

**U.S. Department of Labor**

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**Issue Date: 28 October 2010**

**CASE NO.: 2008-SCA-00017**

**IN THE MATTER OF**

**ADMINISTRATOR, WAGE & HOUR  
DIVISION, UNITED STATES  
DEPARTMENT OF LABOR  
Prosecuting Party**

**v.**

**TRI-COUNTY CONTRACTORS, INC.,  
and JOHN K. HUNTER  
Respondents**

**APPEARANCES:**

**LESLIE PAUL BRODY, ESQ.  
On behalf of the Solicitor**

**KENYA R. MARTIN, ESQ.  
On behalf of the Respondents**

**BEFORE: C. RICHARD AVERY  
Administrative Law Judge**

**DECISION AND ORDER**

This case arises under the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended (the Act), 41 U.S.C. §§ 351, *et. seq.* and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, *et. seq.*, and the federal regulations found at 29 C.F.R. Parts 4, 6, ad 18. In particular, the complaint alleges the following: (1) Respondents failed to pay employees the

minimum monetary wages in accordance with prevailing wage rates determined by the Secretary; (2) Respondents failed to furnish employees the fringe benefits required by the Act; (3) Respondents failed to pay overtime wages for hours worked in excess of forty hours per work week; and (4) Respondents failed to make and maintain accurate records of wages paid and hours worked by employees. The relief sought is a finding of liability and debarment.

A formal hearing was held in Jackson, Mississippi, on April 22 and 23, 2010. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.<sup>1</sup> The following exhibits were received into evidence: Administrative Exhibits (ALJX) 1-2; Complainant's Exhibits (CX) 1-10; and Respondents' Exhibits (RX) 1-5.

### **Issues**

The only issue in this case is whether Respondent should be debarred pursuant to §354(a) of the Act.

### **Preface**

In April 2006, Tri-County entered into a government contract to inspect FEMA trailers. There was no designated wage to be paid to the preventive maintenance inspectors (PMIs). Gill and Associates had held the previous contract and had paid a per-unit wage, so Tri-County did the same.

An investigation was conducted, and Tri-County was told (1) to pay a wage equal to \$10.21 per hour, (2) to keep time records, and (3) to pay overtime. That investigation concluded on November 29, 2006, and the "final" conference was held between Ms. Van Etten, a Wage and Hour investigator, and Mr. Hunter, Respondent's president and CEO, in December 2006. Mr. Hunter promised future compliance.

Despite that conference, however, rather than requiring the keeping of specific hours by the PMIs, hours were estimated using the number of units (trailers) inspected. In addition, no overtime was paid. This was verified by former PMIs who either testified or gave statements, as well as Wage and Hour investigators Melissa Van Etten, Susan Denham, and Brian Tollison.

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<sup>1</sup> The parties were granted time to file post-hearing briefs.

A second investigation began in July 2007 and covered the period from November 30, 2006, through August 1, 2007. Mr. Hunter initially denied the use of a unit/computer formula to estimate hours, maintaining that he had kept proper time records. However, by October 2007, he conceded otherwise.

While I agree there was no official wage determination for the PMIs until the June 29, 2007 letter, a wage of \$10.21 had nevertheless been established by Ms. Van Etten in the first investigation, but no time records were subsequently kept from which the number of hours worked could be calculated. In fact, the overwhelming evidence is that no overtime was paid and Respondents continued to pay the employees based on units/trailers inspected.

### **Findings of Fact**

The findings of fact and conclusions that follow are in part those proposed by the parties in their post-hearing briefs. Where I agreed with the summations, I adopted the statements rather than rephrasing the sentences. The facts and conclusions were determined by me from the pleadings, admissions in discovery, and evidence presented at the hearing.

1. Respondent Tri-County Contractors, Inc. is a corporation with its principal place of business in Jackson, Mississippi, and is engaged in the business of providing inspection and repair services for the Federal Emergency Management Administration (FEMA).

2. At all relevant times, Respondent Tri-County Contractors, Inc. was an 8(a) minority disadvantaged contractor.

3. Respondent John K. Hunter was President and Chief Executive Officer of Tri-County.

4. Sabrina Fountain, a supervisor, and Ben Washington, chief operating officer (COO), had managerial oversight and reported to Mr. Hunter.

5. Mr. Hunter negotiated the contract at issue, dealt directly with FEMA, was ultimately responsible for hiring and supervising employees, and set the pay rates of employees.

6. Respondents employed preventive maintenance inspectors (PMIs) and preventive maintenance technicians (PMTs) during the relevant period from May 17, 2006, through August 1, 2007.

7. At the time Respondents were awarded their contract, there was no specific wage determination listed by the subject service contract for the employment category of preventive maintenance inspector. However, Wage and Hour investigator Melissa Van Etten testified that by December 2006 the parties had settled on an hourly rate of \$10.21.

8. All of the government's witnesses—Respondents' former employees—were previously employed with other government contractors performing similar work as service workers and/or preventive maintenance inspectors at or near the time Respondents hired them.

9. All of Respondents' former employees signed an agreement with Respondents essentially stating they would not work more than forty hours per week. However, the former employees who testified at the hearing or gave statements stated they knew they would have to work more than forty hours per week and only signed the document because they believed they had to in order to keep their jobs.

10. The Department of Labor (DOL) conducted an investigation of Respondents which covered the period from May 17, 2006, through November 29, 2006. As a result of this investigation, DOL found prevailing wage, fringe benefits, and CWHSSA violations totaling \$52,994.42.

11. Respondents promptly paid the total amount of \$52,994.42 to their employees.

12. At the closing conference held at the conclusion of the first investigation in December 2006, Wage and Hour investigator (WHI) Melissa Van Etten informed Mr. Hunter that, in the future, he must keep accurate records of actual hours worked, pay proper prevailing rates, and pay overtime.

13. Mr. Hunter agreed to record Respondents' employees' actual hours of work and pay appropriate overtime wages.

14. At the hearing, Ms. Van Etten testified that the use of a computer program that generated hours of work based on a formula (rather than on actual hours worked) would violate both the Act and CWHSSA if the hours recorded did not accurately reflect the employees' actual hours of work.

15. DOL conducted a second investigation of Respondents through WHI Susan Denham which covered the period from November 30, 2006, through August 1, 2007. As a result of this investigation, DOL found prevailing wage and CWHSSA overtime violations in the amount of \$49,015.39.

16. More specifically, the second investigation revealed Respondents continued to require PMTs and PMIs to work over forty hours per week, were paying these employees at the same per unit rate for all hours of work, and were not paying overtime. In addition, the investigation revealed Respondents were creating timesheets based on a computer generated formula which did not reflect actual hours worked by PMTs and PMIs.

17. During the investigation, Mr. Hunter repeatedly denied that the hours on the timesheets were computer-generated. However, he eventually admitted that this was in fact the case.

18. Respondents did not keep accurate records of actual hours worked by PMIs or PMTs.

19. Respondents' employees believed that when they signed their timesheets, they were only verifying the number of trailer inspections completed and not the number of hours worked.

20. Timesheets during the relevant period never showed more than forty hours worked per week, no matter how many hours each employee actually worked.

21. Supervisor Sabrina Fountain gave a signed statement to WHI Brian Tollison on June 30, 2007, which stated in part, "[w]hen [the employees] turn in their PM sheets, our computer calculates the number of hours. The computer calculates the work hours based on the number of units that have been inspected."

22. In June 2007 COO Ben Washington required all PMIs to sign a memorandum stating incorrectly they did not work in excess of forty hours per week.

23. The secretary for Respondent, Twila Michael, was instructed by Ben Washington not to record hours actually worked by each employee but rather only the number of work orders completed.

24. Statements and testimonies by employees Charles Baden, Dale Cain, Calin Brandenburg, Nathan Gray, Teresa Dabbs, Martha Cooley, Linda James, and Donna Carter support the government's allegations that these employees worked in excess of forty hours per week, but were paid no overtime, rather they were paid by work orders completed. Also, while health and welfare benefits were deducted from their paychecks, no such benefits were received by the employees.

25. WHI Susan Denham testified she believed Respondents had intentionally generated inaccurate timesheets.

26. The evidence supports the finding Respondents' employees were instructed to sign their timesheets, even though they did not accurately reflect their hours worked.

27. The evidence supports the finding Respondents deducted Health and Welfare benefits from employees' paychecks without actually paying these benefits.

28. The evidence supports the finding Respondents had been instructed to record actual hours worked, had agreed to do so, and did not do so.

29. Neither WHI Melissa Van Etten nor any other representative from DOL ever approved of the time-keeping methods used by Respondents.

30. The second investigation uncovered the same type of prevailing rate, fringe benefit, recordkeeping, and overtime violations as had occurred in the previous investigation.

31. Respondents were advised in December 2006 as to how to comply with the Act and CWHSSA and failed to come into compliance after assurances that they would do so.

## Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, the arguments of the parties, and applicable regulations, statutes, and case law.

The debarment provision of the Act states in relevant part:

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 publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

41 U.S.C. § 354(a).

As noted above, debarment is presumed whenever there is a finding of violations under the Act unless the contractor is able to show the existence of “unusual circumstances.” 29 C.F.R. § 4.188(a) and (b). The term “unusual circumstances” is not statutorily defined, and any determination with respect thereto “must be made on a case-by-case basis in accordance with the particular facts present.” 29 C.F.R. § 4.188(b)(1). Neither ignorance of the Act’s requirements nor failure to read and become familiar with the terms of the contract, are sufficient to demonstrate unusual circumstances. 29 C.F.R. § 4.188(b)(1) and (b)(6). Similarly, the lack of a history of noncompliance is insufficient to establish unusual circumstances.

The determination as to whether debarment is appropriate is governed by a three-part test. 29 C.F.R. § 4.188(b)(3)(i)-(ii). First, the contractor must establish that the violations were not willful, deliberate, aggravated in nature, or the result of culpable conduct, and must also demonstrate an absence of a history of similar culpable conduct. 29 C.F.R. § 4.188(b)(3)(i). Second, the contract must show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). Third, a variety of factors must be considered, including any prior investigations for violations of the Act, recordkeeping violations which impeded the investigation, the existence of a “bona fide legal issue,” the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any violations, and whether the amount due was promptly paid. 29 C.F.R. § 4.188(b)(3)(ii). Moreover, the contractor bears the burden of proving the existence of unusual circumstances to warrant relief from the debarment sanction. 29 C.F.R. § 4.188(b)(1).

Under part one of the debarment test, Respondents have failed to show that the violations revealed in the second investigation were not the result of willful and deliberate action. At the conclusion of the first investigation, Mr. Hunter was clearly informed of his obligations to keep accurate hourly records and pay the agreed-upon hourly rate. However, he instead chose to generate inaccurate timesheets through the use of a computer program. The statements and testimonies of Respondents former employees establishes that these timesheets did not accurately reflect the hours worked by each employee and were instead based on the number of trailers each employee had inspected.

In addition, Respondents failed to pay overtime despite being advised that they must do so in order to come into compliance with the Act. Moreover, Respondents have failed to “demonstrate an absence of a history of similar culpable conduct” in that the second investigation essentially revealed the same types of violations as the first. The repetitive nature of Respondents violations can be seen as culpable conduct requiring debarment under the Act. *Vigilantes, Inc. v. U.S. Dept. of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992).

The only defense offered by Respondents in the face of this evidence is the lack of a prevailing wage determination for PMIs and PMTs in the contract. However, this argument fails to explain Respondents failure to pay the wage subsequently agreed upon with Ms. Van Etten or to keep proper records after being advised to do so. Therefore, Respondents have failed to show the presence of unusual circumstances such that they should not be debarred under part one of the test.

Under part two, Respondents must show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). Respondents made prompt repayment of monies owed to their employees and made repeated assurances of future compliance. However, the evidence shows a history of violations and a lack of cooperation in the investigation. Specifically, Respondents impeded the second investigation by failing to keep accurate time records and by denying for several months that employees’ hours had been computer-generated when this was in fact the case. Based on this evidence, Respondents have failed to show they should not be debarred under the second part of the test.

Respondents have also failed to demonstrate they should not be debarred under the final part of the test. As previously noted, Respondents recordkeeping violations and their repeated denials of their unauthorized recordkeeping methods impeded DOL’s investigation. Moreover, the violations revealed by each of DOL’s investigations were serious in nature, totaling nearly \$50,000.00 in each instance. Therefore, based on the totality of the evidence, I find Respondents should be debarred pursuant to § 354(a) of the Act.

### **ORDER**

It is hereby **ORDERED** that Respondents shall be debarred pursuant to Section 354(a) of the Act.

So **ORDERED** this 28<sup>th</sup> day of October, 2010, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

**NOTICE:** To appeal, you must file a written petition for review with the Administrative Review Board (“ARB”) within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). *See* 29 C.F.R. § 6.20. The Board’s address is:

Administrative Review Board  
United States Department of Labor  
Suite S-5220  
200 Constitution Avenue, NW  
Washington, DC 20210

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

The ARB’s Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b). Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).