



**IN THE MATTER OF:**

**ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,**      **ARB CASE NO. 2022-0056**  
**DATE: May 29, 2024**

**PROSECUTING PARTY,**

**v.**

**VET REPORTING, LLC,**

**and**

**THOMAS BAILEY,**

**RESPONDENTS.**

**Appearances:**

***For the Administrator, Wage and Hour Division:***

**Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., Judith Marblestone, Esq.; U.S. Department of Labor, Office of the Solicitor; Washington, District of Columbia**

***For the Respondent:***

**Thomas Bailey, President of Vet Reporting, LLC; Pro Se; Marietta, Georgia**

**Before HARTHILL, Chief Administrative Appeals Judge, WARREN and ROLFE, Administrative Appeals Judges**

## DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the McNamara-O'Hara Service Contract Act of 1965 (SCA or the Act), as amended, and its implementing regulations.<sup>1</sup> Respondents Vet Reporting, LLC (Vet Reporting) and Thomas Bailey (Bailey) petitioned the Administrative Review Board (ARB or Board) for review of the final ruling of the Administrator (Administrator) of the United States Department of Labor's (Department) Wage and Hour Division (WHD), Ruling Letter dated June 8, 2022.

### BACKGROUND

Alpha4 Solutions, LLC (Alpha4) was a Service-Disabled Veteran-Owned Small Business (SDVOSB), that provided medical transcription and court reporting services to the U.S. Department of Veterans Affairs (VA) and other federal agencies.<sup>2</sup> A WHD investigation found that Alpha4 violated the SCA's prevailing wage, fringe benefit, and recordkeeping requirements and owed 166 of its medical transcriptionists over \$380,315.40 in back wages.<sup>3</sup> In a subsequent investigation, WHD found Alpha4 failed to pay the SCA's required prevailing wage and fringe benefits and owed another 98 employees \$76,168.22 in back wages.<sup>4</sup> WHD assessed underpayments totaling \$456,483.62.<sup>5</sup>

The principal officers of Alpha4 were Bailey and David Turner (Turner), who acquired the company in 2014.<sup>6</sup> Alpha4 was initially informed of the WHD investigation in August 2018.<sup>7</sup> In October 2018, Bailey created Vet Reporting.<sup>8</sup> In

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<sup>1</sup> 41 U.S.C. §§ 6701-6707; 29 C.F.R. Parts 4 and 8 (2023).

<sup>2</sup> Ruling Letter at 1.

<sup>3</sup> Ruling Letter at 1; Administrative Record (Admin. Rec.) at 477.

<sup>4</sup> Admin. Rec. at 20.5.

<sup>5</sup> Complaint at 7 (Sept. 20, 2022). WHD's first investigation was from 2018-2020, with the finding issued in 2021. Admin. Rec. at 477-478. WHD's second investigation was in 2021-2022, with a finding in 2022. Admin. Rec. at 20.5-21.

<sup>6</sup> Ruling Letter at 2. Bailey was Alpha4's President and Turner was its CEO. *Id.*

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4. Bailey owns Vet Reporting. *Id.*

July 2019, Turner created a third business relevant to this case, Veterans Command, LLC (Veterans Command).<sup>9</sup>

Alpha4 subsequently entered into asset purchase agreements (APAs) with Vet Reporting and Veterans Command; Vet Reporting purchased Alpha4's court reporting contracts and Veterans Command purchased Alpha4's medical transcription contracts.<sup>10</sup> After they purchased the contracts, Vet Reporting and Veterans Command novated the contracts and entered into novation agreements with the contracting agencies.<sup>11</sup> Respondents state that the asset sales and novation agreements were a result of an upcoming sale of Alpha4 to a non-SDVOSB.<sup>12</sup>

The final conference for the initial WHD investigation was held on June 8, 2020.<sup>13</sup> WHD alerted Alpha4 by letter on February 9, 2021, to the findings from its initial investigation and the possibility of withholding from its contracts.<sup>14</sup> In that letter, WHD informed Alpha4 that the withheld funds would not be distributed until the administrative remedies available to Alpha4 were complete.<sup>15</sup> On May 18, 2021, WHD requested the VA withhold the underpayments from Alpha4's contracts and to cross-withhold from other federal contracts in case of insufficient funds.<sup>16</sup> On October 21, 2021, the VA informed Vet Reporting that it had determined that Vet Reporting was the "same contractor" as Alpha4 and began cross-withholding from Vet Reporting's contracts.<sup>17</sup>

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<sup>9</sup> *Id.* Turner owns Veterans Command. *Id.*

<sup>10</sup> *Id.* at 4-5. Alpha4 may no longer be in business. *See* Administrator's Brief (Adm'r Br.) at 19.

<sup>11</sup> Ruling Letter at 5; Complaint at 3.

<sup>12</sup> Respondents' Brief (Resp. Br.) at 6.

<sup>13</sup> Ruling Letter at 4.

<sup>14</sup> Adm'r Br. at 16.

<sup>15</sup> Admin. Rec. at 478.

<sup>16</sup> Adm'r Br. at 17. When a contractor underpays wages or benefits on an SCA-covered contract, the Act permits withholding of the amount determined to be due on the contract, or from any other contract between the same contractor and the Federal Government. 41 U.S.C. § 6705(b)(1); 29 C.F.R. § 4.187(a). This latter type of withholding is called cross-withholding.

<sup>17</sup> Adm'r Br. at 17; Admin. Rec. at 107-08.

In June 2022, WHD submitted another withholding request to the VA, this time naming all three companies, for the additional back wage liability assessed during the subsequent investigation.<sup>18</sup> In that withholding request, WHD stated that the investigative record was with the Office of the Regional Solicitor, and a Department ALJ would decide issues in the case.<sup>19</sup>

In December 2021, Vet Reporting objected to the VA's cross-withholding from Vet Reporting's novated Alpha4 contracts, and requested the following relief from the Administrator:<sup>20</sup>

1) A final decision as to Vet Reporting's liability for SCA prevailing wage and fringe benefit underpayments that WHD found owed to 166 service employees of Alpha4; or in the alternative,

2) A decision of the Department to rescind the request for cross-withholding under the SCA from Alpha4's contracts that were novated to Vet Reporting; or defer to the VA's decision about whether Vet Reporting is a successor in interest to Alpha4's SCA back wage liability and cross-withholding obligations.<sup>[21]</sup>

WHD denied Vet Reporting's requests and found that Vet Reporting's SCA liability was best determined by a Department ALJ.<sup>22</sup> WHD also agreed with the VA's decision to cross-withhold from Vet Reporting's novated contracts for Alpha4's SCA underpayments.<sup>23</sup> The Administrator stated that information available to her reflected that under the Act, its implementing regulations, and federal common law doctrine of successorship liability, there was a reasonable basis for concluding that Vet Reporting was effectively the "same contractor" as Alpha4 and a successor in interest to any Alpha4 back wage liability, making cross-withholding permissible.<sup>24</sup>

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<sup>18</sup> Admin. Rec. at 20.5-21; Adm'r Br. at 17-18.

<sup>19</sup> Admin. Rec. at 21.

<sup>20</sup> Ruling Letter at 1.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> Adm'r Br. at 4.

On August 8, 2022, Respondents Vet Reporting and Thomas Bailey timely petitioned the Board for review of the Administrator’s Ruling Letter. Shortly thereafter, on September 20, 2022, WHD filed a complaint (the Complaint) with the Office of Administrative Law Judges, naming Alpha4, Turner, Bailey, Vet Reporting, and Veterans Command as respondents (the OALJ Case).<sup>25</sup> Based on the initial and subsequent WHD investigations from 2018-2022, the Complaint alleges that Alpha4 violated the SCA and owed back wages and fringe benefits.<sup>26</sup> The OALJ Case currently awaits a hearing, which is scheduled for September 25, 2024.<sup>27</sup>

### JURISDICTION AND STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide “appeals concerning questions of law and fact from final decisions of the Administrator” rendered under the SCA.<sup>28</sup> “The Board is an appellate body and shall decide cases properly brought before it . . . .”<sup>29</sup> The Board will only modify or set aside a factual finding when it is not supported by the preponderance of the evidence.<sup>30</sup> Questions of law are reviewed de novo, but the ARB will “defer[ ] to the Administrator’s interpretation of the SCA when it is reasonable and consistent with the law.”<sup>31</sup>

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<sup>25</sup> Complaint at 1.

<sup>26</sup> *Id.* at 5-7; Adm’r Br. at 21. The parties apparently engaged in settlement discussions from 2022 until January 2024, when the OALJ proceeding resumed. Consent Motion to Extend Time to Answer, or Otherwise Respond to, the Complaint, *In re Alpha4 Sols., et al.*, ALJ No. 2022-SCA-00006 (ALJ Nov. 20, 2023).

<sup>27</sup> Notice of Assignment, Notice of Hearing, and Initial Pre-Hearing Order, *In re Alpha4 Sols., et al.*, ALJ No. 2022-SCA-00006 (ALJ Feb. 15, 2024).

<sup>28</sup> 29 C.F.R. § 8.1(b); *see also* Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

<sup>29</sup> 29 C.F.R. § 8.1(d).

<sup>30</sup> 29 C.F.R. § 8.9(b).

<sup>31</sup> *Innovair LLC v. Adm’r, Wage & Hour Div., U.S. Dep’t of Lab.*, ARB No. 2020-0070, slip op at 5 (ARB Nov. 21, 2021) (citing *Forfeiture Support Assocs.*, ARB No. 2006-0028, slip op. at 2 (ARB May 27, 2008); *accord Ct. Sec. Officers*, ARB No. 1998-0001, slip op. at 4 (ARB Sept. 23, 1998) (“[W]e ordinarily defer to the expertise and experience of the Administrator, and will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision, taking into account the applicable law and facts of the case.”).

## DISCUSSION

In their Petition for Review and Opening Brief, Respondents argue: Vet Reporting is not the “same contractor” or a successor in interest to Alpha4 and should not be subject to cross-withholding;<sup>32</sup> WHD did not provide sufficient due process in their investigation;<sup>33</sup> WHD made inaccurate assumptions about the APAs and novation agreements;<sup>34</sup> WHD made inaccurate hours and payment calculations;<sup>35</sup> and WHD did not provide an opportunity for an adjustment due to errors made by the contracting agency.<sup>36</sup>

The Administrator counters that WHD has a reasonable basis for the cross-withholding and the process provided in the SCA and regulations satisfies constitutional due process. The Administrator further notes that the ongoing OALJ Case will allow for “a fully developed factual record and an ALJ’s credibility determinations.”<sup>37</sup> In addition to the substantive questions presented in this case, the Administrator filed a “Motion to File under Seal Volumes 2 and 3 of the

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<sup>32</sup> Resp. Br. at 8.

<sup>33</sup> *Id.* at 1. Respondents also argue that failure to properly close an earlier WHD investigation of Alpha4 led to a due process issue. *Id.* at 4.

<sup>34</sup> *Id.* at 5-6.

<sup>35</sup> *Id.* at 6-7.

<sup>36</sup> *Id.* at 7-8. Respondent cites 48 C.F.R. § 22.1015, Discovery of Errors by the Department of Labor, which states, in its entirety:

If the Department of Labor discovers and determines, whether before or after a contract award, that a contracting officer made an erroneous determination that the Service Contract Labor Standards statute did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract, the contracting officer, within 30 days of notification by the Department of Labor, shall include in the contract the clause at 52.222–41 and any applicable wage determination issued by the Administrator. If the contract is subject to 41 U.S.C. 6707(f), the Administrator may require retroactive application of that wage determination. The contracting officer shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.

<sup>37</sup> Adm’r Br. at 37.

Administrative Record” (Motion to Seal) requesting that the Board seal part of the administrative record.

## 1. Motion to Seal

In support of its Motion to Seal, the Administrator states that Vet Reporting stamped some of its documents with a confidentiality label,<sup>38</sup> and the VA indicated certain documents provided by Alpha4, Vet Reporting, or Veterans Command may contain internal business or non-public information.<sup>39</sup>

While the Administrator never specifically states as much, based on the stamping and reference to internal business or non-public information, it appears that the parties’ main concern is disclosure under the Freedom of Information Act (FOIA). The parties’ submissions, including the corporate documents and contracts the parties have moved to be sealed, are part of the record and subject to the FOIA.<sup>40</sup> “The FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the [FOIA].”<sup>41</sup>

In the absence of a FOIA request, it is premature and would be inappropriate for the Board to determine whether any exemption is applicable.<sup>42</sup> If a FOIA request is received for the record in this case, the Department of Labor will follow the proper procedures for responding.<sup>43</sup> We therefore find that sealing portions of the record is neither necessary nor appropriate and deny the Motion to Seal.

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<sup>38</sup> Motion to Seal at 2-3. The label stated: “CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO FOIA EXEMPTION 4 / DO NOT DISCLOSE OUTSIDE OF THE U.S. GOVERNMENT.” *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 5 U.S.C. § 552. Accordingly, there is no reason to “seal” the identified documents.

<sup>41</sup> *Hendrix v. CSX Transp., Inc.*, ARB No. 2023-0033, ALJ No. 2020-FRS-00076, slip op. at 3 (ARB July 13, 2023) (quoting *Rew v. CSX Transp. Inc.*, ARB Nos. 2021-0042, -0058, ALJ No. 2019-FRS-00073, slip op. at 3 (ARB Nov. 2, 2021) (citation omitted)).

<sup>42</sup> *Hendrix*, ARB No. 2023-0033, slip op. at 3 (citing *Bettner v. Crete Carrier Corp.*, ARB No. 2007-0093, ALJ No. 2007-STA-00033, slip op. 3 n.11 (ARB Sept. 27, 2007) (citation omitted) (discussing premature FOIA exemption requests and determinations concerning settlement agreements)).

<sup>43</sup> 29 C.F.R. Part 70 (2023). Pursuant to 29 C.F.R. § 70.26(b), submitters may, in good faith, designate portions of their submissions as containing confidential commercial information, which they consider to be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). Because the parties have designated certain materials as

## 2. Cross-withholding is Permitted by Statute and Regulation as a Matter of Law

Respondents ask us to overturn the Administrator’s ruling on cross-withholding and return the withheld funds because they contend Vet Reporting is not the same contractor as Alpha4. They argue the companies provide different contracted services (the Alpha4 contract is court reporting services versus Vet Reporting handling medical transcriptions services), the APAs signed by the parties do not transfer the contract with alleged violations to Vet Reporting, and the terms of the initial acquisition of Alpha4 by Turner and Bailey protect Alpha4 from some liability.<sup>44</sup>

The Administrator responds that the law allows cross-withholding, and the novation agreement signed by Vet Reporting makes Vet Reporting a successor in interest, and thus, the “same contractor” eligible for withholding for the Alpha4 violations.<sup>45</sup> According to the Administrator:

In its novation agreement with Alpha4, Vet Reporting expressly assumed all obligations and liabilities of, and claims against, Alpha4 under the contracts, as if Vet Reporting were the original party to the contracts. The VA in turn “recognize[d] [Vet Reporting] as [Alpha4’s] successor in interest in and to the contracts” and that “[t]he contract(s) shall remain in full force and effect, except as modified by this Agreement.”<sup>[46]</sup>

The SCA authorizes direct withholding from the contract on which violations may have occurred and cross-withholding from “any other contract between the same contractor and the Federal Government.”<sup>47</sup> The regulations allow for withholding of “the accrued payments due either on the contract or on any

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containing confidential commercial information, the Board will treat those materials to the pre-disclosure procedures in 29 C.F.R. § 70.26.

<sup>44</sup> Resp. Br. at 2, 3, 10.

<sup>45</sup> Adm’r Br. at 30; Ruling Letter at 5.

<sup>46</sup> Ruling Letter at 5.

<sup>47</sup> 41 U.S.C. § 6705(b)(1).



other contract . . . between the same contractor and the Government . . . .”<sup>48</sup> Importantly, withholding is permitted prior to a final order establishing liability.<sup>49</sup> The amounts withheld are retained in a deposit fund and can only be released to underpaid workers upon a final order of the Secretary.<sup>50</sup>

### **3. Whether Vet Reporting is the Same Contractor as Alpha4 is a Factually Specific Inquiry Best Conducted by the ALJ in the First Instance**

Thus, the issue presented to the Board is whether WHD’s determination that Vet Reporting is the “same contractor” as Alpha4 is consistent with the law. Resolving that dispute, however, involves thorough fact-finding regarding the APA and novation agreements at issue that is initially best conducted by the ALJ.

A plain reading of the statute and regulations show that WHD is permitted to request withholding from a different contract with the same contractor.<sup>51</sup> While Respondents argue that the only purchased assets were a different kind of service contract, the nature of the services of each contract is not relevant to the inquiry of whether a business is the “same contractor”—in fact, the other contracts do not even need to be SCA contracts to be eligible for withholding.<sup>52</sup>

The fact that there are distinct business entities also does not resolve the issue.<sup>53</sup> While asset sales generally relieve the acquirer of the liabilities of its

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<sup>48</sup> 29 C.F.R. § 4.187(a); *see also* 29 C.F.R. § 4.6(i) (“contracting officer shall withhold or cause to be withheld . . . such sums . . . as may be necessary to pay underpaid employees employed by the contractor or subcontractor”); 48 C.F.R. §§ 22.1022, 52.222-41(k) (Federal Acquisition Regulation (FAR), which incorporate SCA requirements).

<sup>49</sup> 41 U.S.C. § 6705(b)(1) (stating that withholdings should be held in a deposit fund until there is a final order from the Secretary); *see also* 29 C.F.R. § 4.187(a) (stating the same).

<sup>50</sup> *Id.*

<sup>51</sup> *See Sec’y of Lab. v. Glaude*, ARB No. 1998-0081, ALJ No. 1995-SCA-00038 (ARB Nov. 24, 1999) (affirming WHD and ALJ decisions that included withholding from contracts at different agencies that the same contractor entered into with each agency).

<sup>52</sup> “So much of the accrued payments due either on the contract or on any other contract (*whether subject to the Service Contract Act or not*) between the same contractor and the Government may be withheld . . . .” 29 C.F.R. § 4.187(a) (emphasis added).

<sup>53</sup> “Separate corporate entities are not inviolate.” *United States v. Davison Fuel & Dock Co.*, 371 F.2d 705, 713 (4th Cir. 1967) (holding that a contractor could not circumvent application of Walsh-Healey Act federal contract labor standards by setting up separate legal entities to which the contractor shifted work); *see also Golden State Bottling Co., Inc.*

predecessor, there are exceptions.<sup>54</sup> The general exceptions include when the buyer agreed to assume the liabilities, the transaction amounted to a de facto merger of the buyer and seller, the buyer is a “mere continuation” of the seller, or the transaction is entered into fraudulently in order to escape liability for such debts.<sup>55</sup>

In cases where federal labor laws apply, courts apply federal common law successor liability, which imputes more liability than the traditional approach because of the policies underlying federal employment statutes.<sup>56</sup> Applying federal common law successor liability is consistent with Congress’s intent in passing federal employment laws, including the SCA.<sup>57</sup> Courts look to the following factors:

- (1) whether the successor employer had prior notice of the claim against the predecessor;
- (2) whether the predecessor is able, or was able prior to the purchase, to provide the relief requested; and
- (3) whether there has been a sufficient continuity in the business operations of the predecessor and successor.<sup>[58]</sup>

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*v. NLRB*, 414 U.S. 168, 179-80 (1973) (holding that the NLRB has authority to order a bona fide purchaser of a company to reinstate an employee when the predecessor committed the unfair labor practice).

<sup>54</sup> *Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451, 1456 (11th Cir. 1985) (explaining liability transfers in asset sales).

<sup>55</sup> *Id.* (citation omitted).

<sup>56</sup> *Teed v. Thomas & Betts Power Sols., L.L.C.*, 711 F.3d 763, 764 (7th Cir. 2013) (“[W]hen liability is based on a violation of a federal statute relating to labor relations or employment, a federal common law standard of successor liability is applied that is more favorable to plaintiffs than most state-law standards to which the court might otherwise look.”); *but see In re Danielson, et al.*, BSCA No. 1992-0015, -0016, -0017, 1992 WL 752888 (BSCA Sept. 30, 1992) (Board of Service Contract Appeals examined only the general exceptions when determining whether a successor was liable under the SCA).

<sup>57</sup> *Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1326 (7th Cir. 1990) (noting that courts “have imposed liability upon successors beyond the bounds of the common law rule in a number of different employment-related contexts in order to vindicate important federal statutory policies”); *see also Teed*, 711 F.3d at 764 (examining successor liability in the case of an asset sale involving a violation of the Fair Labor Standards Act); *Golden State Bottling Co., Inc.*, 414 U.S. at 181-85 (examining factors that may be relevant, including knowledge of the potential liability at the time of transfer).

<sup>58</sup> *Upholsterers’ Int’l Union Pension Fund*, 920 F.2d at 1327 (citing *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236 (7th Cir. 1986) (citing *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974))).

Whether or not Vet Reporting is the “same contractor” as Alpha4 is a fact-specific inquiry that the ALJ thus is in a better position to initially resolve after conducting a full evidentiary hearing with an opportunity to evaluate witness credibility.<sup>59</sup>

Interpretation of the service contract itself, and the novation agreement, are key. The ALJ’s duty in the OALJ Case is to hold a full evidentiary hearing and engage in fact-finding on the particular successor-in-interest issue here and apply the law accordingly. The factual arguments that Respondents make in their petition—about inaccurate assumptions about the APAs and novation agreements,<sup>60</sup> inaccurate hours and payment calculations,<sup>61</sup> and whether there was opportunity for an adjustment due to errors made by the contracting agency<sup>62</sup>—are properly decided by the ALJ. Upon issuance of a final Decision and Order, the parties may appeal the ALJ’s Decision and Order for our review and we will have the benefit of a fully developed factual record and the ALJ’s credibility findings.<sup>63</sup>

Accordingly, we find that WHD’s cross-withholding request is legally permissible under the statute and regulations, and we dismiss Respondents’ requests to overturn the Administrator’s ruling on cross-withholding from Vet Reporting and return withheld funds.

#### **4. The Notice and Opportunity to Respond Afforded to Vet Reporting Satisfies Constitutional Due Process**

Vet Reporting argues the Administrator failed to provide Respondents with due process at any step in the withholding process. Respondents claim that the cross-withholding is in violation of the safeguards provided in 48 C.F.R. § 22.1022,<sup>64</sup>

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<sup>59</sup> See *In re Nissi Corp., et al.*, BSCA No. SCA-1233, 1990 WL 656138 (BSCA Sept. 25, 1990) (“This issue, moreover, is essentially factual, even if its outcome directly governs the more legal issue of the propriety of the withholding of funds . . . .”); see also *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985) (“Each case must be determined on its own facts.”).

<sup>60</sup> Resp. Br. at 5-6.

<sup>61</sup> *Id.* at 6-7.

<sup>62</sup> *Id.* at 7-8.

<sup>63</sup> 29 C.F.R. § 8.1(b).

<sup>64</sup> 48 C.F.R. § 22.1022 outlines withholding procedures for SCA labor standards violations in the FAR.

48 C.F.R. § 52.222-41,<sup>65</sup> 48 C.F.R. § 22.406-9,<sup>66</sup> the U.S. Department of Labor Prevailing Wage Resource Book (Resource Book), and U.S. Constitutional protections relating to due process.

Constitutional due process requires notice and an opportunity to be heard.<sup>67</sup> Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>68</sup> Due process also requires the opportunity for “some form of hearing . . . before an individual is finally deprived of a property interest.”<sup>69</sup> Importantly, a hearing is not required prior to a temporary deprivation of property rights—the hearing must occur prior to the final deprivation of property rights.<sup>70</sup> An examination of the process due in this case under the SCA shows that it satisfies the Constitution.

#### A. Notice

The Respondents in this case have received notice. Bailey, as an officer of Alpha4, was alerted to the WHD investigation in 2018.<sup>71</sup> He was also alerted to the withholding request.<sup>72</sup> Vet Reporting, too, was alerted of the VA’s decision that it was the “same contractor” in October 2021.<sup>73</sup> WHD’s subsequent withholding request to the VA after completion of the second investigation named Vet Reporting

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<sup>65</sup> 48 C.F.R. § 52.222-41 incorporates the SCA labor standards into the FAR.

<sup>66</sup> 48 C.F.R. § 22.406-9 outlines withholding procedures for another statute, the Contract Work Hours and Safety Standards, in the FAR.

<sup>67</sup> *Fagan v. Dep’t of Navy*, ARB No. 2023-0006, ALJ No. 2021-CER-00001, slip op. at 17 (ARB Feb. 28, 2024) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

<sup>68</sup> *Mullane v. Cent. Hannover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

<sup>69</sup> *Mathews*, 424 U.S. at 333, 348-49.

<sup>70</sup> *Id.* at 349.

<sup>71</sup> Ruling Letter at 3 (“Mr. Bailey represented Alpha4 at WHD’s September 6, 2018 initial conference.”).

<sup>72</sup> Ruling Letter at 6 (“On February 9, 2021, WHD sent a letter to Mr. Bailey of Alpha4 at the Marietta, GA address advising of WHD’s findings that Alpha4 owed 166 employees back wages totaling \$380,315.40 because of the contractor’s failure to pay required SCA prevailing wages and fringe benefits.”); Admin. Rec. at 477-78.

<sup>73</sup> Resp. Br. at 2.

specifically and was sent to Bailey.<sup>74</sup> WHD included in its correspondence a description of the administrative process.<sup>75</sup> The Ruling Letter was further notice of the withholding, and provided more information to Respondents as to why the VA was cross-withholding from Vet Reporting's contracts. Respondents' petition to the Board shows that they received the notice provided in the Ruling Letter. Accordingly, we find that Respondents received sufficient notice of the withholding and potential liability.

*B. Opportunity to be Heard*

The SCA and its implementing regulations provide for a full and fair opportunity for Respondents to challenge WHD's liability findings, underpayment assessments, and withholding determinations. The regulations specifically provide for review of the Administrator's investigative findings and remedies, with factual disputes to be resolved by the ALJ, with full hearing proceedings, and appellate review by the ARB.<sup>76</sup> After the administrative process, judicial review is available under the Administrative Procedure Act.<sup>77</sup>

The process to determine whether the Secretary of Labor, or their designee, will order payment for back wages and fringe benefits is ongoing in the OALJ Case. Respondents offer no evidence that WHD has deviated from the statutory and regulatory process—to date, a complaint has been filed and a hearing has been scheduled. Instead, they point to the FAR regulations and Resource Book. The relevant FAR regulations require a contracting agency to withhold for SCA violations upon request by WHD.<sup>78</sup> As discussed in more detail below, the SCA and

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<sup>74</sup> Admin. Rec. at 20.5-21.

<sup>75</sup> *Id.* at 21 (“Since no other resolution has been agreed upon with the contractor, we have forwarded the entire record to the Office of the Regional Solicitor for further action. A Department of Labor Administrative Law Judge will then make a decision concerning the issues in this case”); *id.* at 478 (“Please be advised that any determination regarding the withholding of contract funds will not result in the distribution of these funds to the underpaid workers until such time as the administrative remedies available to your firm have been completed. Those procedures . . . may be found in the Department of Labor Regulations, 29 C.F.R. § 4.187 and Part 6, subpart C.”).

<sup>76</sup> See 41 U.S.C. § 6707(a); 29 C.F.R. §§ 4.189, 6.1-6.21, 8.1-8.6, 8.10-8.19, Part 18.

<sup>77</sup> 5 U.S.C. §§ 702-704.

<sup>78</sup> When there is a violation of the SCA labor standards, the FAR, in relevant part, requires an agency to withhold the amount due to underpaid employees upon receipt of a request from WHD. 48 C.F.R. § 22.1022 (“the contracting officer . . . upon written request of

its implementing regulations themselves allow for withholding, with amounts withheld in a deposit fund, until there is an order from the Secretary of Labor, or their designee. The OALJ Case will allow Respondents a full hearing, with further opportunity for appeal, before a final order is issued.

### *C. Pre-Hearing Deprivation of Property*

In cases of withholding due to alleged SCA violations, the withheld funds are not disbursed until after completion of the administrative process.<sup>79</sup> None of the withheld funds may be disbursed by WHD until there is a non-appealable final determination that Alpha4 workers are owed SCA back wages. The Act specifies that the amount withheld “shall be held in a deposit fund.”<sup>80</sup> It further specifies that “on order of the Secretary, the compensation found by the Secretary or the head of a Federal agency to be due an underpaid employee pursuant to this chapter shall be paid from the deposit fund directly to the underpaid employee.”<sup>81</sup> The regulations further echo the Act in directing that withholdings be held in a deposit fund until there is a final order from the Secretary or their authorized representative.<sup>82</sup>

The procedures outlined in the SCA and its regulations satisfy due process. The Department of Labor has a substantial interest in ensuring compliance with the Act and, in accordance with that interest, withholding and cross-withholding

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the Department of Labor from a level no lower than that of Deputy Regional Administrator, Wage and Hour Division, Department of Labor, shall withhold . . .”). It also allows an agency contracting officer to withhold the amount due to underpaid employees. *Id.* (“The contracting officer may withhold . . .”). In this case, because WHD submitted a request to the VA, the VA was required to withhold from the contracts. *See also* 29 C.F.R. § 4.187(a) (“It is mandatory for a contracting officer to adhere to a request from the Department of Labor to withhold funds where such funds are available.”).

<sup>79</sup> 48 C.F.R. § 22.1022 (“The agency shall place the amount withheld in a deposit fund. Such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary (or authorized representatives), and Administrative Law Judge, or the Administrative Review Board.”).

<sup>80</sup> 41 U.S.C. § 6705(b)(1).

<sup>81</sup> *Id.*

<sup>82</sup> 29 C.F.R. § 4.187(a) (“[a]ccrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees . . . . [O]n order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld.”).

are pursued before a final determination of liability. Respondents received notice and are granted an opportunity for a full evidentiary hearing, as well as appeal, before they may be finally deprived of the amounts withheld. Thus, Respondents have both notice and an opportunity to be heard, satisfying the Due Process Clause of the Constitution.

### **5. The Remaining Factual Disputes are Best Resolved by a Department of Labor Administrative Law Judge**

The procedural posture of this case is distinct from many SCA cases that appear before the Board. It is unusual for a case of this type—with a WHD investigation resulting in withholding and a complaint—to arrive at the ARB before there has been a hearing and the ALJ has issued a final Decision and Order. This procedural posture, while contemplated by the regulations, leaves the ARB in the position of an appellate body without the benefit of the fact-finding, record development, and other benefits of a hearing.<sup>83</sup> Vet Reporting was entitled to request the Ruling Letter that led to this appeal, and understandably felt urgency to retain its right to dispute these issues and have them resolved due to the ongoing withholding. However, in addition to the question of whether Vet Reporting is a successor-in-interest, Respondents’ arguments about inaccurate assumptions about the APAs and novation agreements,<sup>84</sup> inaccurate hours and payment calculations,<sup>85</sup> and whether there was opportunity for an adjustment due to errors made by the contracting agency<sup>86</sup> are each factual in nature and should be resolved by the ALJ for the reasons identified.

Indeed, all parties appear to agree that the best place for a resolution of Respondents’ factual disputes and the ultimate question of whether there were SCA violations is a hearing before an ALJ.<sup>87</sup> In their opening brief, Respondents state: “[s]urprisingly, the June 8, 2022 letter states WHD’s opinion that Vet’s grievance should be put before an ALJ—and that, according to WHD, Vet should wait for the

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<sup>83</sup> See 29 C.F.R. §§ 6.15-6.21 (describing the procedure for filing a complaint with OALJ and requesting review by the ARB); 29 C.F.R. § 8.7(b) (allowing appeal to the ARB of a “final written decision (other than a wage determination) of the Administrator”).

<sup>84</sup> Resp. Br. at 5-6.

<sup>85</sup> *Id.* at 6-7.

<sup>86</sup> *Id.* at 7-8.

<sup>87</sup> See Adm’r Br. at 35 (“The Administrator correctly determined that an ALJ is best situated to resolve the factual and legal disputes at issue in this case”).

Regional Solicitor to file a complaint with the ALJ, and call Vet as a respondent. However, in contrast, the bottom of the letter acknowledges that it is an Administrator's final decision, and that Vet has 60 days to appeal to the ARB."<sup>88</sup> The Administrator, too, notes that many of the issues raised may be better resolved by the ALJ proceeding.<sup>89</sup> We agree with the parties.

We find that without the benefit of a full hearing and fact-finding by a Department ALJ, the remainder of this case should be dismissed without prejudice until the completion of the OALJ Case. The parties may appeal the ALJ's decision at that time.

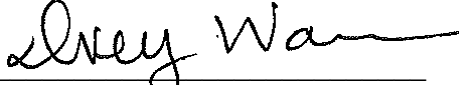
### CONCLUSION

For the reasons set forth above, we **AFFIRM** the Ruling Letter with respect to the Administrator's conclusion that cross-withholding is legally permissible under the SCA and regulations, **DENY** Respondent's petition to find the Administrator violated due process requirements, and because we find that Respondent's factual arguments are best suited to be heard in the concurrent proceeding before the Administrative Law Judge (ALJ), **DISMISS WITHOUT PREJUDICE** the remainder of the petition for review.


**SO ORDERED.**



**SUSAN HARTHILL**  
Chief Administrative Appeals Judge



**IVEY S. WARREN**  
Administrative Appeals Judge



**JONATHAN ROLFE**  
Administrative Appeals Judge

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<sup>88</sup> Resp. Br. at 9.

<sup>89</sup> Adm'r Br. at 35-36.