

ALERT

# Time to Pay the Piper: Department of Labor Imposes a Three-Year Debarment for Violations of the Service Contract Act

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Debarment is a severe remedy. Under the Federal Acquisition Regulation (FAR), agencies will thus allow government contractors the opportunity to demonstrate why debarment is not necessary in certain situations to protect the Government. But for statutory debarments (such as those prescribed under the McNamara - O'Hara Service Contract Act (SCA), 41 U.S.C. §§ 6701-6707) the contractor faces an even greater uphill battle. The SCA prescribes a mandatory debarment of three years for any violations unless the contractor can demonstrate "unusual circumstances." A recent decision by the Department of Labor (DOL) to debar Garcia Forest Service LLC (Garcia Forest) and its President, Samuel Garcia, for three years should serve as a reminder of the dangers of running afoul of the SCA's stringent requirements.

Garcia Forest is a North Carolina firm that provides forest management services, primarily to the U.S. Forest Service. Garcia Forest typically utilized the H-2B visa program to employ foreign guest workers for seasonal work under its contracts. In 2007, the U.S. Forest Service awarded a contract to Garcia Forest to provide reforestation services in Superior National Forest in Minnesota. The contract was covered by the SCA and required that the workers be paid specific wages on an hourly basis, with additional pay for fringe benefits, overtime, and holidays. At some point during performance of the reforestation contract, Garcia Forest decided to incentivize certain workers by switching one work crew from an hourly wage to a production basis in the hopes of accelerating the completion of the contract work.

## Practice Areas

- Employment & Labor
- Employment and Labor Standards Issues in Government Contracting
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Although Garcia Forest personnel testified it was the company's intention that all workers receive at least the equivalent of the required contract rate under the new payment system, a DOL Wage and Hour Division (WHD) investigation found otherwise. When the WHD investigated the contract, the investigators discovered that Garcia Forest was improperly adjusting its time records in order to create the appearance that the company has paid its SCA employees at SCA minimum wage rates. This resulted in significantly different time entries amongst the workers even though all of the workers lived in the same complex and commuted to and from work at the same time. For instance, WHD found that each worker's Friday hours varied wildly on their respective timesheets, with some records showing an hour worked on Friday while others showed as many as 12 hours. In addition, WHD found that the company had failed to provide the required fringe benefits, overtime, or holiday pay—amounts that must be provided separately and in addition to wage payments. Garcia Forest cooperated fully in the investigation, and it subsequently paid the workers \$27,489 in back wages.

Notably, WHD previously had investigated Garcia Forest for similar violations, finding that Garcia Forest failed to pay the requisite amount for holiday pay under three federal contracts. Upon learning of the underpayment, Garcia Forest promptly paid the back pay, and WHD recommended the file be closed. The first WHD investigator advised Mr. Garcia that he should contact WHD if he had any questions in the future regarding worker compensation. As a result of the second set of SCA violations described above, WHD filed an administrative complaint against Garcia Forest and Mr. and Mrs. Garcia for violations of the SCA and the Contract Work Hours and Safety Standards Act (CWHSSA).

Although the administrative judge accepted Garcia Forest's explanation that the production-based system was a good-faith and sincere attempt to meet performance goals, the administrative judge noted that the SCA required debarment unless Garcia Forest could meet the high burden of demonstrating "unusual circumstances." Under the SCA, this standard requires a contractor to establish both "the absence of aggravating factors and the presence of mitigating factors." As a result of initial misrepresentations by the crew leader, evidence of intentionally falsified time records, and the fact that Garcia Forest was on notice of these very requirements due to previous violations, the administrative judge determined that neither Garcia Forest nor Mr. Garcia could satisfy either of these prongs and trip the "limited safety valve to an otherwise strict statute." Consequently, the administrative judge found both Garcia Forest and Mr. Garcia responsible parties for the SCA and CWHSSA violations and debarred them for a term of three years.

Our experience over the past few years and cases like Garcia Forest confirm the Government's renewed focus on investigating and enforcing federal minimum wage laws like the SCA. In this environment, contractors cannot afford but to provide the appropriate focus and attention to contractor pay practices under SCA-covered contracts—otherwise they risk the imposition of mandatory SCA debarment for violations of the SCA. This scrutiny includes review of compliance with not only minimum wage requirements, but also analysis of the company's compliance with fringe benefit and overtime requirements and the accurate record-keeping requirements. Although the cost of ensuring compliance with these provisions can seem daunting, such costs would pale in comparison with the impact of a three-year debarment.