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Issue Date: 28 September 2018

Case No. **2014SCA00005**

In the Matter of:

INNOVATIVE TECHNICAL
SOLUTIONS, LLC, and
WILLIAM F. REDFIELD, JR.,
Respondents.

APPEARANCES:

Willow E. Fort, *Esq.*
United States Department of Labor
Nashville, Tennessee
For the Administrator

Kerry D. Smith, *Esq.*
McMurray & Livingston, PLLC
Paducah, Kentucky
For the Respondent

BEFORE: Peter B. Silvain, Jr.
Administrative Law Judge

**ORDER GRANTING ADMINISTRATOR'S RENEWED
MOTION FOR SUMMARY DECISION**

This proceeding arises under the provisions of the McNamara-O'Hara Service Contract Act ("the SCA" or "the Act"), as amended, 41 U.S.C. §§ 6701 *et seq.*, formerly known as 41 U.S.C. § 351 *et seq.*, and the implementing Regulations promulgated under 29 C.F.R. Parts 4, 6, and 18. The recipient of a federal service contract violates the SCA if it fails to (1) pay service employees the required wage, (2) pay minimum fringe benefits, or (3) keep adequate records. Employers must pay service employees for all hours worked, under the standards of the Fair Labor Standards Act § 29 C.F.R. Part 785, as incorporated by 29 C.F.R. § 4.178. Employers who violate the SCA are subject to penalties such as payment of back wages and are debarred from receiving future federal contracts for a period of three years.

PROCEDURAL HISTORY

The Administrator of the Wage and Hour Division of the U.S. Department of Labor (“the Administrator”) filed a complaint against Innovative Technical Solutions, LLC, and William F. Redfield, Jr., (“the Respondents”) for alleged violations of the SCA, alleging that they failed to pay fringe benefits to 41 service employees during the performance of the Vehicle Registration Administrative and Clerical Support Contract, which includes the request for solicitation, the base contract, and any and all modifications/extensions thereto (collectively, “the Contract”).

Following this case’s referral to this office, the Respondents submitted a *Motion to Compel* requesting an order compelling the Administrator “to respond to request for production of the redacted portions of the wage and hour investigation file,” or, in the alternative, an order compelling the Administrator to submit the redacted portions of the wage and hour investigation file to the undersigned for an *in camera* review and “determination as to whether such material must be produced.” In response, the Administrator filed a *Response to Motion to Compel* along with a *Declaration of Administrator David Weil in Support of Formal Claim of Privilege*, asserting: 1) the Informant’s Privilege; 2) the Deliberative Process Privilege; and 3) the Work Product Doctrine. The Respondents filed a *Response to Solicitor’s Notice/Assertion of Privilege Regarding Motion to Compel*, asserting the Respondents’ substantial need, a lack of harm to informer(s), and an alternative request for an *in camera* review “of the redacted portions of the documents at issue in order to determine whether or not to order production to Respondents.”

The Administrator next filed a *Motion for Summary Decision*, to which the Respondents responded generally and with an affidavit of Respondent Redfield. I subsequently issued an *Order Regarding Discovery*, denying the Administrator’s *Motion for Summary Decision* without prejudice, and the Respondents’ *Motion to Compel*, and ordering an *In Camera* Review of the Administrator’s Privilege Log Documents. The Administrator provided the privilege log describing in further detail those documents identified in the Wage and Hour investigation file, along with a Declaration of Administrator David Weil in Support of Formal Claim of Privilege. Subsequently, the Administrator submitted a *Renewed Motion for Summary Decision* noting that discovery had closed and that no issues of material fact were in dispute. In its responsive motion, the Respondents asserted, *inter alia*, that the motion for summary decision was not ripe for review since the *in camera* review had yet to be conducted.

Upon conducting an extensive review of the *in camera* documents, I found that the entirety of the requested documents fell under at least one or more of the privileges asserted by the Administrator, including the deliberative process, informant’s, work product, attorney-client, and investigative privileges. The parties were given time to respond to the Order or supplement their submissions regarding the Administrator’s Renewed Motion for Summary Decision. On April 6, 2018, the Respondents filed a Supplemental Response to Administrator’s Motion for Summary Disposition. The Administrator did not submit a supplemental response. The Motion is now ripe for review.

ISSUES

The Administrator seeks summary decision on the following issues:

1. Whether the Contract at issue was covered by the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 6701 et seq., and its implementing Regulations, 29 C.F.R. Supt. A, Pt. 4;
2. Whether Respondents are the "party responsible" for violations occurring on the Contract;
3. Whether Respondents violated the SCA;
4. If violations of the SCA are found, the amount of Respondents' liability; and
5. If violations of the SCA are found, whether "unusual circumstances" exist, preventing Respondents from being automatically debarred from government contracts for a three-year period.

(Administrator's Brief at 2).

I have based the following findings of fact and conclusions of law on my analysis of the entire record, with due consideration accorded to the arguments of the parties, supporting exhibits, applicable statutory provisions, regulations, and relevant case law. I have carefully considered all of the evidence in this case, including that not specifically mentioned in this Order.

FINDINGS OF FACT

Background / Evidence

In support of its Renewed Motion for Summary Decision, Administrator also submitted 22 exhibits as supporting evidence:

1. Deposition of William Redfield, taken May 8, 2015 (Government Exhibit ("GX") 1);
2. List of Government Contracts (GX 2);
3. April 29, 2013 Request for Equitable Adjustment (GX 3);
4. September 25, 2008 letter from Gertrude Colbert, Contracting Officer, Department of the Army, to ITS (GX 4);
5. E-mail string, last dated March 5, 2013 from Redfield to Trawick (GX 5);
6. June 25, 2013 letter from Kevin Day, Department of the Army (GX 6);
7. August 6, 2013 email from Redfield to Trawick (GX 7);
8. August 30, 2013 letter from John M. Bates, Wage and Hour, to Rana Steele, Contracting Officer, US Army, MICCC (GX 8);
9. September 3, 2013 letter from Karen Garnett, District Director, Louisville District Office, Wage and Hour, to Redfield (GX 9);

10. September 16, 2013 letter from Redfield to Bates (GX 10);
11. September 19, 2013 letter from Bates to Redfield (GX 11);
12. Email string, last dated September 27, 2013, from Redfield to Rana Steele (GX 12);
13. Respondents' Responses to Interrogatories, Requests for Production and Requests of Admission (GX 13);
14. Administrator's Responses to First Consolidated Interrogatories and Requests for Production/Admissions to United States Department of Labor (GX 14);
15. November 5, 2009 Request for Proposal No. W91248-10-R-0002 from Angela Jacobs to Redfield (GX 15);
16. Contract No. W91248-10-C-0012 (signed January 20, 2010) (GX 16);
17. Modification of Contract No. W91248-10-C-0012 (signed January 24, 2011) (GX 17);
18. Modification of Contract No. W91248-10-C-0012 (signed December 14, 2011) (GX 18);
19. Predecessor Contract No. W91248-07-C-0004 (signed January 23, 2007) (GX 19);
20. Case Narrative (GX 20);
21. Emails between Redfield and Trawick re: backwage calculations, with attachments to emails (GX 21); and
22. April 10, 2013 email from Trawick to Redfield, with attachments (GX 22).

In opposition to the Administrator's motion for summary decision, the Respondents relied on its own responsive motions accompanied by two affidavits by Mr. Redfield, one sworn on November 16, 2015 (Redfield Affidavit ("RA") 1) and the second sworn on March 30, 2018 (RA 2). Although considered in their entirety, I have only summarized the portions of the evidence material to this decision.

William F. Redfield, Jr.'s Affidavits

As stated above, Mr. Redfield submitted two affidavits in opposition to the Administrator's Motion. In his affidavits, Mr. Redfield provided that he was the President, Chief Executive Officer, and managing member of ITS. (RA 1 at 1; RA 2 at 1). He stated that his principal office was in Paducah, Kentucky, which is about 84 miles from where the Contract was performed in Ft. Campbell. (RA 1 at 2; RA 2 at 1). According to Mr. Redfield, ITS was primarily involved with businesses unrelated to this Contract. (*Id.*).

Mr. Redfield explained that the contract at issue,¹ Contract W91248-10-C-0012f, was for Vehicle Registration and Visitor Center services at Ft. Campbell, Kentucky. (RA 1 at 2; RA 2 at 2). He affirmed that the Contract was awarded to ITS for an initial term and all three option years exercised from February 1, 2007 until January 21, 2010. The Contract was then re-awarded to ITS as an 8(a) Sole Source for an initial term with four option years exercised. Therefore, the second time the Contract was awarded, it was set to run from February 1, 2010 to

¹ To clarify at the outset, the Contract at issue involved the provision of Vehicle Registration and Visitor Center services at Ft. Campbell, Kentucky from February 1, 2010 until January 31, 2014. As this was simply a re-award of a previously existing contract, most of relevant discussions, proposals, and timeframes are made in relation to the predecessor contract, which ran from February 1, 2007 until January 2010. The violations claimed in this action, however, are solely those occurring under the re-awarded Contract.

January 31, 2015; however, it was shortened by one year beginning on January 31, 2014 due to sequestration. (*Id.*).

Mr. Redfield then provided the following narrative as to how the benefits in the Contract were derived:

[t]hat back in 2006-2007, at the time ITS initially provided a cost proposal for the sole source contract, ITS simply made a mistake in calculations and only applied the partial application of SCA requirements regarding benefits. ITS relied to a great extent upon information received from the Contracting Officer Technical Representative [“COTR”] and the Contracting Officer [“CO”] and the Defense Contracting Auditing Agency [“DCAA”], all of whom led ITS to believe that the cost proposal submission for the 8(a) sole source opportunity was in compliance with the law.

(RA 1 at 2; RA 2 at 2). Mr. Redfield then inserted a copy of an email exchange between himself and Kevin Day, the CO, from January 2007, where Mr. Redfield explained the figures in his costs proposals. (RA 1 at 2-4; RA 2 at 2-3). Mr. Redfield pointed out that that “[d]uring this email exchange, there was no mention of the SCA Benefits being considered in any of the costs elements or multiple cost proposals requested by the Contracting Officer.” (RA 1 at 4; RA 2 at 3). He added that the prior award was also reviewed and approved by the Defense Contract Audit Agency, with which he had over 35 email exchanges with between October 2006 and December 2006 and yet no mention of SCA benefits. (*Id.*). In his affidavits, Mr. Redfield swore that “ITS was unaware of its partial application to account for the SCA-required fringes,” and therefore, once ITS was awarded the Contract, it “did not receive the compensatory fringe benefit funds from the Department of the Army for distribution to full and part-time employees for Health and Welfare, vacation and holiday pay.” (*Id.*). Mr. Redfield asserted that this “lack of accounting for fringe benefits” was also undetected by CO Kevin Day, the Department of the Army Contracting Office, and the DCAA. (RA 1 at 4; RA 2 at 3-4). As a result, “ITS was under the erroneous assumption that vehicle registration cost and technical submission was compliant.” (RA 1 at 4).

Mr. Redfield noted that on January 8, 2013, the Department of Labor initiated its investigation against ITS and that ITS cooperated fully throughout the investigation. (RA 1 at 4; RA 2 at 4). Following the investigation, Mr. Redfield acknowledged that the investigative findings “showed that 41 employees were due back wages (Health & Welfare, Vacation & Holiday Pay) the amount of \$193,693.64.” (*Id.*). On April 29, 2013, ITS filed a claim with the Army to request equitable adjustment since it had never received compensatory funding for these benefits. (*Id.*). This request was denied by CO Kevin Day on June 25, 2013. (RA 1 at 4-5; RA 2 at 4). According to Mr. Redfield, CO Kevin Day blamed DCAA for missing the error and SBA and DOL for not being on the front-end of contract review “to avoid these types of things.” (RA 1 at 5; RA 2 at 4-5).

On July 3, 2013, the Department of Labor investigator, Mr. Trawick, informed Mr. Redfield that the claim would be dropped “due to (a) the lack of funding from the Army, and (b) the lack of malice or willful intent by ITS or Mr. Redfield.” (RA 1 at 5; RA 2 at 5). However, on February 7, 2014, the current claim was nonetheless initiated. (*Id.*). Mr. Redfield

acknowledged that the Department of Labor “seeks payment and also seeks to debar ITS which at this time holds no significance since ITS has had to close its doors.” (RA 2 at 5). Mr. Redfield asserted that “ITS has pled lack of funding and equitable defenses (estoppel, failure of consideration, laches, and waiver).” Further, in response to debarment, “ITS has pled unusual circumstances, the fact that any SCA violation was inadvertent “a mistake in calculations”, not willful, not deliberate, or the result of culpable neglect.” (RA 1 at 5-6). Mr. Redfield cited to ITS’ reliance on Mr. Trawick’s comments as well as its “exceptional compliance history, cooperation with the underlying investigation, and the fact that Respondents’ liability depends upon the resolution of *bona fide* legal issues of doubtful certainty.” (RA 2 at 6).

Mr. Redfield also expressed his discontent with ITS’ inability to obtain privileged documents from the Department of Labor, including investigator’s notes and recommendations, which has caused ITS to “feel[] that it was duped by both the Army (which received a windfall) and by the DOL investigator (who gave misleading information, guidance and direction regard [with] regard [to] the various DOL Letters of notification).” (RA 2 at 6). Additionally, Mr. Redfield reiterated how he had explained the calculations that went into the initial bid to CO Day and that these calculations were reviewed over the course of 35 plus emails by CO Day and his office as well as the “the ultimate federal auditing agency, Defense Contracting Auditing Agency (DCAA) before the Contract was awarded and then re-awarded to ITS.” (RA 2 at 6). Further, each time the Contract was modified, the scope of work was altered and a new cost proposal would be submitted to the CO Office at Fort Campbell for approval. (*Id.*). According to Mr. Redfield, “[i]f the error in the bid had been obvious then ITS’ bid would not have survived through multiple layers of reviews and audits (estimated over 18 different times via multiple cost proposals from 2007 to 2010).” (*Id.*).

Mr. Redfield relayed that due to the significant reduction in the scope of work, the Contract became unprofitable and ITS had to use profits from other contracts to compensate its employees with benefits and bonuses. (RA 2 at 7). Early in the performance of the Contract, ITS realized “that Standard Intermittent Part-time Employee’s (SIPes) that were above twenty-two hours per week and Flexible Intermittent Part-time Employee’s (FIPes) that were below twenty-two hours per week needed additional health coverage because the majority of the employees had small children.” (*Id.*). As a result, in order “to help these SIPes and FIPes, ITS paid for supplemental insurance coverages at 50% and 25% respectively.” (*Id.*).

On July 31, 2015, ITS terminated all corporate staff and officially closed its doors. (RA 2 at 8). Mr. Redfield averred that this was the result of the denial of equitable adjustment by the Army and “the outstanding claim/violation against ITS (due to a mistake in calculations in the partial application of SCA Benefits[]) and ITS’ ability to pursue any new Federal Government Contract Opportunities.” (*Id.*).

Finally, attached to the Respondent’s August 15, 2017 Affidavit were four exhibits:

Exhibit A: A timeline of events titled “Paths Taken by ITS LLC to Resolve SCA Error in Cost Proposal Calculations”

Exhibit B: A summary showing a comparison of the Health & Welfare portion of the contract with the SCA benefit versus without the SCA benefit;

- Exhibit C: The original cost proposal as submitted with no column labelled Health & Welfare; and
- Exhibit D: Resubmissions after the DOL investigation started with added columns for Health & Welfare which were accepted and paid by the Army from that point forward.

William F. Redfield, Jr.'s Deposition

Background

Mr. Redfield also testified by deposition on May 8, 2015. (GX 1). Mr. Redfield graduated from the University of Tennessee Chattanooga with a degree in Chemical Engineering in 1987. (GX 1 at 6). Thereafter, he taught at his alma mater as an adjunct teacher until he moved to California to work at Arco Chemical Corporation. (GX 1 at 7-10). In July 1990, Mr. Redfield took a job at Paducah Gaseous Diffusion Plant in Paducah, Kentucky where he obtained a top secret (Q) clearance for his work with the Air Force. (GX 1 at 10-11). Around 1995, Mr. Redfield left to work as a site manager for a subcontractor, Systematic Management Services. (GX 1 at 12-13). As a site manager, Mr. Redfield managed the environmental projects, providing oversight and support with the Department of Energy. (GX 1 at 13). In 1999, Mr. Redfield started his own business, ITS. (GX 1 at 13).

In April 2000, ITS obtained its 10-year 8(a) status as a certified small disadvantaged business with the Small Business Administration. (GX 1 at 14-15). Through this program, ITS was able to obtain sole-source government contracts without going through the competitive bidding process. (GX 1 at 15-16). Once certified, ITS started to bid on government contracts. (GX 1 at 25). While he never read them, Mr. Redfield was aware of the extensive requirements for government contracts contained in the Federal Acquisition Regulations ("FAR") as well as the DEARS requirements for Department of Defense contracts. (GX 1 at 22, 25-27). When ITS would bid on a government contract, Mr. Redfield would review the technical documents but delegate the acquisition work to his staff. (GX 1 at 26-27). Further, while he could not recall which contracts were subject to certain regulations, Mr. Redfield was aware that the requests for proposals would often reference regulations that would apply to the contracts. (GX 1 at 28).

For example, Mr. Redfield was unaware that the "CAT project" with the USDA Forest Service in May 2004 or the Wounded Warrior Shuttle Services contract with the Army at Fort Campbell in September 2008 were both contracts that ITS engaged in that purported to be subject to the SCA. (GX 1 at 28-32, 35-37). Rather, Mr. Redfield believed that the initial 2007 contract providing vehicle registration services to the Army at Fort Campbell was their first contract subject to the SCA. (GX 1 at 22, 29-32). Mr. Redfield testified that like the other contracts, the Wounded Warrior Shuttle services contract included fringe benefits, but not benefits in compliance with the SCA. (GX 1 at 37). He explained that the fringe benefits were derived from its previous proposals, meaning that "[t]he same mistake that was made or perpetuated from the original award through this contract, through that contract, and no one ever said anything, and we never identified it." (*Id.*). Regardless, Mr. Redfield admitted that, as CEO, the technical proposals were ultimately his responsibility. (GX 1 at 27-28). When presented with the award letter from the Wounded Warrior contract, Mr. Redfield acknowledged that it clearly

states that the SCA applies to the contract, and added that the award letter for the vehicle registration contract contained the same provision. (GX 1 at 36-37).

Vehicle Registration Services at Fort Campbell

Around August or September 2006, ITS was approached by the government about providing registration services at Fort Campbell. (GX 1 at 19-20). The Respondents reviewed the proposal and submitted its bid based on the cost proposal ITS had been using for the previous six years. (GX 1 at 19-20). Over the next several months, ITS went back and forth with the Fort Campbell contracting office, negotiating the scope of the contract and submitting new cost proposals. (GX 1 at 22-23). However, ITS never mentioned the SCA in any of its submitted cost proposals, and Mr. Redfield believed that this was the first contract ITS had ever entered into that was subject to the SCA. (GX 1 at 22-23). After its review with the Fort Campbell contracting office, ITS started negotiating with the ultimate approving agency, the Department of Defense Auditing Agency (“the DCAA”), about its cost proposals. (GX 1 at 23-24, 66-67). Mr. Redfield recalled the DCAA asking very general questions, such as what fringe benefits did ITS offer, how these were calculated, etc. (*Id.*). ITS provided these calculations and rates to the DCAA through spreadsheets, which outlined the categories, employees, rates, benefits, fringe, vacation, Social Security, taxes, and fees. (*Id.*). All of these calculations were “the same rubber stamp that they used across the board” from the cost proposals ITS had used for other contracts in the preceding six years and, therefore, did not include references to the SCA. (GX 1 at 22-24).

Throughout this process, and under the multiple layers of review, ITS was not informed that its cost proposals did not comply with the SCA fringe benefit requirements. (GX 1 at 23-24, 37, 48). However, at no time during this process was ITS told by anyone in the federal government that the SCA did not apply to the contract or to the payment of fringe benefits to part-time employees. (GX 1 at 38-41). Mr. Redfield acknowledged that when he was corresponding with the Army contracting officer, Kevin Day, in November 2006, Mr. Day attached several documents, including the text of the SCA, for his review in the process of preparing ITS’ proposals. (GX 1 at 43-46). Upon receiving these documents, Mr. Redfield recalled that he checked with his staff to confirm that they were complying with the applicable regulations but stated that there was “no way for [him] to identify that [ITS] [was] not following that.” (GX 1 at 45-46). By the time of his deposition, however, Mr. Redfield admitted that he has read and is “very [f]amiliar now” with the SCA requirements for fringe benefits. (GX 1 at 47-49). He explained that, in the time since the violations were brought to his attention, he has “read several of the presentations where they tell you how to [calculate the benefits],” and how he also presented to Mr. Day in ITS’ Request for Equitable Adjustment “the difference between what was compliant and what was not compliant,” and how “[Respondents and the auditing agencies] should have noticed the difference between the two.” (GX 1 at 47-49). Mr. Redfield also testified that once the violations were brought to his attention through the Wage and Hour investigation in February 2013, he made the corrections and carried out the remainder of the contract in compliance with the SCA requirements. (GX 1 at 40-41).

Wage and Hour Investigation and Request for Equitable Adjustment

Early in 2013, Mark Trawick, with the Department of Labor's Wage and Hour division, began an investigation into ITS for its failure to completely pay fringe benefits to its part-time employees on the Contract. (GX 1 at 40-41, 52-53). Through his investigation and with the assistance of Mr. Redfield, Mr. Trawick ascertained that the total amount of benefits due from February 1, 2010 to the beginning of 2013 was around \$193,693.64. (GX 1 at 51-53). On April 10, 2013, Mr. Trawick presented Mr. Redfield with a compliance and payment agreement detailing the total amount of unpaid fringe benefits. (GX 1 at 53-54). Thereafter, Mr. Redfield and Mr. Trawick discussed an alternative payment plan where the outstanding amount could be paid in installments as opposed to a lump sum. (GX 1 at 54-55).

With the understanding that the fringe benefits required by the SCA worked as a "pass-through fee that [the contractor] never realize[s] any benefit out of [] at all, [and that] it just goes to the employees," Mr. Redfield sought to obtain the funds that he never received from the Department of the Army to pay for these past-due benefits. (GX 1 at 54-57). Accordingly, on April 29, 2013, Mr. Redfield submitted a Request for Equitable Adjustment to Mr. Day in order to obtain from the Army compensation for the amount determined by the Wage and Hour investigation along with interest. (GX 1 at 54-57, 68; *see also* reference to GX 3). Before Mr. Redfield heard back from the Army, he spoke with Mr. Trawick over the phone and was told that the government was not going to pursue ITS for the unpaid benefits. (GX 1 at 64-65). Then, by letter dated July 25, 2013, Mr. Day denied ITS' Request for Equitable Adjustment. (GX 1 at 69-70; *see also* reference to GX 6). Shortly thereafter, on August 6, 2013, Mr. Redfield emailed Mr. Trawick to follow-up on their previous phone conversation about the investigation being dropped. (GX 1 at 70-71; *see also* reference to GX 7). However, within the next two months, Mr. Redfield received two letters from Wage and Hour representatives requesting that the outstanding funds be withheld from the remainder of ITS' contract with the Army. (GX 1 at 72-75; *see also* references to GX 8 and GX 9). After receiving these requests, Mr. Redfield, who believed that the case was being dropped due to lack of funds, spoke with Mr. Trawick who told him that the letters were just "formalities." (GX 1 at 81-84). Finally, while ITS' Request for Equitable Adjustment was denied on July 25, 2013, Mr. Redfield did not appeal the rejection to the Board of Contract Appeals within the 90 days specified by the denial letter or file a claim with the Court of Federal Claims within a year. (GX 1 at 78-81; *see also* reference to GX 6 at 2-3). Mr. Redfield contends that he is unable to pay the unpaid benefits found due. (GX 1 at 110).

STANDARD OF REVIEW

The standard of review for a motion for summary decision is essentially the same as the one used in Rule 56 of the Federal Rules of Civil Procedure, the rule governing summary judgment in the federal courts. *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-000006, slip op. at 6 (ARB Jan. 30, 2011). According to the Rules of Practice and Procedure for Administrative Hearings before the OALJ, an Administrative Law Judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law." 29 CFR § 18.72(a). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 248 (1986). A genuine issue exists when the nonmoving party produces sufficient evidence of a material fact that a fact finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party moving for summary decision² has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 477 U.S. 317, 325. The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson*, 477 U.S. at 257 (1986). In reviewing the request for summary decision, all of the evidence must be viewed in a light most favorable to the non-moving party. *See, e.g., Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

After reviewing the evidence and arguments offered by both parties, I have determined no such issue of material fact exists in this case. As such, I make the following conclusions of law based upon my analysis of the entire record, the arguments of the parties, and applicable regulations, statutes, and case law.

CONCLUSIONS OF LAW

The purpose of the SCA "is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment." 29 C.F.R. § 4.104(b). To that end, the SCA requires that all service employees be paid certain minimum monetary wages and fringe benefits, as established in each contract. 41 U.S.C. 6702(a)(1)-(2); 29 C.F.R. § 4.165.

I. Application of the Services Contract Act

The SCA requires payment of prevailing wage rates and fringe benefits to service employees employed on contracts to provide services to the federal government. 41 U.S.C. § 6703. In particular, the SCA provides a general rule about its application to federal service contracts:

- (a) In general. Except as provided in subsection (b),³ this chapter [41 USC §§ 6701 et seq.] applies to any contract or bid specification for a contract, whether negotiated or advertised, that—

² A judge may order summary decision sua sponte if the record establishes that there is no genuine dispute as to any material fact and one of the parties is entitled to a decision as a matter of law. 29 C.F.R. § 18.72(f)(3).

³ The following types of government service contracts are carved out from the general rule: (1) a contract of the Federal Government or the District of Columbia for the construction, alteration, or repair, including painting and decorating, of public buildings or public works; (2) any work required to be done in accordance with chapter 65 of this title [41 USCS §§ 6501 et seq.]; (3) a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect; (4) a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of

- (1) is made by the Federal Government or the District of Columbia;
- (2) involves an amount exceeding \$ 2,500; and
- (3) has as its principal purpose the furnishing of services in the United States through the use of service employees.

41 U.S.C. § 6702(a).

Recognizing that the SCA only applies to contracts where the principal purpose of the contract is the furnishing of services to the federal government through use of services employees, the Regulations provide a non-exhaustive list of the type of services that would be covered under the SCA. *See* 29 C.F.R. § 4.130. This list includes contracts where the principal purpose is to provide “[o]peration, maintenance, or logistic support of a Federal facility.” 29 C.F.R. § 4.130(a)(38).

On January 20, 2010, ITS was awarded the Contract to provide Vehicle Registration Administrative and Clerical Support for the U.S. Army at Fort Campbell, Kentucky. (GX 16; RA 1 at 2). The Contract was originally awarded for a base year with a period of performance running from February 1, 2010 until January 31, 2011. (GX 16; RA 1 at 2). Thereafter, the Government exercised its option periods to renew the contract until January 2015, although the final year was eliminated due to sequestration. (GX 16 at 1; GX 17 at 1; GX 18 at 1; GX 1 at 34-35; RA 1 at 2). The annual performance award for the base contract and each yearly option period was \$496,377.48. (*Id.*).

Based on the foregoing, the Contract was subject to the SCA. First, under the Contract, ITS was obligated to provide vehicle registration, administrative and clerical support to an entity of the federal government, the U.S. Army. Second, with the base contract award amounting to an annual award of \$496,377.48 (and each subsequent option year award matching that amount), the Contract clearly exceeded the \$2,500 threshold amount to fall under the Act. Finally, in providing vehicle registration, administrative and clerical support, the principal purpose under the Contract was for ITS personnel to furnish “services,” that is, to provide “[o]peration, maintenance or logistic support of a Federal facility.”

In light of the Respondent’s admissions to the material facts as stated above, (*See* RA 1 at 2; GX 1 at 34-35; GX 13 at 3-4), I find that there is no genuine dispute of material fact with regard to the application of the SCA to the Contract. I further note that the Respondents fail to make any argument as to why the SCA would not apply to the Contract. Therefore, in construing the facts in the light most favorable to the Respondents, I find that the Contracts falls within the SCA coverage.

1934 (47 U.S.C. 151 et seq.); (5) a contract for public utility services, including electric light and power, water, steam, and gas; (6) an employment contract providing for direct services to a Federal agency by an individual; and (7) a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. 41 U.S.C. § 6702(b). None of these exceptions are applicable or alleged by the Respondents to be applicable in this case.

II. Party Responsible:

Violations of the SCA shall render the “party responsible” liable for any underpayment of compensation to employees who engaged in the performance of a contract. 41 U.S.C. §6705(a); 29 C.F.R. § 4.187(a). The Regulations indicate that a party responsible encompasses “[a]n officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company.” 29 C.F.R. § 4.187(e)(1). The Regulations further explain:

In essence, individual liability attaches to the corporate official who is responsible for, and therefore causes or permits, the violation of the contract stipulations required by the Act, i.e., corporate officers who control the day-to-day operations and management policy are personally liable for underpayments because they cause or permit violations of the Act.

29 C.F.R. § 4.187(e)(3).

In addition to ITS, Mr. Redfield is the party responsible for any violations of the SCA by ITS. Not only was Mr. Redfield the President, Chief Executive Officer, and sole owner of ITS, but also the individual responsible for signing contracts and delegating responsibilities to others on behalf of ITS. (RA 2 at 1; GX 1 at 26, 91-92). While he may not have been “aware of every detail concerning the day to day activities and operations with respect to [the Contract],” as ITS’ managing member, Mr. Redfield, played a significant role in the negotiation of the contract and the development of the cost elements and proposals. (RA 2 at 1-4; GX 13 at 11-12). Mr. Redfield was also ultimately the representative who submitted the Contract proposal and signed the base contract and modification options on behalf of ITS. (GX 13 at 3). As a result, I find that there is no dispute of material fact that Mr. Redfield was actively engaged in the operations and compensation policy of ITS throughout the performance of the Contract, thereby making him a party responsible for the violations of the SCA. Accordingly, Mr. Redfield and ITS are jointly and severally liable for violations of the SCA in the performance of the Contract.

III. Violations of the Services Contract Act

The SCA requires employers to pay specified fringe benefits to service employees. 41 U.S.C. § 6703(2).61. The Regulations set forth the criteria for fringe benefits. 29 U.S.C. § 4.170-77.⁴ The base wages and fringe benefits applicable to employees working on contracts subject to the SCA are established by Wage Determinations. The Wage Determination identified and incorporated in the Contract as applying to the initial period as well as each of the subsequent modification option periods is No. 2005-2187 (GX 16 at 3, 49-58; GX 17 at 4-14; GX 18 at 4-17).

⁴ The requirements for the health and welfare category of fringe benefits are addressed at 29 C.F.R. § 4.175. The requirements for vacation fringe benefits and holiday fringe benefits are addressed at 29 U.S.C. §§ 4.172, 4.173 and 4.174.

In addressing compliance with the payment of both wage payments and fringe benefits, the SCA Regulations provide:

[t]he Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions.

29 C.F.R. § 4.165(a)(2). Then, with regard to fringe benefits, specifically, the SCA Regulations reiterate:

[a]s set forth in §4.165(a)(2), the Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees. Accordingly, in the absence of express limitations, the provisions of an applicable fringe benefit determination apply to all temporary and part-time service employees engaged in covered work. However, in general, such temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination which is proportionate to the amount of time spent in covered work.

29 C.F.R. § 4.176(a).

The Regulations state that fringe benefits required under the SCA “shall be furnished, separate from and in addition to the specified monetary wages” required. 29 C.F.R. § 4.170(a). The employer “may not include the cost of fringe benefits or equivalents furnished as required [by the Act] as a credit toward the monetary wages it is required to pay under [the Ac].” 29 C.F.R. § 4.167. An employer cannot offset monetary wages paid in excess of the required wages against its fringe benefit obligation. 29 C.F.R. § 4.170(a); *see also* 29 C.F.R. § 4.177(a). However, an employer may satisfy its fringe benefit obligations by providing “equivalent or differential payments in cash” to its employees, though it “must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.” 29 C.F.R. § 4.170(a); *United Kleenist Organization*, ARB Case No. 00-042 2002 WL 181779 (January 25, 2002).

As outlined below, the results of the Wage and Hour Investigation revealed that ITS was not paying health and welfare, holiday, and vacation benefits to certain part-time employees. (GX 20). At no point have Respondents contested the part-time employees' entitlement to these fringe benefits under the SCA or that ITS failed to pay these fringe benefits. Rather, Respondents have continuously maintained that the failure to completely comply with the SCA requirements was a mistake, explaining that the cost proposals that were ultimately approved for the Contract were based on metrics that were not only used in the predecessor contract for vehicle registration services at Fort Campbell, but also for all of ITS' previous government contracts, none of which considered SCA requirements. (*See e.g.*, GX 1 at 37; GX 3 at 7-8; GX 10 at 1; RA 1 at 2, 4; RA 2 at 2, 3, 7).

1. Health and Welfare Benefits Violations

The Respondents failed to pay its part-time employees health and welfare benefits. A contractor has an affirmative obligation to provide its employees with health and welfare benefits under the SCA and can meet this obligation by providing a “*bona fide*” plan (as defined in 29 C.F.R. § 4.171), equivalent cash compensation, or a combination of the two. 29 C.F.R. § 4.170(a)-(b). In particular, 29 C.F.R. § 4.172 states that “[if] prevailing fringe benefits for insurance or retirement are determined in a stated amount, and the employer provides such benefits through contribution in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides.” The Regulations further state that all employees who work under a contract are entitled to receive benefits for all hours they work “up to a maximum of 40 hours per week and 2,080 (i.e., 52 weeks of 40 hours each) per year.” (*Id.*).

Pursuant to Wage Determination No. 2005-2187, all occupations are to receive health and welfare benefits totaling \$3.50 per hour or \$140.00 per week or \$606.67 per month for the initial period of the Contract. (GX 16 at 55). During the option periods, the revisions to Wage Determination No. 2005-2187 raised the hourly rate from \$3.35 to \$3.50, effective June 15, 2010 (GX 17 at 11), to \$3.59, effective June 13, 2011 (GX 18 at 11), and to \$3.71 effective June 13, 2012. Again, the terms of the Contract between ITS and the Army do not alter the health and welfare benefits due to part-time employees. (*See* GX 16; GX 17; GX 18). Thus, ITS was obligated to pay its part-time employees health and welfare benefits in conformance with the SCA and Wage Determination No. 2005-2187.

In the Request for Equitable Adjustment submitted on behalf of ITS to the Army, Mr. Redfield admitted that such requirements were only “partially” applied in the Contract and that “ITS simpl[y] lacked the understanding and had no past experience to rely on to correct the SCA non-compliance.” (GX 3 at 7). Mr. Redfield explained that ITS offered fringe benefits to part-time employees on an elective basis and that most part-time employees chose not to opt-in. (*Id.*). However, through the investigation, Mr. Redfield became aware of these requirements and admitted that:

ITS now understands that these individuals (military soldier wives or retirees along with part-time employees) are still eligible and are required by law to receive the SCA Fringe Benefits of Health & Welfare per of \$593.60 per Full-time Employee per month and \$148.40 for a Part-time employee at 40 hour per month regardless.

(GX 3 at 8). Consistent with this admission along with the results of the Wage and Hour investigation, Exhibit C to RA 1 shows that the cost elements for the predecessor contract for vehicle registration service, which were the cost elements used when the Contract was re-awarded, do not account for health and welfare benefits for part-time employees. (GX 20 at 2; RA 1 at Exhibit C). Further, at his deposition and in his affidavits, Mr. Redfield has repeatedly explained that the cost elements used in the Contract were based on previous cost proposals that did not take into account the SCA requirements, therefore, resulting in the SCA non-compliance.

Finally, once the violations were brought to Mr. Redfield's attention through the Wage and Hour investigation, Mr. Redfield assisted Mr. Trawick in providing the payroll records of ITS' part-time employees and calculating the cash equivalencies required under the applicable wage determination less the amount of fringe benefits actually paid by ITS in order to determine ITS' Contract deficiencies. (GX 21).

Accordingly, upon a comprehensive review of the evidence of record, I find that there is no dispute of material fact that ITS failed to pay the full amount of health and welfare benefits to its part-time employees in performance of the Contract, thus violating the SCA.

2. Holiday Pay Violations

Under the SCA, the Respondents were also required to provide either paid holiday time or payment in lieu of such time to both its full-time and part-time employees. *See* 29 C.F.R. §§ 4.174, 4.176. When a contract lists specific holidays that will be paid for, "an employee who performs any work during the workweek in which a named holiday occurs is entitled to the holiday benefits," unless an applicable wage determination says otherwise. 29 C.F.R. § 4.174(a)(1). Again, for part-time employees, in particular, the Regulations provide that "such temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination which is proportionate to the amount of time spent in covered work." 29 C.F.R. § 4.176(a).

Here, Wage Determination No. 2005-2187 provides:

HOLIDAYS: A minimum of ten paid holidays per year, New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with the pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174).

(GX 16 at 56; GX 17 at 11; GX 18 at 14). Further, the Contract terms do not limit or alter this provision. Therefore, any of ITS' employees who worked during the week of one of the aforementioned holidays was entitled to a proportional share of the paid holiday based upon the hours he or she worked during the workweek of the holiday.

The results of the Wage and Hour investigation show that ITS failed to pay 33 employees holiday pay as required under the foregoing rule. (GX 3 at 3). Again, the Respondents repeatedly admit that part-time employees were not provided complete fringe benefits in compliance with the SCA. (*See e.g.*, GX 1 at 37; GX 3 at 7-8; GX 10 at 1; RA 1 at 2; RA 2 at 2, 3, 7). As a result, I find that there is no genuine dispute of material fact that the Respondents violated the SCA by failing to pay 33 employees holiday pay in accordance with the SCA.

3. Vacation Pay Violations

Lastly, the Respondents were obligated to provide paid vacation time, or payment made in lieu of such time, to both full-time and part-time employees whose vacation time had vested. *See* 29 C.F.R. §§ 4.173, 4.176. Vacation time only vests for employees who have worked for the contractor for at least a year. 29 C.F.R. § 4.173(c)(1). Thereafter, the “required vacation must be given or payment made in lieu thereof before the next anniversary date, before completion of the current contract, or before the employee terminates employment, whichever occurs first.” 29 C.F.R. 4.173(c)(2).

Here, Wage Determination No. 2005-2187 provides:

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 8 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility.

(GX 16 at 56; GX 17 at 11; GX 18 at 14). As with the other fringe benefits, the Contract terms do not limit or alter this provision. Therefore, Respondents were obligated to provide paid vacation time or substituted payment for any employee, whether full-time or part-time, whose vacation time had vested.

The results of the Wage and Hour investigation show that ITS failed to pay six employees vacation pay in accordance with the SCA. (GX 3 at 3). Additionally, the Respondents repeatedly admit that part-time employees were not provided complete fringe benefits in compliance with the SCA (*See e.g.*, GX 1 at 37; GX 3 at 7-8; GX 10 at 1; RA 1 at 2; RA 2 at 2, 3, 7). Therefore, I also find that there is no genuine dispute of material fact that the Respondent violated the SCA by failing to pay six employees the vacation pay which they were due under the SCA.

IV. Amount of Fringe Benefits Owed

The Administrator claims that the Respondents are jointly and severally liable in the amount of at least \$193,693.64 for the payment of fringe benefits owed to the 41 employees for the contract period between February 1, 2010 and January 31, 2013. (*Administrator’s Renewed Motion for Summary Decision* at 18). Specifically, Mr. Trawick, with the help of Mr. Redfield, found that ITS failed to pay Health and Welfare Benefits to 41 employees in the amount of \$173,127.53, Holiday Pay to 33 employees in the amount of \$13,521.99, and Vacation Pay in the amount of \$7,044.12, for a sum total of \$193,693.64 in fringe benefit violations. (GX 20 at 2). Again, this sum was derived from the calculations that Mr. Trawick determined represented the deficiencies for the Contract based on hours and payments provided by Mr. Redfield himself. (GX 20; GX 21; GX 22). The Respondents do not appear to challenge⁵ the calculations or even

⁵ In further defense of their position that they should not be liable for the outstanding amounts due, the Respondents aver that “ITS has pled the lack of funding and equitable defenses (estoppel, failure of consideration, laches, and

the amounts claimed, rather, they fault the Army for failing to provide them with the funds to cover these costs through the Respondents' request for equitable adjustment. (RA 1 at 5; RA 2 at 4-5; GX 1 at 54-57, 68). As pointed out by the Administrator, however, the Respondents' failure to obtain funds from the Army ultimately stemmed from the Respondents' failure to account for the fringe benefits in the Contract.⁶

Therefore, I find that the calculations offered by the Administrator are based on the evidence of record, reasonable inferences, and the applicable regulations. Further, I note that Mr. Redfield played a substantial role in contributing to these calculations and arriving at these numbers. Accordingly, I find that the Administrator has carried its burden of establishing the amount of fringe benefits owed by the Respondents on the Contract. As a result, the Respondents are jointly and severally liable for the payment of Health and Welfare Benefits to 41 employees in the amount of \$173,127.53, Holiday Pay to 33 employees in the amount of \$13,521.99, and Vacation Pay in the amount of \$7,044.12, for a sum total of \$193,693.64 in fringe benefit violations.

V. Debarment

Under the SCA, "any person or firm found ... to have violated the Act shall be declared ineligible to receive Federal contracts unless the Secretary recommends otherwise because of unusual circumstances." 29 C.F.R. § 4.188(a); 41 U.S.C. § 6706. The existence of "unusual circumstances" is determined on a case-by-case basis, "in accordance with the particular facts present." 29 C.F.R. § 4.188(b)(1). The Secretary's discretion to grant such relief is constrained, making "unusual circumstances" a very limited exception to an otherwise strict statute. *See* 29 C.F.R. § 4.188(b)(2). Debarment for a violation is a severe penalty, but Congress intended for it to be the rule rather than the exception. *See Summitt Investigative Serv., Inc. v. Herman*, 34 F.Supp. 2d 16, 19 (D.D.C. 1998); *see also Vigilantes, Inc. v. U.S. Dep't of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992) ("only the most compelling of justifications should relieve a violating contractor from that sanction"). "Debarment is designed to break down a chain of non-compliance and to force employers to take the labor regulations seriously" by restricting the award of government contracts to responsible bidders. *Hugo Reforestation, Inc.*, ALJ No. 1997-SCA-20, ARM No. 99-003, slip op. at 13 (ARB Apr. 30, 2001); 29 C.F.R. § 4.188(b)(6). The relevant Regulations further provide that negligence per se does not constitute an unusual circumstance and that a contractor cannot avoid debarment by remaining ignorant of its legal

waiver)." (RA 2 at 5). As the Respondents have merely recited a laundry list of defenses with no support or developed argumentation, I find these claimed defenses waived. *See Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972, 979 (6th Cir. 2000) (finding that "even 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" (citing *United States v. Layne*, 192 F.3d 556, 566-67 (6th Cir. 1999), cert. denied, 529 U.S. 1029, 146 L. Ed. 2d 330, 120 S. Ct. 1443 (2000) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997))).

⁶ I also note that although the Respondents attempted to pursue the Army for these funds through its Request for Equitable Adjustment, once the Request was denied, the Respondents failed to appeal the decision to the Board of Contract Appeals or file a claim in the United States Court of Federal Claims as outlined by the denial letter. (GX 1 at 78-81; *see also* reference to GX 6 at 2-3). Thus, the lack of funds from the Army were a matter of dispute subject to an alternative proceeding and do not serve to excuse the Respondents for their violations. Similarly, any claim that the Respondents did not pursue these available courses of action because of their reliance on Mr. Trawick's alleged statements that the Department of Labor would dropping this investigation is belied by the evidence and irrelevant to this proceeding.

responsibilities or by shifting responsibility for compliance to subordinate employees. 29 C.F.R. § 4.188(b)(4),(5), and (6). Relief from debarment can only be granted in cases where the violation is shown to have been minor and inadvertent, or where debarment would be “wholly disproportionate to the offense.” 29 C.F.R. § 4.188(b)(2).

Since debarment is presumed for SCA violations, the violator bears the burden of establishing the existence of “unusual circumstances.” 29 C.F.R. § 4.188(b)(1). In order to show “unusual circumstances,” the violator must establish the “absence of aggravating factors and the presence of mitigating factors.” *See* 29 C.F.R. § 4.188(b)(3)(i-ii); *Dantran, Inc. v. U.S. Dept. of Labor*, 171 F.3d 58 (1st Cir. 1999); *Karawia v. U.S. Dept. of Labor*, 627 F.Supp.2d 137 (S.D.N.Y. 2009). These factors result in a three-part test, and a violator must satisfy all stages of the test to be eligible for relief from debarment. *Id.* at 146. Failure at any point in the test ends the analysis without the need to consider the remaining steps. *Id.*

The first step of the “unusual circumstances” test concerns the violating contractor’s culpability, providing:

where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

29 C.F.R. § 4.188(b)(3)(i). If the contractor cannot satisfy part one of the test, it cannot avoid debarment. *Integrated Resource Management, Inc.*, ARB No. 99-119, PDF at 4-5 (June 27, 2002). Part two of the test requires that the violator 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). If the violator satisfies both parts one and two, the factors in part three of the test must be considered:

Where the prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including, whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

Id. Here, the Respondents are unable to meet the first part of the test. In *Integrated Resource Management, Inc.*, the Board found culpable negligence under part one of the test where the contractor failed to read the SCA provisions of the contract. The Board stated that:

Because the SCA requirements were plain from the face of IRM's contract, Barnes was at least culpably negligent in failing to read and perform them. As we have observed, 29 C.F.R. § 4.188(b)(1) provides that 'negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract. . . .' do not establish 'unusual circumstances.'

Id., PDF at 6. Because the contractor could not satisfy the first part of the test, the Board stated that it did not need to consider the second and third prongs of the test and stated that it would be improper to do so. *Id.*

In this case, I find that there is no dispute of material fact that the Respondents' conduct constituted culpable neglect. From the evidence of record, it is likely that the Respondents have violated the SCA on numerous occasions. The Respondents have consistently traced their "mistaken non-compliance" to their reliance on cost elements used in previous ITS contracts. The Respondents attempt to use this reason to show that their non-compliance was an "inadvertent (mistake in calculations), not willful, deliberate, or the result of culpable neglect." (RA 2 at 5-6). However, what this really shows is that while the Respondents did not specifically intend to violate the SCA, they also did not take the necessary (if any) steps to ensure compliance either. Instead, the Respondents continued to utilize a compensation practice for over a decade that violated the SCA. While the majority of ITS' contracts were not subject to the SCA, the evidence suggests that there were several contracts, including the 2004 CAT project, the 2008 Wounded Warrior shuttle services contract, and the 2007 Vehicle Registration predecessor contract, that ITS performed prior to this Contract that were subject to the SCA, and thus, likely implemented these same violative compensation practices.

Further, I am not persuaded by the Respondents argument that their non-compliance was an inadvertent mistake. At his deposition, Mr. Redfield acknowledged that the request for proposals expressly stated that the SCA applied to the prospective contract and that the contracting officer, Mr. Day, purported to forward the text of the SCA to Mr. Redfield during the negotiation period. (GX 1 at 43-46). However, as his defense, Mr. Redfield claims that there was "no way for [him] to identify that [ITS] [was] not following that" (GX 1 at 45-46) and that "ITS simpl[y] lacked the understanding and had no past experience to rely on to correct the SCA non-compliance." (GX 3 at 7). As outlined above, the Respondents' violations stem from the fact that they failed to completely account for fringe benefits of part-time employees by not providing them the same level of benefits that full-time employees were provided. As repeated throughout this decision, the SCA expressly states, in unambiguous language, that "[t]he Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees." 29 C.F.R. §§ 4.165(a)(2), 4.176(a). Therefore, the Respondents' practice of providing fringe benefits to its full-time employees while only offering the option of fringe benefits to part-time employees (without the option of a cash alternative) was clearly in violation

of these provisions. Thus, the Respondents' non-compliance was not the result of a mistake or a lack of understanding of a complex or ambiguous calculation or procedure, rather, it was a simple failure to read and implement the applicable Regulations.

Mr. Redfield has demonstrated throughout this proceeding that he is anything but an incompetent or helpless contractor. On the contrary, Mr. Redfield has shown to be a motivated and successful entrepreneur with an extensive history working with the federal government, both before and during his time at ITS. In fact, the majority of ITS' work was through federal contracts. Thus, even if these contracts were not subject to the SCA specifically, Mr. Redfield was well aware that federal contracts are often subject to extensive requirements contained in the Federal Acquisition Regulations. (GX 1 at 22, 25-28). Despite this, however, Mr. Redfield admitted that, prior to this investigation, he never read the applicable Regulations and would simply delegate the work to his staff to ensure compliance. (GX 1 at 25-28, 45-49).

Again, the provisions the Respondents violated were not the result of a complex or ambiguous calculation or procedure, rather the plain language of the Regulations. Thus, it was not the case that there was "no way" for Mr. Redfield to identify the violations, and in fact, he admitted that he has since read the Regulations and is "very [f]amiliar now" with the correct procedure for calculating benefits. (GX 1 at 47-49). Further, even if the violations did involve complex or ambiguous issues, it is the affirmative obligation of the contractor to ensure compliance and seek advice in the face of confusion. 29 C.F.R. § 4.188(b)(4). The fact that the contracting office for the Army and DCAA also did not identify the violations when approving and modifying the Contract may weigh in favor of the finding that the violations were not patent, but it does not excuse or justify Respondents' failure to carry out its affirmative obligation to ensure compliance.⁷ The Respondents culpable conduct is not excused by remaining ignorant of the law or passing off compliance duties to subordinate employees. 29 C.F.R. §§ 4.188(b)(1), (4).

Finally, I find that the Respondents' violations on this Contract were serious in nature. The sum amount of unpaid fringe benefits in this case amounted to \$196,693.64 and affected 41 employees. Accordingly, for all the foregoing reasons, I find that the Respondents' violations of the SCA were a result of culpable neglect, thus supporting debarment.

Because the Respondents' conduct involved aggravating circumstances, the remaining two steps of the analysis are moot. *See Integrated Resource Management, Inc.*, PDF at 6; C.F.R. § 4.188(b)(3)(ii). However, if the case had been strong enough to reach the remaining stages, on the evidence presented, the record would justify an unfavorable view of Respondents' actions.⁸

⁷ Further, if I were to accept this argument, I note that any contractor found in violation of the SCA—except those with purely recordkeeping violations—could claim this as a defense simply by virtue of their contract being awarded (and thereby approved) by a government agency.

⁸ In further support of "unusual circumstances," the Respondents point to ITS' "exceptional compliance history, cooperation with underlying investigation, and the fact that Respondents' liability depends upon the resolution of *bona fide* legal issues of doubtful certainty." (RA 2 at 6). All of these elements reference factors in parts two and three of the test, *see* 29 C.F.R. § 4.188(b)(3)(ii), and therefore, are not relevant as I have found the existence of aggravating circumstances in part one. Nonetheless, I will note, to the Respondents' credit, that all of the evidence of record indicates that Mr. Redfield and ITS were very cooperative in the investigation process. As to the Respondents' claim of an "exceptional compliance history," however, I again refer to the substantial persuasive

As discussed above, the Respondents have admittedly perpetuated a compensation practice that violates the plain language of the SCA. They have also failed to repay any of the amounts due to the aggrieved 41 employees. Therefore, I find that the Respondents failed to present a genuine issue of material fact in support of their claim for “unusual circumstances.” In the absence of unusual circumstances, the SCA requires the Respondents’ debarment from receiving federal contracts for three years. 29 C.F.R. § 4.188(a). On the facts established in this matter, I find the penalty appropriate and within the guidelines Congress intended for the circumstances present here.

ORDER

IT IS ORDERED:

- I. The Administrator’s Motion for Renewed Summary Decision is **GRANTED**.

- II. The Respondents William F. Redfield, Jr. and Innovative Technical Solutions, LLC shall pay to the Wage and Hour Division, United States Department of Labor, for distribution to the 41 former employees identified in the Administrator’s Complaint, or their legal representatives, the following amounts for unpaid fringe benefits:
 1. To Petra Abel, the sum of \$3,394.67;
 2. To Cheryl Barbee, the sum of \$2,288.34;
 3. To Amanda Bath, the sum of \$3,103.36;
 4. To Lori Brown, the sum of \$804.12;
 5. To Debbie Bryan, the sum of \$4,891.50;
 6. To Dianne Cannon, the sum of \$4,142.31;
 7. To Matthew Charles, the sum of \$554.23;
 8. To Kaya Cloud, the sum of \$218.70;
 9. To Julie Credle, the sum of \$3,736.40;
 10. To Katrina Croom, the sum of \$6,201.35;
 11. To Jeffrey Daniel, the sum of \$1,329.94;
 12. To Amanda Fielden, the sum of \$3,778.49;
 13. To Shannon Fleck, the sum of \$11,798.76;
 14. To Evelyn Fletcher, the sum of \$18,216.00;
 15. To Tara Gard, the sum of \$4,823.10;
 16. To LaShonte Hickmon, the sum of \$218.03;
 17. To Tammie Ibarra, the sum of \$261.21;
 18. To John Jennett, the sum of \$1,130.85;
 19. To Angela Johansen, the sum of \$2,285.61;
 20. To Tonya Llamas, the sum of \$198.10;

evidence that because Respondents’ violation was admittedly based upon a non-compliant compensation practice, there were likely numerous, previous violations on ITS’s contracts, most obviously the 2007 vehicle registration services predecessor contract. A history of undetected violations is hardly an exceptional compliance history. Finally, as the Respondents have repeatedly admitted their “partial compliance” with the SCA Regulations on fringe benefits, I am uncertain as to how they can contend that their “liability depends upon the resolution of *bona fide* legal issues of doubtful certainty.”

21. To Carmen Lopez, the sum of \$1,461.91;
22. To Tiona Maxie, the sum of \$626.31;
23. To Marthisa Mays, the sum of \$13,119.32;
24. To Cheryl McElwee, the sum of \$336.48;
25. To John Miller, the sum of \$1,734.94;
26. To Danyelle Money, the sum of \$4,199.89;
27. To Renae Natero, the sum of \$711.56;
28. To Candida Phelps, the sum of \$3,879.08;
29. To Lydia Rodriguez, the sum of \$9,498.34;
30. To Renne Rosales, the sum of \$6,745.13;
31. To Natasha Santiago, the sum of \$590.16;
32. To Kresendo Smith, the sum of \$16,078.19;
33. To Ryan Spurgeon, the sum of \$2,565.70;
34. To Jodi Starke-Griffith, the sum of \$3,386.23;
35. To Lorena Stewart, the sum of \$3,650.10;
36. To Tioni Taylor, the sum of \$3,403.59;
37. To Gerald Turner, the sum of \$9,399.68;
38. To Emily Tyson, the sum of \$20,352.45;
39. To Jennifer Van Cott, the sum of \$1,447.05;
40. To Tashia Williams, the sum of \$152.25; and
41. To Atisha Woodward, the sum of \$16,980.21.

III. The Respondents William F. Redfield, Jr. and Innovative Technical Solutions, LLC shall be debarred for period of three years, commencing on the date of publication by the Comptroller General of their names on the ineligibility list as provided in 41 U.S.C. § 354.

PETER B. SILVAIN, JR.
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 petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002, 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).

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 must 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).