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bond guarantees that the principal shall fulfill ''all the undertakings, covenants, terms, conditions, and agreements'' of the contract, or similar words to the same effect, the surety-guarantor is jointly liable for underpayments by the contractor of the wages and fringe benefits required by the Act up to the amount of the bond. *U.S.* v. *Powers Building Maintenance Co.*, 366 F. Supp. 819 (W.D. Okla. 1972); *U.S.* v. *Gillespie*, 72 CCH Labor Cases ¶33,986 (C.D. Cal. 1973) *U.S.* v. *Glens Falls Insurance Co.*, 279 F. Supp. 236 (E.D. Tenn. 1967); *United States* v. *Hudgins-Dize Co.*, 83 F. Supp. 593 (E.D. Va. 1949); *U.S.* v. *Continental Casualty Company*, 85 F. Supp. 573 (E.D. Pa. 1949), affirmed per curiam, 182 F.2d 941 (3rd Cir. 1950).

§ 4.188 Ineligibility for further contracts when violations occur.

(a) Section 5 of the Act provides that any person or firm found by the Secretary or the Federal agencies to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances. It also directs the Comptroller General to distribute a list to all agencies of the Government giving the names of persons or firms that have been declared ineligible. No contract of the United States or the District of Columbia (whether or not subject to the Act) 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 3 years have elapsed from the date of publication of the list containing the names of such persons or firms. This prohibition against the award of a contract to an ineligible contractor applies to the contractor in its capacity as either a prime contractor or a subcontractor. Because the Act contains no provision authorizing removal from the list of the names of such persons or firms prior to the expiration of the three-year statutory period, the Secretary is without authority to accomplish such removal (other than in situations involving mistake or legal error). On the other hand, there may be situations in which persons or firms already on the list are found in a subsequent administrative proceeding to have again violated the Act and their debarment ordered. In such circumstances, a new, three-year debarment term will commence with the republication of such names on the list.

(b)(1) The term *unusual circumstances* is not defined in the Act. Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present. It is clear, however, that the effect of the 1972 Amendments is to limit the Secretary's discretion to relieve violators from the debarred list (H. Rept. 92–1251, 92d Cong., 2d Sess. 5; S. Rept. 92–1131, 92d Cong., 2d Sess. 3–4) and that the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction, *Ventilation and Cleaning Engineers, Inc.*, SCA–176, Administrative Law Judge, August 23, 1973, Assistant Secretary, May 22, 1974, Secretary, October 2, 1974. It is also clear that unusual circumstances do not include any circumstances which would have been insufficient to relieve a contractor from the ineligible list prior to the 1972 amendments, or those circumstances which commonly exist in cases where violations are found, such as 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, failure to keep necessary records and the like. *Emerald Maintenance Inc.*, Supplemental Decision of the ALJ, SCA–153, April 5, 1973.

(2) The Subcommittee report following the oversight hearings conducted just prior to the 1972 amendments makes it plain that the limitation of the Secretary's discretion through the unusual circumstances language was designed in part to prevent the Secretary from relieving a contractor from the ineligible list provisions merely because the contractor paid what he was required by his contract to pay in the first place and promised to comply with the Act in the future. See, House Committee on Education and Labor, Special Subcommittee on Labor, The Plight of Service Workers under Government

Contracts 12–13 (Comm. Print 1971). As Congressman O'Hara stated: ''Restoration * * * [of wages and benefits] is not in and of itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts * * *. The authority [to relieve from blacklisting] was intended to be used in situations where the violation was a minor one, or an inadvertent one, or one in which disbarment * * * would have been wholly disproportionate to the offense.'' House Committee on Education and Labor, Special Subcommittee on Labor, Hearings on H.R. 6244 and H.R. 6245, 92d Cong., 1st Sess. 3 (1971).

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. See, e.g., *Washington Moving & Storage Co.*, Decision of the Assistant Secretary, SCA 68, August 16, 1973, Secretary, March 12, 1974; *Quality Maintenance Co.*, Decision of the Assistant Secretary, SCA 119, January 11, 1974. Thus, 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.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these 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.

(4) A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor. *Murcole, Inc.*, Decision of the ALJ, SCA 195–198, April 10, 1974; *McLaughlin Storage, Inc.*, Decision of the ALJ, SCA 362–365, November 5, 1975, Administrator, March 25, 1976; *Able Building & Maintenance & Service Co.*, Decision of the ALJ, SCA 389–390, May 29, 1975, Assistant Secretary, January 13, 1976; *Aarid Van Lines, Inc.*, Decision of the Administrator, SCA 423–425, May 13, 1977.

(5) Furthermore, a contractor cannot be relieved from debarment by attempting to shift his/her responsibility to subordinate employees. *Security Systems, Inc.*, Decision of the ALJ, SCA 774–775, April 10, 1978; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974; *Ernest Roman*, Decision of the Secretary, SCA 275, May 6, 1977. As the Comptroller General has stated in considering debarment under the Davis-Bacon Act, ''[n]egligence of the employer to instruct his employees as to the proper method of performing his work or to see that the employee obeys his instructions renders the employer liable for injuries to third parties resulting therefrom. * * * The employer will be liable for acts of his employee within the scope of the employment regardless of whether the acts were expressly or impliedly authorized. * * * Willful and malicious acts of the employee are imputable to the employer under the doctrine of respondeat superior although they might not have been consented to or expressly authorized or ratified by the employer.'' (Decision of the Comptroller General, B–145608, August 1, 1961.)

(6) Negligence per se does not constitute unusual circumstances. Relief on no basis other than negligence would render the effect of section 5(a) a nullity, since it was intended that only responsible bidders be awarded Government contracts. *Greenwood's Transfer & Storage, Inc.,* Decision of the Secretary, SCA 321–326, June 1, 1976; *Ventilation & Cleaning Engineers, Inc.,* Decision of the Secretary, SCA 176, September 27, 1974.

(c) Similarly, the term *substantial interest* is not defined in the Act. Accordingly, this determination, too, must be made on a case-by-case basis in light of the particular facts, and cognizant of the legislative intent ''to provide to service employees safeguards similar to those given to employees covered by the Walsh-Healey Public Contracts Act''. *Federal Food Services, Inc.,* Decision of the ALJ, SCA 585–592, November 22, 1977. Thus, guidance can be obtained from cases arising under the Walsh-Healey Act, which uses the concept ''controlling interest''. See *Regal Mfg. Co.,* Decision of the Administrator, PC–245, March 1, 1946; *Acme Sportswear Co.,* Decision of the Hearing Examiner, PC–275, May 8, 1946; *Gearcraft, Inc.,* Decision of the ALJ, PCX–1, May 3, 1972. In a supplemental decision of February 23, 1979, in *Federal Food Services, Inc.* the Judge ruled as a matter of law that the term ''does not preclude every employment or financial relationship between a party under sanction and another * * * [and that] it is necessary to look behind titles, payments, and arrangements and examine the existing circumstances before reaching a conclusion in this matter.''

(1) Where a person or firm has a direct or beneficial ownership or control of more than 5 percent of any firm, corporation, partnership, or association, a ''substantial interest'' will be deemed to exist. Similarly, where a person is an officer or director in a firm or the debarred firm shares common management with another firm, a ''substantial interest'' will be deemed to exist. Furthermore, wherever a firm is an affiliate as defined in § 4.1a(g) of subpart A, a ''substantial interest'' will be deemed to exist, or where a debarred person forms or participates in another firm in which he/she has comparable authority, he/she will be deemed to have a ''substantial interest'' in the new firm and such new firm would also be debarred (*Etowah Garment Co., Inc.,* Decision of the Hearing Examiner, PC–632, August 9, 1957).

(2) Nor is interest determined by ownership alone. A debarred person will also be deemed to have a ''substantial interest'' in a firm if such person has participated in contract negotiations, is a signatory to a contract, or has the authority to establish, control, or manage the contract performance and/or the labor policies of a firm. A ''substantial interest'' may also be deemed to exist, in other circumstances, after consideration of the facts of the individual case. Factors to be examined include, among others, sharing of common premises or facilities, occupying any position such as manager, supervisor, or consultant to, any such entity, whether compensated on a salary, bonus, fee, dividend, profit-sharing, or other basis of remuneration, including indirect compensation by virtue of family relationships or otherwise. A firm will be particularly closely examined where there has been an attempt to sever an association with a debarred firm or where the firm was formed by a person previously affiliated with the debarred firm or a relative of the debarred person.

(3) Firms with such identity of interest with a debarred person or firm will be placed on the debarred bidders list after the determination is made pursuant to procedures in § 4.12 and parts 6 and 8 of this title. Where a determination of such ''substantial interest'' is made after the initiation of the debarment period, contracting agencies are to terminate any contract with such firm entered into after the initiation of the original debarment period since all persons or firms in which the debarred person or firm has a substantial interest were also ineligible to receive Government contracts from the date of publication of the violating person's or firm's name on the debarred bidders list.

§ 4.189 Administrative proceedings relating to enforcement of labor standards.

The Secretary is authorized pursuant to the provisions of section 4(a) of the