

**OFFICE OF ADMINISTRATIVE LAW JUDGES
U. S. DEPARTMENT OF LABOR
WASHINGTON, D.C.**

In the Matter of)
)
 INNOVATIVE TECHNOLOGIES, INC.)
) Case No. 2015-SCA-00013
 Respondent.)

CONSENT FINDINGS AND ORDER

The Administrator of the Wage and Hour Division of the United States Department of Labor (“Administrator”) and Innovative Technologies, Inc. (“ITI” or “Respondent”), having agreed to the entry of this Consent Findings and Order (“Order”) and the matters contained herein in full resolution of this matter, and pursuant to 29 CFR § 6.18, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. On November 7, 2006, the Defense Media Agency (“DMA”) awarded ITI (prime contractor) Contract No. HQ0028-07-D-0003 (“Subject Contract”). The Subject Contract amount exceeded \$100,000 and was for the contract period November 15, 2006 through January 12, 2013, in multiple jobsites including Chantilly, VA.

2. At the time it was awarded to ITI, the Subject Contract did not contain or incorporate by reference Federal Acquisition Regulation (“FAR”) Clause 52.222-41 “Service Contract Act of 1965” or FAR Clause 52.222-4 “Contract Work Hours and Safety Standards Act – Overtime Compensation.”

3. The majority of the services specified in the Subject Contract were furnished in the United States by ITI to the Federal Government of the United States through the use of service employees, as defined by the McNamara-O’Hara Service Contract Act of 1965, as amended (hereinafter “SCA”), 40 U.S.C. § 3701(a) and 41 U.S.C. § 6701(3).

4. At all times relevant to this proceeding, Respondent ITI was a prime contractor for the Subject Contract with a place of business in Chantilly, Virginia.

5. In or around June 2012, June 2013 and October 2013, ITI and the DMA signed bilateral modifications to the Subject Contract to retroactively incorporate FAR Clause 52.222-41 "Service Contract Act of 1965", some of the applicable Wage Determinations, and FAR Clause 52.222-4 "Contract Work Hours and Safety Standards Act – Overtime Compensation." ITI consented to the bilateral modifications, without waiving its right to contest Wage Hour's proposed classification of Installation Technicians.

6. Pursuant to the labor standards of the SCA, and the applicable Department of Labor regulations at 29 C.F.R. Part 4, ITI was required to pay service employees on the Subject Contract, as that term is defined by Section 8(b) of the SCA, 41 U.S.C. §357(b), the applicable prevailing wage rates and fringe benefits for the classifications of work performed.

7. Pursuant to the Contract Work Hours and Safety Standards Act of 1962, as amended (40 U.S.C. §327, *et seq.*) (hereinafter "CHWSSA"), ITI was required to pay overtime premiums to laborers and mechanics on the Subject Contract. 40 U.S.C. § 3701.

8. The Department of Labor's Wage and Hour Division, Baltimore Office ("Baltimore Wage and Hour Office") thereafter conducted an investigation into ITI's compliance with SCA and the CWHSSA, which spanned from May 2012 until the final conference was held on October 31, 2013 ("Investigation").

9. In January 2014, Respondent placed the entire amount of back pay claimed by the Baltimore Wage and Hour Office to be due – i.e., \$1,767,807.55 – into an interest-free account at the Department of Labor.

10. The Baltimore Wage and Hour Office and ITI were unable to resolve their differences over the results of the Investigation.

11. Accordingly, on May 12, 2015, the Administrator issued a Complaint against Respondent, docketed as Administrative Proceeding 2015-SCA-00013, alleging that the Respondent failed to promptly pay certain service employees required minimum monetary wages and fringe benefits in the above-referenced Subject Contract in violation of the SCA and CHWSSA.

12. ITI filed an Answer and Affirmative Defense denying many of the allegations in the Complaint and disputing the conclusions reached by the Baltimore Wage and Hour Office as a result of the Investigation, including its proposed classification of Installation Technicians as Engineering Technicians.

13. Counsel for the Administrator and Counsel for Respondent have discussed this matter, and the parties hereby agree to these Consent Findings and Order (“Order”).

14. Respondent acknowledges that it is aware of the labor standards and provisions of the SCA and CWHSSA and their associated regulations, and promises to comply with the terms of those Acts and those regulations when they are applicable.

15. ITI agrees to the release of \$1,530,000 of the \$1,767,807.55 of Subject Contract funds (“Subject Contract Funds”) that are currently being held in an interest-free account by the Wage and Hour Division of the Department of Labor pursuant to the SCA, 41 U.S.C. §352, and the regulations issued thereunder, 29 C.F.R. § 4.187, to the employees identified in the attached Schedule A.

16. Within thirty (30) days of the entry of an order approving this Order, Respondent will provide the Department of Labor with the current or last known address, telephone number,

and social security number of each ITI employee identified on the attached Schedule A, if Respondent has any information that differs from the information listed on Schedule A. The Wage and Hour Division will seek the same information from the subcontractors on the Subject Contract.

17. As soon as possible following entry of this Consent Findings and the Wage and Hour Division's reconciliation of the back pay amounts to be paid to each employee, the Wage Hour Division will release \$237,807.55 in Subject Contract Funds to ITI. Without limiting the foregoing, such funds shall be released within 180 days from the date of entry of this Order unless the information described in Section 16 is not timely provided by ITI or the subcontractors. ITI's sole and exclusive remedy in the event Wage and Hour Division fails to comply with the foregoing sentence shall be specific performance of this paragraph 17.

18. Subject to paragraph 20, the Wage Hour Division shall distribute said released funds to employees. The Wage Hour Division, after making any applicable deductions, such as the employees' share of Federal Insurance Contributions Act (FICA) taxes, shall distribute the proceeds of the payment to each employee named in Schedule A. With respect to each ITI employee, Respondent shall remain solely responsible for the payment of the "employer's share," including, but not limited to, Federal Insurance Contributions Act (FICA) taxes. With respect to each subcontractor employee, the subcontractor employer shall remain solely responsible for the payment of the "employer's share," including, but not limited to, FICA taxes.

19. Any funds not distributed within three years from the date of this Order of Dismissal in this matter to any of the employees listed on the attached Schedule A or to their personal representatives because of an inability to locate them or because of their refusal to

accept such funds, shall be deposited with the Treasurer of the United States as miscellaneous receipts in accordance with 28 U.S.C. Sections 2041 and 2042.

20. Neither Respondent nor anyone acting on its behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as back wages under this Order.

21. The parties agree and the Secretary so recommends that this case constitutes unusual circumstances sufficient to warrant relief from application of the debarment provisions of §5(a) of the SCA, 41 U.S.C. §354(a).

22. This Order shall have the same force and effect as an order made after a full hearing.

23. The entire record on which this Order is based shall consist of the Complaint, and this Order.

24. This Order only resolves the claims and defenses raised in this matter and with respect to the Subject Contract.

25. Following execution of this Order, ITI intends to submit to DMA a request for an equitable adjustment to the Subject Contract price based on an increased cost of performance resulting from compliance with this Order. The Administrator has no position regarding the availability of an equitable adjustment, which is a decision made by the DMA, but agrees that the amounts released from the above-referenced escrow account to the Administrator, as well as ITI's share of FICA payments due on behalf of its employees, are back wages, FICA payments, and other withholdings stemming from the retroactive application of the Service Contract Act of 1965 and the associated wage determinations.

26. Nothing in this Order is binding on any governmental agency other than the United States Department of Labor. Nothing in this Order shall affect or have any effect on any

decision, dispute, or liability relating to any claim DMA or the United States, including acting through the Department of Justice, may have against ITI or any of its agents, employees, or officials, or any claim or cause of action for which the Administrator lacks actual authority to commence, compromise, or settle on behalf of the United States or any of its agencies or instrumentalities.

27. This Order shall have no legal effect on, or establish a precedent with respect to, or relating to, Respondent's past, pending or future requests for conformances for other contracts, including its pending conformance request for Contract No. #HQ002812D0011, which is pending reconsideration with the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. ("Pending Matter"). Accordingly, neither this Order nor any of its terms shall be construed for any purpose as an admission or acknowledgement by any party that any employee who has performed or is performing work or services for ITI or any subcontractor of ITI is or should be classified under any particular Service Contract Act classification or category, nor shall this Order be used by the parties in connection with the Pending Matter for any purpose. Accordingly, neither this Order nor any of its terms shall be used by the parties in connection with the Pending Matter for any purpose.

28. Nothing in this Order shall prevent the Administrator from instituting a separate and distinct action under the Service Contract Act and/or CHWSSA for any alleged violations by Respondent that occurred on any contract other than the Subject Contract. This Order shall not apply, and ITI shall not be precluded from raising any defenses.

29. The parties waive any further procedural steps before the Office of Administrative Law Judges and the Administrative Review Board regarding those matters which are the subject of this agreement, including but not limited to any requests for conformance for the Subject

Contract. Respondent further waives any further procedural steps or actions before the Administrator of the Wage and Hour Division regarding the Subject Contract, including but not limited to the Branch of Service Contract Wage Determinations.

30. Each party agrees to bear its own attorneys' fees, costs, and other expenses incurred by such party in connection with any stage of the above referenced proceeding, including, but not limited to attorneys' fees which may be available under the Equal Access to Justice Act as amended, 5 U.S.C. § 504, 28 U.S.C. § 2412.

31. By entering into this Order, each party represents that it has been informed by Counsel of the effect and purpose of this Order and agrees to be bound by its terms.

32. The parties waive any right to challenge or contest the validity of this Order.

33. This Order is a complete integration of the agreement between the parties. Any interpretation of this Order shall be based solely on the language of this Order, and not on any other evidence.

34. Upon execution hereof by all parties, this case shall be deemed settled and dismissed with prejudice.

Each party consents to the entry of this Order. Each party expressly acknowledges and represents that it, through a duly authorized representative, has read this Order and understands its provisions.



Signed By: Mario J. Martinez
Date: Fri May 27 2016 11:18:05

May, 27, 2016

Mario Martinez, President
Innovative Technologies, Inc.

Date

The Administrator appears by counsel and agrees to the entry of this Order.

M. Patricia Smith
Solicitor of Labor

Oscar L. Hampton III
Regional Solicitor

Douglas N. White
Associate Regional Solicitor



Evelyn H. Chung
Senior Trial Attorney

5/27/2016

Date

SO ORDERED.

Date: _____

Administrative Law Judge