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OFFICE OF THE INSPECTOR GENERAL  
NATIONAL SECURITY AGENCY  
CENTRAL SECURITY SERVICE

To: Chief, D14 [redacted] Date: 9 January 2015

From: [redacted]

Subject: [redacted] (b) (3) - P.L. 86-36

File No: IV-14-0039

Precedence: Routine

Purpose: To provide a summary progress report and to recommend that this case be referred to BA3 for investigation.

Details:

I. (U) Background

(U//~~FOUO~~) A confidential witness alleged to the NSA OIG that [redacted] failed to pay him "scale wages" for work done on NSA contract [redacted]. The confidential complainant also claimed that he had never received "fringe benefits" and had no idea he was entitled to them. He further alleged that [redacted] intentionally circumvented the law by 1) failing to post the Davis Bacon scale rates and 2) failing to accurately characterize the type of labor performed.

(U//~~FOUO~~) The OIG subsequently opened an inquiry into the allegations.

II. (U) Issue(s)

(U//~~FOUO~~) Did [redacted] violate the Davis Bacon Act by failing to pay scale wages for work done on NSA contract [redacted] between January 2009- January 2014?

III. (U) Applicable Standard(s)

- (U) 18 USC §1001; Statements or entries generally:
  - (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-

<sup>1</sup> (U//~~FOUO~~) [redacted] is a sub-contractor to [redacted] on the subject contract.

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- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years...or both.”

- (U) 40 USC §3142, Rate of wages for laborers and mechanics:
  - (a) Application. – The advertised specifications for every contract in excess of \$2000 to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair... shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.
  - (b) Based on Prevailing Wage. – The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics....
  - (c) Stipulations Required in Contract. –
    - (1) The contractor or subcontractor shall pay all mechanics and laborers employed... the full amounts accrued at time of payment, computed at wage rates not less than those stated in advertised specifications....
    - (2) The contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work....
- (U) 29 CFR Part 5, Subpart A – Davis-Bacon and Related Acts Provisions and Procedures:

§5.5 Contract provisions and related matters.

(1)(i) All laborers and mechanics or working upon the site of the work will be paid unconditionally and... the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor.... Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics.... Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill.... Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided that the employer's payroll records accurately set forth the time spent in each classification in which the work is performed. The wage determination... shall be posted at all times by the contractor and its subcontractors at the site of work in a prominent and accessible place where it can be easily seen by the workers.

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(1)(ii)(A) The Contracting Officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination....

- (U) Federal Acquisition Regulation, Part 52 – Solicitation Provisions and Contract Clauses

52.222-6 Davis-Bacon Act

(b)(1) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and... the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor....

(b)(2) Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics....

(b)(3) Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill.... Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided that the employer's payroll records accurately set forth the time spent in each classification in which the work is performed.

(b)(4) The wage determination (including any additional classifications and wage rates... shall be posted at all times by the Contractor and its subcontractors at the primary site of the work and the secondary site of the work....

(c)(1) The Contracting Officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination....

IV. (U) Investigative Activity

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A. (U) Document Review

(U) Contract [redacted] The contract is an Indefinite Delivery Indefinite Quantity (IDIQ) type contract with formal Delivery Orders. Delivery Orders issued under this IDIQ contract will be Fixed Price or Time & Materials type orders. Fixed price type orders shall employ the labor categories, rates, and pricing specified in Section "B" of the contract. T&M type orders shall be reimbursed as stated in the contract.

(U) The ordering period for this IDIQ shall extend from 01 October 2007 through 29 August 2014 to allow for the processing of contract closeouts.

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(U) Clause H.11 (which is derived from DFARs 352.222-9000) states that the minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing are set forth in the attached Wage Decisions:

Service Contract Act Wage Determination No: 1986-1348 Rev. No. 14, dated 11/16/2004

Davis Bacon Wage Determination No: MD070021 07/06/2007 MD21, Mod. 5, dated 07/06/2007

(U//~~FOUO~~) **Certified Payroll Records.** The OIG reviewed certified payroll records for six [ ] employees from February 2009- October 2013. A preliminary review of the documents compared with the Davis Bacon Wage Determination No: MD070021 demonstrated irregularities.

(U//~~FOUO~~) For instance, many employees earned different rates for the same labor category (i.e. a single employee would earn \$11/hr for laborer/carp help or \$15.92 as laborer/carp help). The inconsistency could not be attributed to overtime or weekend rates.

(U//~~FOUO~~) The OIG could find no evidence that some employees were paid fringe benefits at all. Although some employees elected optional benefits packages, for others, there were no such elections reflected in the records. Therefore, one could not conclude that those employees had been paid their fringe entitlement through HR benefits. Furthermore, their hourly salaries did not include the missing fringe benefits.

(U//~~FOUO~~) [ ] **Payroll Explanations and Timecards.** The OIG supplied [ ] with a sampling of 4 certified payrolls with dates ranging from 21 March 2010- 15 May 2011 and asked them to explain the irregularities observed. [ ] informed the OIG that for 21 March 2010- 15 May 2011, the wage rate determination was No: MD080021, Mod 16, dated 09/04/2009. The OIG compared the certified payroll and [ ] timecards to that Wage Determination.

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(U//~~FOUO~~) [ ] described the wage scale and fringe rate each employee was entitled to under the Wage Determination. However, they did not provide an explanation for how the employees were paid their fringe benefits. The records reflect that the fringe rate was not added to the wage scale. For those employees who did not elect HR benefits, [ ] indicated that their fringe was "paid time off." Although paid time off is an acceptable fringe benefit, [ ] offered no explanation for how the hourly fringe rate was determined to be equivalent to a given number of hours paid time off. Some employees received 40 hours paid time off, some 120 hours, and some received both paid time off as well as HR benefits (such as health insurance or 401K).

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(U//~~FOUO~~) The OIG found it implausible that paid time off accounted for all of the owed fringe benefits. For instance, if a carpenter earned \$15.91/hr, then 40 hours paid time off is worth \$636.40. A carpenter was also entitled to \$3.62/hr in fringe benefits which in one week equates to \$144.80. If he were being paid his fringe benefits in paid time off, he would be entitled to a week's vacation every 4 weeks.

(U//~~FOUO~~) Additionally, [ ] explained that some employees appeared to earn different rates for the same labor category because, "the classifications listed on the certified payroll reports were incorrect due to the payroll software [ ] was using." [ ] provided copies of their timecards to demonstrate how the labor should have been classified in the certified payroll.

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### B. (U) Interviews

(U//~~FOUO~~) [ ] Division Chief [ ] Contracting Specialist; and [ ] Contracting Officer [ ] were interviewed on 18 November 2013 and provided the following information.

(U//~~FOUO~~) There were 2 wage determinations for this contract, the Davis Bacon Act determination and the Service Contract Act Wage Determination. According to BA3, they were not required to update Davis Bacon wage rate determinations for the contract. Once it is established at the beginning of the contract, it stays that way for the duration, even if the contract lasts 5 years. The wage determination is not changed for each job either. The Service Contract Act Wage Determination requires annual review. Therefore, the contractor can request increases in cost over their initial estimate.

(U//~~FOUO~~) Contract [ ] is a firm-fixed price, but parts of it resemble a time and materials contract. It has 3 main components: a base maintenance piece, and logistics piece and a DOC piece. DOC, or delivery order construction contract, consists of individual small construction jobs that are priced out a few weeks before award. The DOCs are indefinite delivery, indefinite quantity. The base maintenance and logistics parts are negotiated at contract award and are a known fixed price.

(U//~~FOUO~~) In order to determine how much to charge for the construction jobs, the contractors use a pricing tool/software called Gordian. [ ] did not believe that labor rates were included in Gordian's estimating process. Gordian used similar jobs to provide an estimate and then BA3 added a co-efficient (i.e. profit) on top of that.

(U//~~FOUO~~) BA3 could not explain why some individuals were paid different rates for the same labor categories on the same job. (For instance, a carpenter was paid both \$15/hr and \$22/hr for the same job). They speculated that maybe some

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aspects of a job may require more specialized training. However, they did not know if breaking up a job in this manner was permissible.

(U//~~FOUO~~) BA3 does not typically review the payroll records, unless they receive a complaint.

(U//~~FOUO~~) A **Confidential Witness** was interviewed on 17 January 2014 and provided the following sworn testimony.

(U//~~FOUO~~) The Witness worked NSA jobs for approximately 2.5 years at Fort Meade and FANX. He opted out of standard benefits (such as health care and 401K). He did not know what fringe benefits were and never had any discussion with management about how he would receive his fringe entitlement (i.e. in cash added to his hourly rate or in some other type of benefit). The Witness did not receive any fringe benefits.

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(U//~~FOUO~~) The maximum hourly rate The Witness received was \$17.80. [redacted] paid him nothing else and he was always paid the same hourly rate regardless of what job he did. The Witness could only recall one time at [redacted] that he earned more than \$17.80. He was paid "scale" for 1.5 days of [redacted] at FANX in June or July of 2011.

(U//~~FOUO~~) For the most part, however, [redacted] employees were not paid scale rate. For instance, The Witness [redacted] for a week at NTOC but did not receive scale. The Witness knew [redacted] was a scale job, because the plumbers, HVAC technicians, and electricians kept a copy of the scale rates in their gang boxes. If he asked, he could take a look at their chart. The plumbers, HVAC, and electricians worked for other companies that paid scale. Those individuals knew exactly what they were supposed to earn and had to put the number that corresponded to the labor type (i.e. electrical) on their time tickets. Sometimes when the Witness looked at the chart, he saw that he was already earning more an hour than the scale rate for a particular job, so he dismissed it. But for some jobs (i.e. [redacted] which paid a few dollars more an hour), the rates posted were higher than he was earning.

(b) (6)

(U//~~FOUO~~) [redacted] did not post copies of the scale rate chart and when asked, he always said it was not a scale job. However, if it was a scale job, [redacted] supposedly paid the higher of the two rates. If your regular rate was higher than the scale wage for the job, you earned your regular wage and vice versa. The Witness never complained to [redacted] about the lost wages because he was afraid of losing his job in a poor economy. At [redacted] a few guys complained about not getting paid scale wages. [redacted] had to pay them back wages, but he later fired them and never hired them back.

(U//~~FOUO~~) [redacted] had several rules to avoid paying scale for jobs. Field Manager [redacted] was in a company meeting and was told by [redacted]

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that only the person running the screwgun will get paid scale for drywall work. Plus, [ ] will cut off the wage when the gun is turned off. [ ] related this information to The Witness. In practice, since there was no one there to watch when the gun was turned on and off, the supervisors estimated it. If you put on your time ticket 8 hours for drywall, [ ] would only pay for 6 hours because a person couldn't run the drill for 8 hours. In reality, though, the Witness never heard of anyone getting paid scale of any kind for drywall work.

(U//FOUO) One time, [ ] filled out the time ticket with the scale rates for a curb-building job. He had looked up the rates on the chart that the HVAC technicians had in their gang box. He submitted the time ticket to [ ] who tore it up. [ ] said they were not going to pay it.

(U//FOUO) The time tickets usually contained the PTN, or project tracking number assigned by NSA, as well as the job number assigned by [ ]. If a person was working on a long-term project, the field manager filled out their hours for them and submitted it. However, if a person was moving from job to job, the field manager would fill in the hours, sign and then send the person and the ticket to the next job. The Witness usually worked a 40 hour week and sometimes worked more than 1 job in a day.

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(U//FOUO) When asked why he might have earned two different pay rates in the same day and on the same job, The Witness had no insight.

(U//FOUO) [ ] President, [ ] and [ ] Senior Vice President, [ ] were interviewed jointly on 8 August 2014 and provided the following sworn testimony.

(U//FOUO) [ ] is sub to [ ] on the [ ] contract. It has one year remaining and then will be up for renewal. They also have two other contracts with the Maryland Procurement Office, two of which are closing out and one which is active. [ ] primarily does drywall, painting, and carpentry work.

(b) (6)

(U//FOUO) On 14 January 2014, [ ] became an ESOP (employee stock ownership plan) or an employee-owned company. [ ] the founder of [ ] is Chairman of the board and CEO. He was formerly the COO.

(U//FOUO) From 2009-2011, [ ] was the Senior Vice President of Finance. [ ] retired 2 years ago. [ ] started work with [ ] in the summer of 2012. [ ] was President from 2009-2011. [ ] was involved with payroll "to a limited amount." He typically did not review the certified payroll. [ ] supervises the payroll functions within the company and signs the certified payroll reports.

(U//FOUO) [ ] believed that [ ] used the Department of Labor Wage scale that corresponded to the contract year. [ ] agreed that if the

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contract was estimated in 2009, they would continue to use the 2009 rate for the duration of the contract. They would not "bump it up" to 2014 or amend the contract to incorporate the new wage rate determination. Therefore, [redacted] workers employed on one job might be earning more than workers employed on another job. Later [redacted] clarified that each individual task order is treated as an individual job. The master contract might be from 2009, but individual task orders over the duration of the contract (5-7 years) are estimated individually using the appropriate current rate. Nevertheless, their "headquarters job" dates back to 2009.

(U//~~FOUO~~) The Davis Bacon Act scale rate cannot be posted at the jobsite, because they do interior work and there is no jobsite trailer. The jobs often do not have gang boxes, either. However, the field managers carry "green folders" that contain the rates and follow them on jobs.

(U//~~FOUO~~) Field managers (also known as superintendants) on the project fill out the weekly timesheets for the employees and transmit them electronically or by hand to the office. The field managers apply the Davis Bacon scale rate and the craft code that corresponds to the work completed. The office managers have no way of knowing whether the workers were doing concrete, carpentry, or firestopping, for example, so they rely on the field managers to apply the correct code. For instance, the standard industry code for drywall is 09250.

(U//~~FOUO~~) If an employee is doing firestop work, he gets paid the Davis Bacon firestop rate. If he is doing concrete work, he gets paid the Davis Bacon concrete rate. The exception is if his base salary is higher than the Davis Bacon rate, in which case he gets paid his base salary.

(b) (6)

(U//~~FOUO~~) [redacted] said that all employees are paid the Davis Bacon base wage plus fringe benefits. Payroll determines the employees' fringe entitlement and then deducts health insurance, vacation, paid time off, and 401K contributions. If an employee does not elect any benefits, their share of the fringe automatically goes into a 401K for that individual, whether they consent or not. The value of the fringe benefit is calculated by a software program, which breaks it down to an hourly rate. Any remaining value after the benefits are deducted goes to the 401K. [redacted] does not pay fringe in cash.

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(U//~~FOUO~~) Later, when it was pointed out that the certified payroll records showed some individuals, but not others, received 401K benefits, the witnesses explained that it was possible [redacted] was not using the Davis Bacon contractor 401K plan at the time. However, all employees received something, at minimum paid time off and possibly holidays. [redacted] later amended his statement, saying that new employees would not be entitled to paid time off. [redacted] emphasized that the certified payroll report would not reflect the fringe benefits paid to employees.

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(U//~~FOUO~~) The witnesses could not explain why one labor category (i.e. carpenter) seemed to be paid two rates on the certified payroll records. They said they would need to examine their records.

#### V. (U) Analysis

(U//~~FOUO~~) 40 USC §3142 requires construction contractors to pay minimum wages as determined by the Secretary of Labor. 29 CFR Part 5, Subpart A states that all laborers on a federal construction contract shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work performed. Federal Acquisition Regulation, Part 52.222-6 states that laborers will be paid the full amount of wages and bona fide fringe benefits at rates not less than those contained in the wage determination of the Secretary of Labor.

(U//~~FOUO~~) The evidence to date suggests that [redacted] did not pay all of its laborers all the fringe benefits to which they were entitled.

- o [redacted] told the OIG that they did not pay the fringe benefits in cash. Payroll records are consistent with this statement; there is no indication that fringe benefits were added to the scale wage.
- o [redacted] told the OIG that employees were paid fringe in HR benefits. However, payroll records indicate that some employees did not elect any benefits. In those cases, [redacted] told the OIG, those individuals were mandatorily enrolled in the company 401K. [redacted] later retracted this statement when it was pointed out that payroll records demonstrated that some, but not all, employees were enrolled in the company 401K. Furthermore, the confidential witness stated that he was not enrolled in a 401K and received no HR benefits.
- o [redacted] then said that employees were paid fringe in paid time off. Rudimentary equations demonstrate that 40 hours paid time off could not be sufficient compensation to account for the missing fringe benefits. Furthermore, [redacted] stated that new employees are not even entitled to paid time off, calling into question the suggestion that paid time off is fringe compensation.

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#### VI. (U) Conclusion(s)

(U//~~FOUO~~) Preliminary evidence suggests that a violation may have occurred. Additional investigation is required to determine the extent and severity.

#### VII. (U) Recommendation(s)

(U//~~FOUO~~) In accordance with FAR 22.406-8, this potential violation of labor standards should be referred to the Contracting Officer for investigation. The CO should coordinate his investigation with the Department of Labor and report to us his findings and proposed corrective actions. Egregious findings should also be

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reported to the Department of Labor or the U.S. Attorney General as appropriate under FAR 22.406-8.

VIII. (U) **OGC Concurrence (as appropriate)**

(U//~~FOUO~~) N/A

CS/cs

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