



In the Matter of:

**ATLANTIC ELECTRICAL
SERVICES, AES, INC., and
JAMES R. SEFAH**

ARB CASE NO. 96-191

DATE: May 28, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This matter arises under the labor standards provisions of the Federal-Aid Highway Act, 23 U.S.C. § 113(a), a Davis-Bacon Related Act (DBRA), and 29 C.F.R. Parts 5, 7 (1996). It is before the Administrative Review Board on the petition of James Sefah and AES, Inc. (Petitioners) for review of the August 13, 1996 final ruling letter issued by the Office of Enforcement Policy, Government Contracts Team, Wage and Hour Division (Administrator), U.S. Department of Labor.

The Administrator denied the Petitioners' request for early removal from the debarred bidders list. For the reasons set forth below, the petition for review is denied and the Administrator's decision is affirmed.

BACKGROUND

On December 7, 1994, the Administrator issued a charging letter to Petitioners alleging aggravated and willful violations of DBRA. Three copies of the charging letter were sent to Petitioners in: New Orleans, Louisiana (Certified Mail # P115 448 678); Marrero, Louisiana (Certified Mail # P115 448 652); and Harvey, Louisiana (Certified Mail # P115 448 658). The letters sent to the New Orleans and Marrero addresses were returned to the Administrator by the United States Postal Service as "Addressee Unknown" and "Moved, Left No Address." Administrative Record (A.R.) Tab N. The letter addressed to Petitioners at Harvey, which is Petitioner Sefah's residence, was unclaimed after an attempt at delivery and two notices. *Id.*

The Petitioners, as a corporate entity and as an individual, were debarred by the Comptroller General on April 3, 1995, pursuant to the Administrator's request. The Petitioners requested early removal from the debarred bidders' list on October 5, 1995. A.R. Tab K. The Wage and Hour Division investigated Petitioners in order to determine whether early removal from the debarred bidders list was warranted and the Petitioners' request was denied.

DISCUSSION

The regulation at 29 C.F.R. § 5.12(c) which provides that a debarred contractor may request removal from the debarment list after six months, requires the Administrator, Wage and Hour Division, to examine the facts and circumstances surrounding the violative practices which caused the debarment and to determine if the debarred person or firm has demonstrated a current responsibility to comply with the requisite labor standards. Among the factors to be considered are the severity of the violations, the contractor's attitude toward compliance, and the past compliance history of the firm with the labor standards provisions applicable to Federal contracts and other Federal labor standards statutes, such as the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*

The Administrator reviewed the debarment case file and determined that the underlying violations were of sufficient gravity as to be properly regarded as aggravated or willful within the meaning of 29 C.F.R. § 5.12(a)(1). The Administrator's review of the Petitioners' compliance history prior to the events leading up to the debarment revealed that there had been four previous violations of DBRA labor standards, each requiring back wage payments to Petitioners' employees. A.R. Tab A at 2; Tab F. The Administrator further considered Petitioners' violation of the FLSA in another business venture (the AES Group, Peanuts Product Division, in Opelika, Alabama), subsequent to debarment, and determined that these factors taken together were sufficient to deny the Petitioners' request for early removal. A.R. Tab E at 2.

We follow precedent in deferring to the Administrator, to whom the DBRA rulemaking functions are entrusted, as being in the best position to interpret those rules, and barring an interpretation that is unreasonable, arbitrary or capricious, or a departure from past practice the Administrator's decision will be upheld. *In the Matter of Titan IV Mobile Service Tower*, Wage Appeals Board (WAB) Case No. 89-14, May 10, 1991, slip op. at 7, citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). *See, In the Matter of Patton-Tully Transportation Co.*, WAB Case No. 93-13, May 6, 1994 (Board is to determine if Wage and Hour's application of a rule is reasonable and not a departure from past determinations); *cf. In the Matter of Bhatt Contracting Co., Inc. and Vijay A. Bhatt*, ARB Case No. 96-124, Order Denying Administrator's Motion to Dismiss and Order of Remand, issued Sep. 6, 1996 (undue delay by Administrator in requesting petitioner to be placed on debarment list is breach of Consent Order); *In the Matter of Heavy Constructors Assoc. of the Greater Kansas City Area*, WAB Case No. 94-13, issued Oct. 11, 1994.

Although the Petitioners now contend that they were not at fault in not responding to the charging letter(s), the debarment became effective in 1995 and Petitioners' appeal concerning that action at this time, is not timely. Nor are we persuaded by Petitioners' contention that they have precluded any further violations of DBRA by using an outside accounting firm to prepare payroll checks for employees. The accounting firm merely prepares the payroll checks for the Petitioners' employees in reliance on the information provided to them by Petitioners. Although

the Wage and Hour investigation did not uncover any violations under this method, there is no inherent safeguard to ensure proper payment to Petitioners' employees. *Compare In the Matter of IBEW Local No. 103*, ARB Final Dec. and Order, Case No. 96-123, Nov. 12, 1996, slip op. at 3.

For the reasons stated above, the decision of the Administrator is affirmed and the petition for review is DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member