIIS and William Guidice violated the SCA in the course of performing a United States Navy contract to provide guard services at Colts Neck, New Jersey, between 1986 and 1989 and an Internal Revenue Service (IRS) contract to provide guard services in Holtsville, New York, in 1990. The ALJ found that Complainant failed to prove violations under the IRS contract regarding health and welfare benefits and

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<sup>2/</sup> Like other remedial prevailing wage statutes, the SCA is designed to raise labor standards using as leverage the Government’s purchasing power. *Cf. Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-508 (1943)(Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-46 (1994)). As such, it is liberally construed in favor of its intended beneficiaries -- nongovernment service employees. Conversely, it mandates strict adherence by the private contractors favored with Government business to avoid national expenditures “tending to depress wages and purchasing power and offending fair social standards of employment.” *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128 (1940). Prevailing wage statutes are not applicable generally in the industry, applying only to contractors who compete voluntarily to obtain Government business. These contractors are fairly forewarned of the conditions of doing business in that the particular terms are included in the contracts.

<sup>3/</sup> Culpable conduct is described in the regulation as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or culpable failure to comply with recordkeeping requirements such as records falsification.

<sup>4/</sup> Prerequisites to relief include a good compliance history, cooperation in the investigation, repayment of money due and assurances of future compliance. The following issues also pertain: (1) whether the contractor has been investigated previously, (2) whether recordkeeping violations have impeded the investigation, (3) whether liability was dependent on resolution of a *bona fide* issue of doubtful certainty, (4) efforts to ensure compliance, (5) the extent and seriousness of past or present violations and (6) whether moneys due were paid promptly.

vacation pay and that no violation under that contract occurred involving uniform cleaning benefits. D. and O. at 10-12. The record fully supports the ALJ's findings. The ALJ also correctly found four violations under the Navy contract to be technical *de minimis* violations. D. and O. at 4-9. As these violations were both "innocent" and "petty," we except them from consideration in deciding whether debarment is mandated. We also agree with the ALJ that these *de minimis* violations "involved questions of reasonable differences in interpretation of what was required of UIIS." *Id.* at 13.

The remaining violations, then, are (1) failure to pay minimum wage by paying employees with checks that were dishonored and (2) failure to make timely contributions to the union-sponsored health and welfare and pension funds. With regard to the dishonored paychecks, the ALJ found:

[I]n most instances, the paychecks were immediately covered and the employees received their pay promptly. It appears that the dishonoring of paychecks was due to a combination of cash flow problems and banking problems, namely the failure of funds from contract payments to be posted prior to clearance of the paychecks. This was not the result of willful, deliberate or any other culpable conduct on the part of UIIS. . . . The dishonored paychecks occurred in the early part of the contract at Colts Neck during the period when UIIS was just beginning many of its federal contracts. After July of 1987, there were no more dishonored paychecks until the last paycheck [which was] the result of a lack of communication regarding an unexpected and unwarranted withhold by the Navy. It is clear that Guidice's and UIIS's conduct with regard to this violation was not culpable.

D. and O. at 15. We agree.

Complainant argues that the series of dishonored paychecks represented separate, repeated violations of the SCA, which precludes a finding of unusual circumstances.<sup>5/</sup> As the ALJ recognized, however, with the exception of the final dishonored paychecks for which the Navy was responsible, the series of five incidents in late 1986 and early to mid-1987 transpired at the inception of the contracting endeavor and resulted from a common cash flow-banking problem. Once the problem was corrected, payment was ensured. We consider the incidents to comprise a discrete phase in Respondents' acclimation rather than a case of truly repetitive violations. *Compare A to Z Maintenance Corp. v. Dole*, 710 F. Supp. at 856 (contractor repeatedly violated the SCA by continuing to avoid payment obligations under two separate contracts). The facts in *Summitt Investigative Services, Inc.*, BSCA Case No. 95-10,

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<sup>5/</sup> The bounced checks resulting from cash flow and banking difficulties occurred on November 25, 1986, December 23, 1986, January 26, 1987, July 15, 1987 and July 30, 1987. The final checks following the end of the Colt's Neck contract in October 1989 bounced due to the Navy's wrongful withhold.

ARB Dec., Nov. 15, 1996, also are distinguishable.<sup>6/</sup> There, we found that, due exclusively to a cash flow problem, the contractor repeatedly violated the SCA by bouncing payroll checks nearly every pay period during the course of a single contract. The “negative impact of the missed payrolls on the employees was ‘tremendous.’” Slip op. at 12. In the instant case, the predominant problem, which derived from the bank’s posting procedures, was remedied early in the contract, and the dishonored paychecks were covered immediately with other funds. The final paychecks bounced after the Navy wrongfully withheld payment<sup>7/</sup> and failed to communicate the withhold until after the checks had been issued. Guidice took out a second mortgage on his house in order to pay the employees before the Navy finally released the withhold four months later. *See* T. 845-857.

Respondents also failed to make timely payments to the health and welfare and pension benefit funds as required under the collective bargaining agreement which had been incorporated into the Wage Determination effective November 1, 1987.<sup>8/</sup> D. and O. at 7-8. As the ALJ explained, deferral of the benefit fund payments represented a pragmatic decision in Guidice’s particular circumstances:

Guidice, at this point, had lost all patience with the Navy contract and was considering walking off the contract because the Navy would not pay the increase he requested. [A] union board member convinced him to remain on the contract and in return gave Guidice assurances that he would do what he could about Guidice’s inability to make the fund payments on a timely basis. Guidice eventually made all payments . . . . [T]here was no indication that any employee was harmed by the failure to make these payments. [Guidice] could not financially make the payments and believed that his obligation to make timely payments had been relieved by the union which administered the funds. Therefore, his failure . . . was not culpable conduct. Given the fact that he could not make all payments, his decision to pay current wages, and defer payments to the benefit funds while remaining a viable wage-payer and continuing performance on the contract, was a good decision . . . .

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<sup>6/</sup> In *Summitt*, the bid solicitation included a wage rate which was lower than that set by the wage determination. The solicitation cautioned, however, that “THIS STATEMENT IS FOR INFORMATION ONLY: IT IS NOT A WAGE DETERMINATION.” Slip op. at 8 (capitalization in original). “[T]he contract was seriously underbid from the very beginning” because “Summitt ignored the caution in the bid solicitation and based its bid on the wage rates set out in the solicitation, rather than those contained in the wage determination.” *Id.*

<sup>7/</sup> The Navy alleged that UIIS had failed to provide training required under the contract and withheld an amount to cover anticipated damages. UIIS had, in fact, provided the training.

<sup>8/</sup> During the summer of 1987, UIIS negotiated an agreement with the Industrial, Technical and Professional Employees, Division of the National Maritime Union of America, AFL-CIO, which resulted in wage and benefit increases for the employees at Colts Neck. D. and O. at 6, 16.

*Id.* at 15 (citations omitted). A preponderance of the evidence supports this finding of nonculpability. Guidice chose the avenue which was least detrimental to the employees with the understanding that the union acquiesced to the temporary deferral.

In *Summitt Investigative Services, Inc.*, BSCA Case No. 95-10, ARB Dec., Nov. 15, 1966, slip op. at 12, we “note[d] that the failure to pay employees because of ‘[f]inancial problems resulting from poor business judgment’ constitutes culpable neglect” and cited *United Services, Inc.*, BSCA Case No. 92-36, Jan. 28, 1994, for that proposition. In *Unified Services*, the Board of Service Contract Appeals phrased the issue more generally as whether financial problems could constitute unusual circumstances, holding that they could not. Slip op. at 7-8. Mere mistaken judgment does not necessarily mandate debarment, however. Rather, the measure of a contractor’s culpability turns on the reasons for and character of the conduct. The mistake made by UIIS in this case, *see* D. and O. at 13-14, does not rise to the level of “extremely poor business judgment in underbidding th[e] contract” present in *Summitt* or the gross neglect and disregard of fundamental responsibilities present in *Unified Services*.<sup>9/</sup>

The ALJ found that “misrepresentations” by Guidice and William Hause, UIIS’s chief financial officer (CFO), that certain benefit fund payments had been made, when they had not, constituted willful violation of the SCA. D. and O. at 15-16. This finding does not withstand scrutiny. A communication of this type, even if culpable, is not a violation of the Act. Rather, the violation at issue is failure to make timely benefit fund payments. Nor does it follow that the statements caused the violation to result from culpable conduct. The statements, (1) in a June 2, 1988, telephone conversation with the Department of Labor investigator, (2) in a letter to the Navy dated September 30, 1988, and (3) in a September 1989 telephone conversation with the investigator, *postdated* the particular violations which were being investigated and as such could not have caused them to result from culpable conduct. The failure to make timely payments resulted, rather, from financial difficulties and a belief that the union had acquiesced to temporary deferral. Furthermore, as the ALJ found, the “misrepresentations” were not made to “cover up” a violation of the Act. *Id.* at 16. “This is not a company which culpably schemed to underpay workers, or falsify records. It made good on its delayed payments as soon as practicable and compromised disputes with DOL in favor of the workers even where DOL’s position was of doubtful validity.” *Id.*

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<sup>9/</sup> In *Unified Services*, Respondents drafted and submitted the contract proposal and accepted the contract award at a time when Unified was engaged in Chapter 11 bankruptcy and owed 2.8 million dollars to the IRS. Although clearly not financially sound, Unified accepted the contract knowing that it required performance to begin within four days of its award and that such an abbreviated start-up period was unrealistic. Unified’s financial condition caused it to secure outside financing which proved expensive and unreliable. As the result of undercapitalization and severe cash flow problems, Unified “missed four very large payrolls” and failed to make timely benefit fund payments for the duration of the contract. Slip op. at 9. The Board of Service Contract Appeals found that the violations resulted from Unified’s culpable neglect.

In order for an act to be willful, it must be done “intentionally, knowingly, and purposely . . . as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently.” Black’s Law Dictionary 1434 (5th ed. 1979). In the instant case, evidence that Respondents knowingly misrepresented their payment status is tenuous. The following evidence was adduced:

(1) Richard Galatro, the Labor Department investigator, testified that on June 2, 1988, CFO Hause stated that two or three weeks before “he had mailed four checks covering the period of 11/87 to 2/8[8] to the health and welfare fund. . . . And he admitted to date that he had not sent any contributions to the pension fund.” T. 234. The checks at issue were dated May 16, 1988. *See* Plaintiff’s Exhibits (PX) 26-29. These checks subsequently were returned for insufficient funds. T. 239, PX 30. The letter returning the checks is dated May 31, 1988. The checks were sent from the union health and welfare benefit fund in Savannah, Georgia, to UIIS’s offices in Anaheim, California. Replacement checks issued by UIIS were dated June 2, 1988. T. 241; PX 31. Consequently, Hause was correct in stating on June 2 that he had mailed checks two or three weeks previously. There is no evidence establishing when on June 2 Galatro spoke to Hause or whether Hause knew that the checks had bounced at the time of the conversation.<sup>10/</sup>

(2) The ALJ found that “Guidice admitted at the hearing that he misrepresented that he was current with his health and welfare payments in a letter to the Navy . . . .” D. and O. at 8. By letter to the Colts Neck Naval Facilities Engineering Command dated September 30, 1988, Guidice stated:

The U.S. Department of Labor is in the process of conducting an Audit, and that audit will show that the company is current, with regard to Employee Health and Welfare payments and benefits. The collective bargaining agreement also provides for Pension Plan benefits. However, in evaluating the Pension Plan that is being offered by the union, the period for vesting is ten years. This is normal for several of our contracts, which use union agreements. In order to provide our employees with a more meaningful plan, we have set up an Employee Savings Plan through Wells Fargo Bank [which offers rapid vesting].

PX 75. Guidice ultimately instituted a different pension arrangement because the Wells Fargo plan proved too expensive. T. 986-988. As to the health and welfare payments, the statement that the “audit will show that the company is current” is somewhat ambiguous in that Guidice may have meant that he expected to be current as the result of correcting any problems found by the Department of Labor auditor. *See* D. and O. at 16 (“monies that were owed due to the

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<sup>10/</sup> During the June 2 conversation, Hause “stated that by the end of the month they would be current with both funds,” T. 250, which concededly did not come to pass. Galatro also testified that he spoke to Hause in August 1988. Hause “stated at that point in time that he was a couple of months behind in health and welfare, and that no pension payments had been made to date.” T. 250-251.

investigations were in most instances paid prior to conclusion of the investigation by DOL”). Regardless, the evidence does not establish that any misstatement was intentional as the ALJ ultimately found. *Id.* at 15-16. On cross-examination, Guidice agreed with counsel for Complainant that as of the end of September 1988 the health and welfare benefits should have been current through the month of August.<sup>11/</sup> T. 954. Guidice then agreed with counsel that that statement did not comport with PX 58B, a listing compiled in 1990 or 1991 by the Administrator of the union health and welfare fund. *Id.* According to the listing, benefit payments for July and August 1988 were received in December 1988 and payments for May 1988 were received in June 1989. This testimony is the only testimony by Guidice concerning the representation. It does not establish intent or knowledge.

We note that at least a portion of the listing is incorrect. As discussed above under item (1), the four checks for payment from November 1987 through February 1988 were dishonored. The listing shows date of receipt of these payments as May 19, 1988, rather than date of receipt of the valid replacement checks which would have followed their June 2, 1988, issuance. The listing also records payments made out of sequence. For example, payment for October 1988 was received on June 20, 1989, whereas payments for November and December 1988 and January and February 1989 were received on May 3, 1989. The payment for June 1989 was received on November 1, 1989. Payments for July and August 1989 were received on October 15, 1989. This disruption in the order of payment suggests confusion on the parts of Guidice and Hause about whether payments had been made. In addition, the dates on some of the checks do not correspond to the dates of receipt, leading the ALJ to find that the checks either had been written and not sent or had been backdated. D. and O. at 8. Again, the predominant image is one of confusion deriving from Respondents’ financial problems.

(3) Galatro testified that in September 1989, Guidice stated that the health and welfare fund payments were current through July 1989. Dates on checks for the June and July 1989 benefits show that payment was made in October 1989. T. 291-294. An explanation for the proximity between the September conversation and October payment is that Guidice made the statement believing that payment had been made, and upon checking discovered that it had not. He then issued the checks promptly. This construction is consistent with the ALJ’s finding that the misrepresentations were not made to “cover up” violations of the Act. D. and O. at 16. Guidice’s misstatement, then, would have been made inadvertently rather than purposely and thus would not have been willful. Because a preponderance of the evidence does not support the ALJ’s finding that Hause’s statements and Guidice’s misstatements constituted willful, culpable conduct, we decline to affirm it.

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<sup>11/</sup> Monthly fund contributions are due by the 15th day of the following month. For example, the contribution for August should have been submitted by September 15. In the event of nonreceipt, employers are permitted a ten-day grace period. A delinquent employer could have been subject to legal action by the fund only after September 25.

We agree, however, with the ALJ's remaining findings, *i.e.*, that UIIS did not have a history of similar violations,<sup>12/</sup> did not repeatedly violate the SCA and did not commit previous violations that were serious in nature. UIIS had a good compliance history, company representatives cooperated fully in the investigations, all monies due have been repaid and Respondents have offered sufficient assurances of future compliance. Finally, the factors enumerated at the conclusion of 29 C.F.R. § 4.188(b)(3)(ii) do not militate in favor of debarment.

In determining the presence of unusual circumstances, the ALJ examined UIIS's progression from a nascent contractor overwhelmed by a surfeit of contract awards to "a company which appears in all respects to be a responsible and competent guard services contractor." D. and O. at 17. *See Federal Food Service, Inc. v. Donovan*, 658 F. 2d at 834 ("[T]he Secretary must consider the particular circumstances of the business under review--for example, the actual problems it has faced . . . before implementing the severe debarment provision."). Even during the early, financially-troubled years, Guidice acted out of concern for the service employees. The ALJ found:

UIIS has demonstrated, in many ways, its dedication to its employees and to performing its obligations under its contracts in a superior fashion. UIIS recognized the union at Colts Neck and negotiated a collective bargaining agreement with that union . . . . Adam Ginther, the contracting officer at Colts Neck, testified that UIIS's performance on the contract was the best that the Navy had had up until that time.

*Id.* at 16. On a number of occasions, UIIS incurred unexpected expenses in commencing contract performance prematurely when the prior contractors had walked off the jobs. Faced with the Navy's intransigence, Guidice chose the least detrimental course in negotiating a temporary deferral of benefit fund payments rather than walking off the job and thus disemploying the incumbent employees. UIIS representatives cooperated with the Labor Department investigators and readily corrected problems found during the investigations. Money found due was paid promptly "even where DOL's position was of doubtful validity." *Id.* The ALJ also considered the effect of debarment on UIIS:

Justice [and the purposes of the SCA] would not seem to be served by debarring this company from government contracts at the very time when everything

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<sup>12/</sup> Complainant argues that the ALJ erred by excluding documentary evidence which purported to show a history of prior investigations. PX 70. The documents in question are excerpts from authenticated compliance files. No witness with personal knowledge of their contents was present to offer an explanation. We agree with the ALJ that because the documents are incomplete, not self-explanatory and not sufficiently probative to be given any real weight, they properly were excluded. Alternatively, even if the ALJ erred by excluding the documents, the error was harmless in that he afforded Complainant the opportunity to elicit testimony about other investigations, and such testimony appears in the record. *See, e.g.*, D. and O. at 16.

seems to have come together and no further problems are occurring. This would likely cause serious problems for this company and may even result in the demise of UIIS.

*Id.* at 17. This consideration is relevant. “Debarment is a severe penalty which may have a serious economic impact upon a business and may well cause it to fail. It should therefore be used prudently and not . . . with a reckless hand.” *Mastercraft Flooring, Inc. v. Donovan*, 589 F. Supp. 258, 263 (D.D.C. 1984). In enacting the SCA, Congress intended that violators be spared the “catastrophic” debarment sanction, *Federal Food Service, Inc. v. Donovan*, 658 F.2d at 834, “in situations where the violation was a minor one, or an inadvertent one, or one in which d[e]barment [is] wholly disproportionate to the offense.” To Amend the Service Contract Act of 1965: Hearings on H.R. 6244 and H.R. 6245 Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 92nd Cong., 1st Sess. 3 (1971); 29 C.F.R. § 4.188(b)(2). As recognized by both the *Federal Food Service* and *Mastercraft Flooring* courts, the very absence of any other sanction supports distinguishing and excepting incommensurate circumstances. At the same time, Congress did not intend that relief from the SCA be given automatically or lightly. Rather, it intended “that the full vigor of the law should be felt by those who repeatedly and callously violate it.” Hearings on H.R. 6244 and H.R. 6245 at 3. The ALJ recognized this distinction:

I have no qualms about debarring a contractor in situations that warrant it and I have done so in other cases. However, in all of those cases, the violations were the result of willful and culpable conduct that demonstrated a disregard for the welfare of the employees. That is not the case here . . . .

D. and O. at 17. We agree. Guidice concededly made a mistake in overbidding during his early experience with government contracting. To debar him now, however, given the unflagging and ultimately successful drive to rectify that mistake and to remain in compliance, would not serve the purposes of the SCA.

## **CONCLUSION**

With the exception of the finding of willful violation discussed above, the decision of the ALJ IS AFFIRMED and Respondents United International Investigative Services, Inc., and William Guidice are relieved from an ineligibility listing under SCA section 5(a), 41 U.S.C. § 354(a), because of the unusual circumstances present in this case.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member