ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	
Disputes concerning the payment of prevailing wage rates, overtime pay, and proposed debarment by:	
RAY WILSON CO., a Corporation, Prime Contractor,	
With respect to laborers and mechanics employed by its subcontractors: AZTEC FIRE PROTECTION, INC., DAVID NAIM, President, ABRAHAM YAZDI, Vice President,	ARB Case No. 02-086
on Contract Number GS-09P-95-KTC-0012 let by the General Services Administration, Region 9, to Respondent, Ray Wilson Co., For the construction at the Ronald Reagan Building in Santa Ana, California.	

STATEMENT FOR THE ADMINISTRATOR IN RESPONSE TO PETITION FOR REVIEW

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ISSUES PRESENTED

1. Whether the administrative law judge ("ALJ") correctly held that the case should not be dismissed due to the elapsed time between the withholding of funds and the granting of a hearing to Aztec Fire Protection, Inc. ("Aztec") because there was no denial of due process and the doctrine of laches was not applicable.

2. Whether the ALJ correctly determined that Aztec violated the prevailing wage provisions of the Davis-Bacon Act ("DBA" or "Act") and the overtime provisions of the Contract Work Hours and Safety Standards Act ("CWHSSA") based on Aztec's responsibility for wages being paid to any of the second-tier subcontractor's workers on the project, and whether back wages were calculated properly based on the principles enunciated in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

3. Whether the ALJ correctly concluded that Aztec and its officials were subject to debarment under the Davis-Bacon Act for disregard of their obligations to employees.

STATEMENT OF THE CASE

A. Course Of Proceedings[1]

Following an investigation in 1997, the Department of Labor ("DOL" or "Department") brought this action under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, the Contract Work Hours and Safety Standards Act ("CWHSSA"), 40 U.S.C. 327 *et seq.*, and the applicable regulations issued thereunder at 29 C.F.R. Part 5, to recover unpaid prevailing wages and overtime compensation due under a contract for construction of the

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[1] The facts relevant to the allegation of improper delay are set forth in the Statement of Facts below.

Ronald Reagan Building in Santa Ana, California. The Department also sought debarment of Aztec and its officers, David Naim, president, and Abraham Yazdi, vice president. (Tr. 25-27).

A hearing was held before ALJ Thomas M. Burke on November 6, 7, and 8, 2001. Witnesses called by DOL were Abraham Yazdi, vice president of Aztec; John Leung, a Wage-Hour investigator; Peggy De La Torre, contracting officer for the Ronald Reagan Building project; Brian Taverner, Assistant District Director ("ADD") for DOL's Wage and Hour Division; Klod Grigorian Maisshi and Bahid Zohrabian, pipefitters on the project; David Naim, president of Aztec; Robert Dehnoushi, a partner in R&F Fire Protection, Inc., which installed the fire protection system at issue; and Marianne Shur, former bookkeeper for Aztec. Bahman Shahangiam, owner of Parrs Fire Protection; David Edwards, Senior Project Manager for Ray Wilson Company, the prime contractor; and Abraham Yazdi were called as witnesses by Aztec. (Tr. 3, 246, 552).

On May 10, 2002, the ALJ issued a Decision and Order in favor of the Department, ruling that Aztec and its officers were subject to debarment. Aztec filed a Petition for Review with this Board on June 20, 2002.

B. Statement Of Facts

In 1995, the General Services Administration ("GSA") awarded a contract for the construction of the Ronald Reagan Federal Building in Santa Ana, California to Ray Wilson Co. (Tr. 81; Exh. C-1). In September 1995, Wilson subcontracted the fire protection installation and design to Aztec (Exh. C-2), and Aztec in turn subcontracted the labor for the installation of the fire protection system to R&F Fire Protection, Inc. ("R&F") in May 1996. (Exh. C-5). R&F agreed to supply the labor to install the fire sprinklers for approximately $209,000, while Aztec supplied the materials. (Tr. 49-50, C-5). It is undisputed that the contract and subcontracts were subject to the labor standards provisions of the Davis-Bacon Act, the CWHSSA, and the applicable regulations. (Exh. C-16).

R&F was a partnership composed of senior partners (and brothers) Robert and Fred Dehnoushi, while the sprinkler fitters who labored on the project were denoted as "general partners." (Tr. 182, 539-40). The laborers were not paid the required rate for "sprinkler fitters" because Robert Dehnoushi believed that the partnership obviated the prevailing wage

requirements of the Act. (Tr. 565; Exhs. C-27, R-44).[2]

In April 1997, DOL's Wage and Hour Division investigated Aztec's performance on the project for possible violations of the Act with respect to the employment of sprinkler fitters. Wage and Hour determined that the sprinkler fitters had not been paid the required wage rates for their work and found back wages, as well as liquidated damages for CWHSSA, due in the amount of $152,528. In April 1997, GSA withheld $152,528 from Wilson's contract to cover the underpayments. (Exhs. C-23, R-16, R-17). Wage and Hour also referred the matter to DOL's Office of Inspector General for criminal investigation, as it appeared that Aztec and R&F had devised the R&F partnership scheme in order to avoid paying prevailing wages.

Shortly after the funds were withheld, in June 1997, Aztec met with ADD Brian Taverner of the Wage Hour Division at his office in Santa Ana, California. (Tr. 418, 772-73; Exhs. C-18, R-26). Taverner informed Aztec that the R&F partnership did not negate the Act's prevailing wage requirements as to R&F's laborers and informed Aztec of the possible consequences

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[2] Under the Secretary's Wage Determination supplied with the Wilson contract, the classification of the laborers who installed the fire protection system was "sprinkler fitters". (Tr. 249-250; Exh. C-8). The required wage rate for sprinkler fitters was $37.96 per hour ($28.12 per hour plus $9.84 per hour in fringe benefits), plus time and a half for overtime hours worked. (Tr. 26; Exh. C-8).

for violations of the Act. (Exhs. C-18, R-26). That same month, ADD Taverner sent Aztec a letter dated June 20, 1997, identifying the DBA sections requiring payment of the prevailing wage to all laborers, with attached copies of Wage-Hour forms on which the investigator had calculated the back wages owed to the sprinkler fitters. (Exhs. C-18, R-26).

At approximately the same time, Aztec sued R&F and the sprinkler fitters who had worked on the project for the withheld funds pursuant to the indemnity clause in the R&F subcontract and under California law. (Tr. 783-84; Exhs. C-19, R-42). Pursuant to a stipulated judgment, the state court issued an order in Aztec's favor for "funds held or purportedly held for the benefit of any of [the R&F partners], by any agency of the United States Government and/or the Ray Wilson Company in connection with the [Ronald Reagan Federal Building project]." (Exhs. C-20, R-43). Based on this judgment, Aztec claimed that it had an execution lien on the back wages held by the GSA, and the right to collect the funds directly from the GSA. (Exhs. R-18, R-19, R-20, R-21). In December 1997, Aztec attempted unsuccessfully to collect from the GSA on its judgment. (Id.) Aztec, however, also informed the GSA and Wage and Hour that it did not dispute Wage and

Hour's findings of underpayments and violations under the Act with respect to the sprinkler fitters. (Exhs. C-21, R-22).

In June 1998, Wage and Hour prematurely disbursed $108,000 of the withheld funds to the sprinkler fitters. (Tr. 443). The Wage and Hour Division issued a charging letter in February 2000. On March 7, 2000, Aztec requested a hearing,[3] and on March 30, 2000, DOL filed an Order of Reference with the Office of Administrative Law Judges regarding back wages and debarment. (Order of Reference dated March 30, 2000). A hearing was held in November 2001.

C. The ALJ's Decision

On May 10, 2002, the ALJ issued his Decision and Order, ruling in DOL's favor on all issues raised by Aztec.[4] The ALJ rejected Aztec's claim that the action should be dismissed due to excessive delay by DOL, allegedly resulting in violation of its due process right to a prompt hearing after the withholding of its contract payments by the GSA. He also

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[3] The ALJ, without citation, noted that the request for a hearing was in 1999, but, as indicated below, the ALJ analyzed the case as if there were a five-year delay involved (between the withholding of funds and the hearing). (D&O at 4).

[4] Despite the fact that Wilson is jointly and severally liable, see infra, and that Wilson joined in the Petition for Review before this Board, only Aztec and its officials were debarred; therefore, we often refer only to Aztec, even though Wilson, too, is liable.

rejected Aztec's argument that DOL's action should be barred by the equitable doctrine of laches. The ALJ did not rule on DOL's contention that the "delay" was less than three years (from the date of the hearing request to the hearing date) rather than the five years (from the withholding of funds to the hearing date) alleged by Aztec,[5] but instead held that, even assuming a five-year delay, Aztec had not demonstrated any resulting prejudice, as required by the Board in Tom Rob, Inc., et al., WAB Case No. 94-03 (June 21, 1994) (delay of four years and eleven months did not deny contractor due process when no actual prejudice was shown). The ALJ found "unconvincing" Aztec's argument that it suffered prejudice because it could have submitted additional records if the hearing had been held sooner. Since Aztec's own witness testified that R&F did not keep records of wages, the ALJ concluded that "[a]n earlier hearing would not have changed this." (D&O at 4).

The ALJ also concluded that the facts of this case did not demonstrate the "extreme" delay which the Board ruled in Tom Rob, supra, and Public Developers Corporation, et al., WAB Case No. 94-02 (July 29, 1994), is necessary to create a

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[5] The actual time from the date of the withholding (April 1997) to the hearing (November 2001) was four years and seven months.

presumption of prejudice. Relying on the fact that the Board did not find a presumption of prejudice in the eight-year delay in Public Developers, the ALJ concluded that "even an assumed five-year delay would be inadequate to be considered 'extreme' when compared to the eight-year delay in Public Developers, and as stated earlier, the Respondents have not shown that they have suffered any prejudice." (D&O at 5).

With regard to Aztec's contention that the R&F laborers on the project were partners in R&F and therefore not entitled to the prevailing wage rates, the ALJ concluded that the determinative issue was whether the "partners" performed work on the job site, because under DOL regulations and applicable caselaw, anyone performing the duties of a laborer or mechanic on a project is considered an employee "regardless of any contractual relationship alleged to exist between the contractor and such person." 29 C.F.R. 5.2(o); see also Lance Love, Inc., WAB Case No. 88-32 (March 28, 1991), and Labor Services, Inc., WAB Case No. 90-14 (May 24, 1991). Since it is undisputed that the R&F "partners" performed labor on the project, the ALJ concluded that they were entitled to receive the prevailing wage rate.

Aztec also contended that DOL was estopped from bringing this action against it because government officials were aware

of the "partnership" agreement and never informed Aztec that there was a problem with it.[6] The ALJ rejected this contention because he credited the statement of Peggy De La Torre, contracting officer on the project, that she had expressed concern to Aztec about the partnership arrangement and told the project manager that she was going to submit the matter to DOL for investigation. Moreover, he concluded that there was no evidence that any government official ever "assented" to the partnership arrangement. Finally, relying on the Board's decision in Arbor Hill Rehabilitation Project, WAB Case No. 87-04 (Nov. 3, 1987), the ALJ concluded that any "inaction" by DOL was insufficient to warrant an estoppel defense.

Concerning Aztec's challenge to Wage-Hour's computation of back wages, the ALJ concluded that, under the principles of Anderson v. Mt. Clemens Pottery, 328 U.S. 680 (1946), Wage and Hour demonstrated in the absence of proper records that underpayments had occurred as a matter of just and reasonable inference, and that Aztec failed to meet its burden of refuting this evidence. In this regard, the ALJ also summarily rejected Aztec's contention that the certified payroll reports which investigator Leung relied upon in

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[6] Aztec did not raise this issue in its Petition for Review.

computing back wages were inadmissible as hearsay. The ALJ relied upon the well-settled principle that "[h]earsay evidence is admissible in administrative hearings and may constitute substantial evidence if found reliable and credible." J.A.M. Builders, Inc. v. Herman, 223 F.3d 1350 (11th Cir. 2000).[7]

Turning to debarment of Aztec and Aztec officials David Naim and Abraham Yazdi, the ALJ, citing to Arliss D. Merrell, 94-DBA-41 (October 26, 1995), noted that as a subcontractor, Aztec is responsible for the violations of its lower-tier subcontractor. He found the following to be irrefutable evidence that Aztec and its officials disregarded their obligations to employees within the meaning of the Davis-Bacon debarment regulations at 29 C.F.R. 5.12(a)(2) and 5.12(b)(1): (1) R&F employees were underpaid for their work and Aztec is responsible for actions of lower-tier contractors; (2) Aztec officials discussed forming the partnership with R&F before they entered the project and Aztec, having performed ten previous Davis-Bacon projects, should have been aware that prevailing wage requirements applied regardless of the

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[7] The ALJ did find a slight mathematical error (as opposed to an error in methodology) in Wage-Hour's computations, and consequently ordered DOL to reimburse Ray Wilson Co. for payment withheld in the amount of $6,381.48. This is not at issue in this case.

existence of any partnership agreement; (3) Aztec helped create the violations by not including in the contract those provisions required by the Act to be included in the subcontract; and (4) in the words of the ALJ, "there could be no clearer example of 'aggravation' than a contractor suing the underpaid workers on a project for violations the contractor helped to create."

STANDARD OF REVIEW

This Board reviews the ALJ's legal conclusions and factual findings de novo, but when an Administrative Law Judge's credibility determinations are at issue, there is a reluctance on the part of the Board to disturb them unless they are clearly in error. See In the Matter of Sundex, Ltd., ARB Case No. 98-130 (December 30, 1999). In the instant case, this Board is presented largely with legal issues.

ARGUMENT

I. THE ALJ CORRECTLY RULED THAT THE CASE SHOULD NOT BE DISMISSED ON THE GROUNDS OF DENIAL OF DUE PROCESS OR LACHES DUE TO ANY ADMINISTRATIVE DELAY IN THE GRANTING OF A HEARING AFTER THE WITHHOLDING OF FUNDS

A. Due Process[8]

It has long been the Department of Labor's position that entitlement to the uninterrupted flow of contract payments does not constitute a property interest under the Due Process Clause.[9] However, even if Aztec had a constitutionally protected property interest in the withheld funds,[10] there has been no due process violation in this case due to any administrative delay in the

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[8] As did the ALJ, we discuss the case in terms of a five-year lapse of time between the withholding of funds in 1997 and the holding of the hearing in 2001. As the ALJ recognized, however, "[a] review of the record shows that the Respondent did not initially contest the findings of the Wage and Hour Division."

[9] See Winzeler Excavating Co. v. Brock, 694 F. Supp. 362 (N.D. Ohio 1988); G & H Machinery Co. v. Donovan, 96 Lab. Cas. (CCH) ¶34,354 (S.D. Ill. 1982); Cotham v. Tuite, 94 Lab. Cas. (CCH) ¶34,215 (E.D. Cal. 1982); California Housing Corp. v. California Housing Fin. Agency, 93 Lab. Cas. (CCH) ¶34,146 (E.D. Cal. 1981).

[10] It should be noted that "just as the Board is entitled to refrain from deciding constitutional claims," "the Board is entitled to hear and decide constitutional claims germane to the proceedings before it, as long as this does not include declaring the Board's governing statute unconstitutional." Tom Rob, supra, slip op. at 10.

granting of a hearing.[11]

Assuming without deciding that the contractor had a property interest in its claim for payment under its contracts, the Supreme Court, in Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001), reversed the Ninth Circuit's holding that the state's withholding of over $120,000 from the prime contractor (and the consequent withholding from the subcontractor) as a result of the subcontractor's failure to pay prevailing wages under California law ran afoul of the Due Process Clause because no hearing was provided. The Court held that such a hearing was not constitutionally required because state law allowed the subcontractor to sue the state for breach of contract, even though the state court might not resolve the breach of contract lawsuit for several years. "Because we believe that California law affords respondent sufficient opportunity to pursue that claim in state court, we conclude that the California statutory scheme does not deprive G & G of its claim for payment

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[11] As discussed below in the section on laches, Aztec, by its own admission, did not request a hearing in a timely manner. See 29 C.F.R. 5.11(b)(2). Aztec made this admission despite the fact that a charging letter was not issued by Wage and Hour until February 2000, and a hearing was requested in March 2000. It is significant, however, that Wage-Hour did meet with Aztec in June 1997, following the withholding of funds in April 1997, and ADD Taverner sent a letter to Aztec on June 20, 1997, indicating that back wages were owed to the sprinkler fitters. Despite this acknowledged failure on the part of Aztec to timely request a hearing, we nevertheless follow the ALJ in addressing the issues of due process and laches in turn.

without due process of law." 532 U.S. at 195. And "[a] [breach of contract] lawsuit of that duration [perhaps lasting several years], while undoubtedly something of a hardship, cannot be said to deprive respondent of its claim for payment under the contract." Id. at 197.

Significantly, in G & G, the Supreme Court addressed its own case law holding that a prompt hearing is necessary where there is a deprivation of a property interest:

> In each of these cases [where the Court required a prompt pre- or post-deprivation hearing], the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property or to pursue a gainful occupation. Unlike those claimants, respondent [G & G] has not been denied any present entitlement. G & G has been deprived of payment that it contends it is owed under a contract, based on the State's determination that G & G failed to comply with the contract's terms. G & G has only a claim that it did comply with those terms and therefore that it is entitled to be paid in full. Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, . . . it is an interest, unlike the interests discussed above, that can be fully protected by an ordinary breach-of-contract suit.

532 U.S. at 196.

Here, Wilson's contract with the GSA and Aztec's contract with Wilson contained a clause giving the contractors notice that contract funds might be withheld for underpayment of wages. See 29 C.F.R. 5.5. By entering into a contract with

the GSA, Wilson agreed to all the contractual provisions, including the withholding clause, and the clause providing for resolution of contract disputes "in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7." 29 C.F.R. 5.5(a)(9). Wilson also acknowledged in signing its contract with the GSA that it was responsible for the violations of any of its subcontractors. Accordingly, Wilson and Aztec have not been deprived of any present entitlement. Rather, they have been deprived of contract funds which they acknowledged by contract would be withheld in the event of their failure to comply with the Act and regulations. Thus, Wilson and Aztec have only claims for payment dependent upon an ultimate resolution as to their compliance with the terms of their contracts. The procedures provided to Aztec by DOL in the instant case, which included the granting of a hearing, satisfied the due process requirements.[12]

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[12] The regulation at 29 C.F.R. 5.11 sets forth the procedures, including the right to a hearing, for the resolution of disputes concerning the payment of wages under the Davis-Bacon and Related Acts. Subsequent to the withholding of funds in the present case, Wage and Hour, in 1999, put in place new procedures to supplement the procedural safeguards for contractors where contract funds are withheld for back wage violations under both the Davis-Bacon Act and the Service Contract Act. They include an opportunity, before withholding is instituted, to meet with the investigator to discuss the alleged violations and present rebuttal evidence, to receive written notice of the possibility of the withholding of contract funds, and to present written information or evidence

Finally, Aztec contends that the withholding of its accrued contract payments is a "permanent" deprivation of its property because the Wage and Hour Division mistakenly distributed the withheld funds to R&F employees who the investigator found were entitled to back wages. As discussed above, however, Aztec has no present entitlement to these funds. The fact that the funds have been released to employees does not affect the outcome of these proceedings because if Aztec prevails in this case, it would have a claim against the government for the full amount withheld. Such a claim would be analogous to the breach of contract claim in G & G, which the Supreme Court found sufficient to protect G & G's due process rights. See 532 U.S. at 195. Irrespective of whether the funds were disbursed, Aztec would not have had those funds in hand.

B. Laches

Under the applicable Board precedent of Tom Rob, Inc., WAB Case No. 94-03 (June 21, 1994), and Public Developers Corp., WAB Case No. 94-02 (July 29, 1994), delay in bringing matters to a hearing may be a basis for dismissal under the principle of laches. See also Star Brite Construction Co., Inc., ARB Case No. 98-113 (June 30, 2000); KP & L Electrical Contractors, Inc., et al., ARB Case

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to higher-level official of DOL concerning whether the violations occurred. See R&B Trucking Co. v. U.S. Dep't of Labor, Civil Action No. 00-04314-SVW (RNBx) (C.D. Cal. Aug. 28, 2000) (holding that such safeguards satisfy due process requirements in a Davis-Bacon Act enforcement action).

No. 99-039 (May 31, 2000).[13] In Star Brite, this Board reaffirmed the four criteria the predecessor Wage Appeals Board set forth for analyzing the effect of administrative delay: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; and (4) prejudice to the defendants.

In this case, the ALJ made no finding as to the precise length of the "delay." Even assuming, however, that it was the five years (between the withholding of funds and the hearing) alleged by Aztec (and utilized by the ALJ in his analysis), that time period alone is not so lengthy as to raise a presumption of prejudice. In this

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[13] Although the Board has addressed the applicability of laches against the government on its merits, it is worth noting that some 80 years ago, the Supreme Court stated that "[a]s a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." Utah Power and Light Co. v. United States, 243 U.S. 389, 407 (1917). See also OPM v. Richmond, 496 U.S. 414, 422 (1990) (the Supreme Court has "reversed every finding of estoppel [against the government] that [it has] reviewed"). As the Supreme Court stated, "This Court has frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." Brock v. Pierce County, 476 U.S. 253, 260 (1986) (internal quotation marks omitted). Indeed, addressing the analogous principle of estoppel, the Wage Appeals Board acknowledged that "[t]o invoke estoppel against DOL to defeat a legitimate claim for back wages on behalf of aggrieved workers may be a legal impossibility . . . ." L.T.G. Construction Co., WAB Case No. 93-15, at 6 (Dec. 30, 1994).

regard, the Board ruled in Tom Rob and Public Developers that a delay might be so extreme as to create a presumption of prejudice. The overall time periods at issue in those cases were, respectively, almost five years, from the withholding of funds until the commencement of the hearing in Tom Rob, and eight years from the commencement of the alleged violations to receipt of the Order of Reference in Public Developers. In both of those cases the Board reversed the ALJ's dismissal, holding that the time frame alone was not justification for dismissal without a showing of actual prejudice. Similarly, the ALJ in this case correctly ruled that actual prejudice must be shown.

Aztec failed to demonstrate any actual prejudice resulting from any delay in this case. It contends that it has been prejudiced because witnesses' memories have faded. The critical evidence in this case, however, is almost entirely documentary, and Aztec has failed to indicate that any testimony that witnesses could have provided earlier in these proceedings would have resulted in a different outcome. See Gemini Construction Corp., WAB No. 91-23 (Sept. 20, 1991), slip op at 4. Thus, investigator Leung testified that he relied on the certified payroll reports of hours worked for

his back wage calculations.[14] The employee interviews taken during the investigation corroborated the "hours worked" information contained in those payrolls. (Exh. C-9, Tr. 255-56, 259, 281). The certified payrolls were maintained by Fred Dehnoushi, a senior partner of R&F who was on the job site for the majority of the time worked. (Tr. 535-536, 560).

Aztec has not offered any evidence to refute the certified payroll evidence, nor has it demonstrated that there is any missing evidence that might refute Leung's calculations. Aztec's claim that it "would have" collected more evidence, or investigated R&F's practices back in 1997, if it had known it was the subject of an investigation is unavailing. First, by the admission of Aztec's own witness, R&F did not keep records of wages; thus, evidence probative of prevailing wage payments was never in existence. Second, in the very early stages of these proceedings, Aztec met with ADD Taverner to discuss the issues. Following this meeting, by letter dated June 20, 1997, (Exhs. C-18, R-26), ADD Taverner sent copies of the forms on which the Wage and Hour investigator had calculated the back wages owed to the sprinkler fitters. (See Exh. C-11 for the forms). At that

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[14] The certified payrolls indicate hours worked, but do not show the amount of wages paid.

time, ADD Taverner also indicated his willingness to accept any additional documents that Aztec wished to submit. (Exhs. C-18, R-26). It is undisputed that Aztec failed to submit any additional documents to Wage and Hour after this meeting. (Tr. 831).

If actual prejudice is not established in the absence of a presumption of prejudice, the Board has in the past ended the inquiry. See KP&L Electrical Contractors, Inc., supra, slip op. at 6 ("We do not address the first three of the . . . factors because we conclude that KP&L has not established actual prejudice as a result of the passage of time."). It is nevertheless instructive that with regard to the second and third factors, the reason for the delay and the assertion of one's right to a hearing, Aztec bears partial responsibility because it did not contest the violations, or request a hearing, until after its attempts to obtain the withheld funds had failed. On three separate occasions, Aztec acknowledged that R&F violated the Act and that Wage and Hour's calculations of underpayments to the sprinkler fitters were correct. First, in a letter sent to Thomas Hawkins, General Counsel for the GSA, Aztec asserted that the withheld back wages should be immediately released because, as Aztec did not request a hearing under DOL rules, the "findings referenced in

Mr. Taverner's June 20, 1997 letter are, in fact, final."

Aztec stated:

> I must emphasize that nobody, including Aztec Fire Protection, Inc., is now contesting or has ever contested the Department of Labor's findings that R&F Fire Protection failed to comply with the Davis-Bacon Act and that the monies being withheld are due and payable to R&F's employees.

(Ex. R-10)(emphasis in original). Second, in a letter sent to contracting officer De La Torre, Tom Cairns, attorney for Aztec, identified the sprinkler fitters as "Judgment Debtors" (following Aztec's lawsuit against R&F):

> There can be little question that your agency is now holding funds which are due and payable to the Judgment Debtors . . . The amounts being held by your agency pursuant to the direction of the U.S. Department of Labor [29 CFR § 5.9] have been "found to be due" to Aztec's Judgment Debtors (see, e.g. enclosed copies of U.S.D.O.L. Forms WH-55).

(Exh. R-20, page 2). Third, as a follow-up to a phone conversation held with ADD Taverner, Aztec stated in a letter:

> You further acknowledged that nobody, including Aztec Fire Protection, R&F Fire Protection and Ray Wilson Company has ever disputed the findings referenced in your June 20, 1997 letter.

(Exh. C-21, page 2).

These letters were sent after Aztec had sued R&F and the sprinkler fitters in state court and R&F had stipulated to

judgment in Aztec's favor. In fact, Aztec's position changed only after it unsuccessfully attempted to collect the funds directly from GSA, and after it learned that the withheld funds had been prematurely disbursed to the sprinkler fitters directly. (Tr. 443). Only subsequent to that point did Aztec demand a hearing. (Tr. 444).

II. THE ALJ CORRECTLY DETERMINED THAT AZTEC VIOLATED THE PREVAILING WAGE PROVISIONS OF THE DAVIS-BACON ACT AND THE OVERTIME PROVISIONS OF THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT AND CORRECTLY DETERMINED THE BACK WAGES OWED TO R&F'S SPRINKLER FITTERS

A. R&F Sprinkler Fitters Were Entitled To Prevailing Wage Rates Regardless Of The Existence Of Any Partnership Agreement Between Them.

It is well established that both the prime contractor and subcontractor are jointly and severally liable for underpayments to laborers employed by the subcontractor or by a lower-tier subcontractor. See Trataros Construction Corp., WAB Case No. 92-03 (Apr. 28, 1993) (prime contractor "jointly and severally liable" with first-tier subcontractor for underpayments owed to employees of second-tier subcontractor); Abernathy & Wood, WAB Case No. 87-41 (Jan. 9, 1990) (subcontractor is liable for underpayments of its lower-tier subcontractor). See also 29 C.F.R. 5.5(a)(6) ("The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the

contract clauses in 29 CFR 5.5."). Thus, both Wilson and Aztec are liable for the underpayments to R&F's sprinkler fitters.

Aztec contends that the R&F "partners" were not entitled to be paid the prevailing wage rate for a sprinkler fitter because as owner/operators, the partners were not subject to the prevailing wage provisions of the Act. This position is contrary to the Act and regulations. Whether laborers are performing work under the contract controls whether prevailing wages are to be paid to them. Regardless of whether laborers are characterized as independent contractors, partners, or co-owners, that characterization does not defeat their entitlement to the prevailing wage.

Section 1(a) of the Davis-Bacon Act requires, in pertinent part, that

> the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amount accrued at the time of payment, computed at wage rates not less than those stated in the advertised specifications, <u>regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics</u>.

40 U.S.C. 276a(a) (emphasis added). The regulation at 29

C.F.R. 5.2(o) states that "[e]very person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person."). See also 29 C.F.R. 5.5(a)(1).

The pertinent legislative history is instructive. Section 1(a) of the Act, as originally passed on March 3, 1931, had no comparable provision regarding contractual relationships. The phrase "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics was added to the Act as a part of the 1935 amendments. The legislative history makes it perfectly clear that the purpose of its inclusion was to avert circumvention of the Act's pay requirements by just the kind of partnership agreement existing here. It states as follows:

> The bill requires payment of the minimum rate to all persons employed as laborers and mechanics regardless of any contractual relationship alleged to exist between such person and the contractor or subcontractor. The subcommittee had found several instances of the formation of partnerships

> between individual workmen and the letting to such partnership of certain portions of the work under contract, the net results of which was to pay the members of the partnership less than the prevailing rate of wage. This provision would eliminate this particular device for circumventing the law.

S. Rep. No. 1155, 74th Cong., 1st Sess., p.13 (May 13, 1935); H. Rept. No. 1756, 74th Cong., 1st Sess., p.3 (Aug. 9, 1935). Thus, any kind of partnership agreement among R&F's workers does not negate their right to be paid the prevailing wage.

B. Wage-Hour Correctly Calculated The Back Wages.

Aztec also challenges the ALJ's acceptance of investigator Leung's testimony and computations. To the extent that Aztec is disputing the ALJ's credibility determinations, the Board has been reluctant to set aside such determinations absent clear error. See Star Brite, supra; Sundex, supra; Permis Construction Corp., WAB Case No. 88-11 (July 31, 1991). Furthermore, the ALJ's acceptance of Leung's testimony and computations is in accord with the principles enunciated in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). The Supreme Court has established the standards for determining underpayments of a required wage rate in the frequently quoted FLSA case of Anderson v. Mt. Clemens Pottery. The Court there stated that where an employer has failed to maintain accurate wage or hours records,

> the employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result is only approximate.

328 U.S. at 687-88. These principles apply when determining wage underpayments under the Act. See Thomas and Sons Building Contractors Inc. ARB No. 00-050,(Aug. 27, 2001); Star Brite, supra, Trataros supra.

It is undisputed that R&F did not maintain its own records as to the number of hours worked by sprinkler fitters on the construction projection. Investigator Leung testified that in the absence of reliable original time records, it became necessary to reconstruct the payrolls. He also testified that, to establish the number of hours worked by each sprinkler fitter, he relied on the certified payrolls[15] because they seemed reliable for that purpose -- the hours worked were not uniform, the employee interviews corroborated

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[15] As indicated above, R&F's certified payrolls specify hours for "owner operators," but do not indicate the rate of pay.

the information that the employees generally worked 40 hours per week, and Leung did not discover any evidence to suggest that the hours listed on the certified payrolls were not correct. (Exh. C-9, Tr. 255, 259, 281).[16] Significantly, the certified payrolls were maintained by Fred Dehnoushi, a senior partner at R&F, who was on the job site almost all of the time. (Tr. 535-536, 560).[17]

To arrive at the underpayment, Leung credited the contractors with the amounts that had already been paid to the sprinkler fitters as indicated by their paychecks (Exh. C-10),

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[16] The payrolls provide a starting date of June 28, 1996, and ending date of March 29, 1997 (approximately nine months) for the work performed by the sprinkler fitters on the project. (Exh. C-9) The nine-month duration of the work on the project was undisputed. (Tr. 180, 181, 482).

[17] To the extent that Aztec argues that the certified payrolls should have been excluded as hearsay, it is incorrect. They are, at minimum, admissible under the "[r]ecords of regularly conducted activity" exception. See 29 C.F.R. 18.803(a)(6). Moreover, the Board has consistently stated that hearsay evidence is admissible in ALJ proceedings. See Howell Construction, Inc., WAB Case No. 93-12 (May 12, 1994); U.S. Floors, Inc., WAB Case No. 91-33 (March 20, 1992); Permis, supra; and M.C. Lazzinnaro Construction Corp., WAB Case No. 88-08 (March 11, 1991). Finally, as this Board has stated, "When examining questions of possible error committed by a trier of fact in the handling of evidence, the Board must emphasize that, in general, an ALJ has broad discretion in the types and quality of evidence which is admitted at hearing. Sweeping authority accorded an ALJ in the conduct of hearings is specified in the regulations governing proceedings conducted before the Department of Labor's Office of Administrative Law Judges. *See* 29 C.F.R. § 18.29." Star Brite, supra.

and as corroborated by the statements they gave to him during the course of his investigation.[18] (Exh. R-44, Exh. C-27). The paychecks provided by Dehnoushi to Leung corroborate the sprinkler fitters' statements and testimony that they were generally paid approximately $10-$12 per hour, plus bonus. (Exhs. C-10, C-15). The applicable wage determination required payment of $37.96 per hour (including fringe benefits of $9.84 per hour). The investigator's computations, based on the entirety of the information he was provided and his own reconstructions, were reasonable, and there is no evidence in the record to dispute them.

III. AZTEC AND ITS OFFICIALS WERE PROPERLY DEBARRED UNDER THE DAVIS-BACON ACT FOR DISREGARD OF THEIR OBLIGATIONS TO EMPLOYEES.

The Davis-Bacon Act mandates a three-year debarment for "persons or firms . . . found to have disregarded their obligations to employees and subcontractors." 40 U.S.C. 276a-2(a) (emphasis added). See also 29 C.F.R. 5.12(a)(2). "Disregard of obligations" under the Act "has been interpreted to mean a level of culpability beyond mere negligence, involving some element of intent." Sundex, supra. See also Structural Concepts, Inc., WAB Case No. 95-02 (Nov. 30, 1995).

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[18] This information is also corroborated by Aztec's check records, which correspond to the paychecks as to date, payee, and amount. (Exh. C-15).

Once such a violation is established, however, a three-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances. See Sundex, supra, slip op. at 6; G & O General Contractors, Inc., WAB Case No. 90-35 (Feb. 19, 1991).

Aztec's failure to include the required labor standards provisions in its subcontract with R&F, taken together with the resultant underpayment of R&F's workers, is evidence of its disregard of obligations under the Act. The regulation at 29 C.F.R. 5.5(a)(6) provides that "[t]he contractor or subcontractor shall insert in any subcontract the clauses contained in 29 CFR 5.5(a)(1) through (10)." Clauses (a)(1) through (10) provide in detail the labor standards for the DBA, including the prevailing wage requirement, record keeping requirement, and penalties for non-compliance. The same provision also requires that a clause must be inserted "requiring the subcontractors to include these clauses in any lower tier subcontracts." 29 C.F.R. 5.5(a)(6).

Aztec's subcontract with R&F Fire Protection did not contain the requisite labor standards clauses, but simply stated:

> Subcontractor is aware that the Prevailing Wage Act (Davis/Bacon) is applicable to this project, and it is Subcontractor's

> responsibility to comply with the payment of prevailing wage to all his employees on this project, and to submit certified payroll forms as required.

(Exh. C-5). The subcontract did not explain what "prevailing wages" were, did not indicate where such information could be found, did not explain the information required to be submitted on the certified payroll forms, and neglected to mention that failure to accurately complete certified payrolls might lead to termination of the contract and debarment. As indicated above, the certified payrolls R&F completed listed hours for "owner-operators" (which were used by the investigator to determine hours worked), but did not indicate the rate of pay, based on R&F's asserted belief that these "owner operators" were not entitled to the prevailing wage.

Abraham Yazdi, the vice president of Aztec who drew up the subcontract with R&F, agreed that the subcontract with R&F did not, for the most part, comply with 29 C.F.R. 5.5(a)(6) and 5.5(a)(1)-(10). He testified as follows: "At the time when I was preparing this contract I was not aware of the detailed requirements, and therefore I did not comply." (Tr. 55). Yazdi admitted that he did not read the provisions of the Act that were included in Aztec's subcontract with Wilson. (Tr. 773).

Abraham Yazdi asserted that the contract's shortcomings should be attributed to his ignorance of the Act rather than intentional misconduct. However, "there has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government on a Davis-Bacon job." Phoenix Paint Co., WAB Case No. 87-8 (May 5, 1989). Aztec was, after all, an experienced government contractor which had engaged in ten prevailing wage jobs prior to the Reagan Building project. (Tr. 57).

As explained above, Aztec is responsible for the violations of its subcontractor R&F in failing to keep proper records and pay the sprinkler fitters the prevailing wage. It was undoubtedly aware of the partnership set up by R&F, as evidenced, at minimum, by the certified payrolls it submitted to Wilson for submission to the Agency; those payrolls listed "owner operators" and did not contain any rate of pay, based on R&F's belief that owner operators were not entitled to the prevailing wage. In this regard, Yazdi asserted that he had discussed the partnership formation with Robert Dehnoushi of R&F, yet inexplicably stated that it was his belief that the

R&F partnership obviated the need for prevailing wages:

> Q: Was it your understanding that if laborers and R&F Fire Protection were partners that they would not have to pay prevailing wages?
> A [Yazdi]: That was my understanding.

(Tr. 74). And, the Act and regulations, which were included in and made a part of its contract with Wilson, clearly and unambiguously provide that, regardless of any agreement between the employer and the employees, the employer must pay its workers the required wages. As an experienced government contractor, Aztec thus should have known that R&F's partnership agreements did not excuse the subcontractor from compliance with the prevailing wage provisions of the Act and regulations.

Aztec's knowing reliance on R&F's "partnership" to avoid paying prevailing wages, together with its failure to include the requisite DBA provisions in its subcontract with R&F, is sufficient to warrant debarment. See Edwards Furnace Company Inc., WAB Case No. 77-28 (Sept. 18, 1978) (calling employees independent contractors to avoid paying prevailing wages is a "subterfuge" warranting debarment). In addition, its attempt to recover from the workers the back wages which Wage and Hour had determined were owed under the Act clearly demonstrates that Aztec has disregarded its obligations under the Act.

Suing workers to obtain wages owed to workers shows a clear lack of intent to pay the workers the required wages. See Morello Brothers, Inc., WAB Case No. 87-24 (Feb. 21, 1991). It is well established that a contractor may not circumvent labor laws by seeking back wages pursuant to an indemnification clause. See Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 (10th Cir. 1992). Funds that are due to an employee should not be allowed to accrue to the benefit of the underpaying employer. See Irwin Company Inc. v. 3535 Sage Street Associates, Ltd., 37 F3d 212, 216 (5th Cir. 1994). When funds are withheld pursuant to suspected violation of federal labor laws, the contractor has no assignable property right to those funds. See United California Discount Corporation v. United States 19 Cl. Ct. 504, 510 (U.S. Claims Court 1990). When all of these facts are viewed in their totality, debarment against Aztec and its president and vice president is warranted.

CONCLUSION

For the reasons stated above, this Board should affirm the decision of the ALJ in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this motion for extension of time have been served on the following individuals by deposit in the United States Mail this 22nd day of October 2002:

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