ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	)	
INNOVAIR LLC,	)	
Complainant,	)	
v.	)	ARB Case No. 2020-0070
ADMINISTRATOR, WAGE AND HOUR DIVISION,	)	
Respondent.	)	

BRIEF OF THE ADMINISTRATOR IN RESPONSE TO PETITION FOR REVIEW

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This case arises under the labor standards provisions of the McNamara-O'Hara Service Contract Act of 1965 ("SCA" or "the Act"), 41 U.S.C. §§ 6701-6707, and its implementing regulations at 29 C.F.R. Parts 4 and 8. Innovair LLC ("Innovair") and the U.S. General Services Administration ("GSA") were parties to an SCA-covered contract under which Innovair provided aircraft maintenance support to the Federal Government. The contract was scheduled to expire on April 30, 2019; however, on April 15, 2019, GSA exercised an option to extend Innovair's period of performance from May 1, 2019 to September 30, 2019.

Innovair also was a party to a collective bargaining agreement ("CBA") with the International Association of Machinists and Aerospace Workers AFL-CIO, District Lodge 725, Local Lodge 1125 ("IAM") that was in effect from May 15, 2016 to May 14, 2019 ("2016 CBA"). Innovair and the IAM entered into a subsequent CBA that became effective on May 15, 2019 ("2019 CBA"). In letters to the Administrator of the Wage and Hour Division of the U.S. Department of Labor ("Administrator"), Innovair requested review and reconsideration of the SCA wage determination applicable to the May 1, 2019 to September 30, 2019 contract extension period, which was based on the wages and fringe benefits in the 2016 CBA, arguing that this wage determination did not apply because, in its view, the 2019 CBA established the wages and fringe benefits for the contract's extension period pursuant to section 4(c) of the SCA.

In a final ruling letter dated August 7, 2020, the Administrator concluded that Innovair's request for review and reconsideration was untimely and that, in any event, the 2019 CBA's wage rates and fringe benefits were not the SCA-required wage rates and fringe benefits pursuant to section 4(c) of the SCA for the successor contract period of May 1, 2019 to September 30, 2019 because Innovair did not actually pay wages and fringe benefits in accordance with the 2019 CBA during the term of the predecessor contract. Innovair now seeks review of the Administrator's ruling letter by the Administrative Review Board ("ARB" or

"Board"). For the reasons below, the Administrator seeks the ruling letter's affirmance.

STATEMENT OF THE ISSUES

1. Whether the Administrator correctly concluded that Innovair's request for review and reconsideration was untimely.

2. Whether the Administrator correctly concluded that the 2019 CBA's wage and benefit rates are not the SCA-required wage and benefit rates pursuant to section 4(c) of the SCA for the successor contract period of May 1, 2019 to September 30, 2019 because Innovair did not actually pay its workers in accordance with the 2019 CBA during the predecessor contract period.

STATEMENT OF THE CASE

A. The Service Contract Act and Section 4(c)

The SCA "requires most government service contracts to contain clauses that protect workers' wages and fringe benefits." *Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262, 1266 (Fed. Cir. 2006). Any contract that is "made by the Federal Government" in "an amount exceeding $2,500" and "has as its principal purpose the furnishing of services in the United States through the use of service employees" must pay workers no less than certain specified minimum hourly wage rates, and provide them certain fringe benefits or their cash equivalent. 41 U.S.C. §§ 6702(a), 6703(1)–(2).

The Wage and Hour Division of the U.S. Department of Labor ("WHD") issues wage determinations that specify the minimum wages and fringe benefits that apply to specific service contracts. *See* 41 U.S.C. § 6703(1)–(2); 29 C.F.R. §§ 4.50–4.55. In accordance with the SCA, WHD primarily issues two types of wage determinations: (1) prevailing in the locality determinations, also known as area-wide wage determinations, and (2) CBA wage determinations. *See* 41 U.S.C. § 6703; *see also* 29 C.F.R. §§ 4.51, 4.53. By setting wage and fringe benefit floors, the SCA "prevents contractors from underbidding each other (and hence being awarded government contracts) by cutting wages or fringe benefits to its service workers." *Lear Siegler Servs., Inc.*, 457 F.3d at 1266.

As originally enacted, the SCA required covered contracts to include "[a] provision specifying the minimum monetary wages [and fringe benefits] to be paid the various classes of service employees… in accordance with prevailing rates for such employees in the locality." 41 U.S.C. § 351(a)(1)-(2) (Pub. L. 89-286; 79 Stat. 1034) (1965), recodified at 41 U.S.C. § 6703(1)-(2). In its 1972 amendments to the SCA, Congress added section 4(c), which applies to federal contracts that succeed an SCA-covered contract (a "successor contract") when service employees working under the predecessor contract received wages pursuant to a CBA. 41 U.S.C. § 353(c), recodified at 41 U.S.C. § 6707(c)(1) ("section 4(c)"). Contractors subject to section 4(c) generally must pay service

employees at least the wages and fringe benefits to which they would have been entitled if employed under the predecessor contract. Section 4(c) reads:

> Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a [CBA] as a result of arm's-length negotiations.

41 U.S.C. § 6707(c)(1). Section 4(c) thus ensures that service employees under the successor contract, *i.e.*, the second contract, will not be paid less than employees under the predecessor contract, *i.e.*, the prior contract. *See Lear Siegler Servs., Inc.*, 457 F.3d at 1267 (explaining that section 4(c) "prohibits a successor contractor from paying its employees less than its predecessor had paid its employees pursuant to the predecessor's CBA."). However, "[s]ection 4(c) will be operative only if the employees who worked on the predecessor contract were *actually paid* in accordance with the wage and fringe benefit provisions of a predecessor contractor's [CBA]." 29 C.F.R. § 4.163(f) (emphasis added). *See also* 41 U.S.C. § 6707(c)(1) (successor contractor may not pay "less than the wages and fringe benefits the service employee *would have received under the predecessor contract*.") (emphasis added). Thus, if a predecessor contractor's CBA did not become effective until after the predecessor contract expired, the CBA will not establish the minimum wage and fringe benefit rates for the

successor contract under section 4(c). *See, e.g.*, 29 C.F.R. § 4.163(f).

Further, agencies often award a successor contract to the incumbent contractor, such as when the incumbent contractor is "the successful bidder on a recompetition of an existing contract," or "the contracting agency exercises an option or otherwise extends the term of the existing contract." 29 C.F.R. § 4.163(e). Section 4(c) applies, "by its [plain] terms, to a successor contract without regard to whether the successor contractor was also the predecessor contractor." *Id.* A contractor thus can "become its own successor" under section 4(c) whenever the term of an existing contract is extended by the exercise of an option clause. *Id.*; *see also* 29 C.F.R. § 4.143(b); *accord Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 312 (5th Cir. 1998) ("a contractor may become its own successor").

B. Time Limitations for Requesting the Administrator's Review and Reconsideration of a Wage Determination

An interested party affected by a wage determination issued under the SCA may request review and reconsideration by the Administrator. 29 C.F.R. § 4.56(a)(1). However, this request must be made no later than ten days before the exercise of a contract option or extension; the Administrator is prohibited from reviewing a wage determination less than ten days before the exercise of a contract option or extension. *Id*. This limitation is necessary in order to ensure an orderly procurement process. *Id*; *see also EG&G Tech. Servs., Inc.*, ARB Case

No. 02-006, 2002 WL 1482176 (ARB June 28, 2002) (finding that the Administrator's inability to fully consider and respond to a request made even eleven days prior to the commencement of a contract option was reasonable because the time limitation in 29 C.F.R. § 4.56(a)(1) would have required the Administrator to act upon the request the same day it was received); *United Food and Commercial Workers Local No. 1105*, BSCA No. 94-08, 1994 WL 897733 (BSCA Oct. 28, 1994) (holding that the Administrator properly declined a request to review a wage determination because the request was made more than five months after the contract at issue had commenced and such delayed review by the Administrator would not facilitate an orderly procurement process).

C. Statement of Facts and Course of Proceedings

The U.S. General Services Administration ("GSA") and Innovair were parties to an agreement that obligated Innovair to provide aircraft maintenance support at the Marine Corps Air Station in Miramar, California. AR 9.[1] The contract was scheduled to expire on April 30, 2019. AR 1. On April 15, 2019, GSA extended the contract by five months for a period of performance from May 1, 2019 to September 30, 2019. AR 58-59; *see also* 136-37 n.1.

[1] All citations to "AR #" correspond to pages in the Administrative Record.

Innovair and the IAM, a union representing Innovair's employees, were parties to a CBA that was effective from May 15, 2016 to May 14, 2019 ("2016 CBA"). AR 109. In January 2019, Don Buzard ("Buzard"), Chief Operating Officer and Co-owner of AVMAC LLC ("AVMAC"),[2] sent emails to GSA contracting officers referencing the re-negotiation of the 2016 CBA. AR 131-34. On February 7, 2019, GSA advised Buzard that "[t]he CBA process is entirely between INNOVAIR and the union, and GSA can't get involved in INNOVAIR's business decisions or provide any direction as to whether INNOVAIR should or shouldn't initiate the renegotiation or when." AR 105. Innovair and the IAM subsequently entered into the 2019 CBA on March 13, 2019. AR 62. The 2019 CBA became effective on May 15, 2019 for a stated duration of May 15, 2019 to May 14, 2022. AR 93 ("This agreement will be in full force and effect from May 15, 2019 to and including May 14, 2022…").

According to Innovair, employee wage rates and fringe benefit rates increased under the 2019 CBA as of July 1, 2019. AR 110. Innovair therefore requested that GSA adjust the contract price to compensate it for the increased labor costs resulting from the increase in wage and fringe benefit rates under the 2019 CBA for the period July 1, 2019 through September 30, 2019. *Id*. However,

[2] According to Innovair submissions, Innovair LLC is a "joint venture" and AVMAC LLC is its managing member. *See* AR 109.

the GSA contracting officer ("CO") denied the requested price adjustment on the ground that the rates established under the 2016 CBA—and not the rates under the 2019 CBA—were the applicable wage and fringe benefit rates under SCA section 4(c) throughout the contract extension period of May 1, 2019 to September 30, 2019. AR 111. Innovair states that the CO, citing 29 C.F.R. § 4.163(f), "reasoned that adjustment was not warranted because the employees were not actually paid in accordance with the wage and fringe benefit provisions of [the 2019 CBA] prior to the extension's start date." AR 111.

On July 10, 2019, more than two months after the May 1, 2019 effective date of the contract extension at issue, AVMAC's President and CEO, on behalf of Innovair, requested pursuant to 29 C.F.R. § 4.56 that the Administrator review and reconsider the wage determination applicable to the contract's extension period. AR 1-2. AVMAC argued that the wage determination associated with the contract extension should have incorporated the 2019 CBA's rates rather than the 2016 CBA's rates pursuant to section 4(c) of the SCA. *Id*.

In response to AVMAC's request, on November 1, 2019, Daniel Simms, Director of WHD's Division of Wage Determinations ("DWD"), concluded that AVMAC's request was untimely pursuant to 29 C.F.R. § 4.56(a)(1), which requires an interested party who requests that the Administrator review and reconsider an SCA wage determination do so no later than ten days before the

exercise of a contract option or extension. AR 99-100. Notwithstanding the untimeliness of the request, DWD also addressed the merits of the request and concluded that because Innovair did not actually pay the wages and fringe benefits set forth in the 2019 CBA during the term of the predecessor SCA-covered contract, the 2019 CBA's wage rates and fringe benefits were not the SCA-required wage rates and fringe benefits pursuant to section 4(c) for the successor contract period of May 1, 2019 to September 30, 2019. AR 101-102. For these reasons, DWD denied AVMAC's request for review and reconsideration of the wage determination applicable to the contract extension period. *Id*.

DWD's determination advised that any interested party wishing further consideration of the matter could submit a request for review and reconsideration, with supporting documentation, to the Administrator within 30 days of the date of the determination letter. AR 102. On November 27, 2019, Innovair requested that the Administrator further consider the matter and issue a final determination. AR 103-106. In the request, Innovair argued that the GSA CO should have requested a new wage determination that incorporated the rates in the 2019 CBA or, alternatively, that a wage determination dated June 12, 2019, which incorporated the 2019 CBA's wage and fringe benefit rates, should have been applied to the contract's extension period. AR 104-105; 126 (June 12, 2019 wage determination). Innovair further argued that 29 C.F.R. § 4.1b(b), a regulatory

provision relating to implementation of SCA section 4(c), was improperly applied in the matter. AR 105-106.

On April 20, 2020, Miriam Marte, Chief of WHD's Branch of Service Contract Wage Determinations, requested that Innovair provide additional information and documentation in support of assertions made in Innovair's November 27, 2019 request for review and reconsideration. AR 113-14. Innovair responded to the request on May 7, 2020 and provided further explanation and documentation ("Innovair Letter"). AR 115-135. On August 7, 2020, the Administrator issued her final determination denying Innovair's request for review and reconsideration. AR 136-141.

In the final determination, the Administrator reiterated DWD's conclusion that AVMAC's initial request on Innovair's behalf was untimely because the request was not made at least ten days before the exercise of the contract extension at issue, as required by 29 C.F.R. § 4.56(a)(1). AR 138-39. The Administrator noted that neither the initial request nor the Innovair Letter contained any legal analysis of the timeliness issue or any argument as to why the request was in fact timely under 29 C.F.R. § 4.56(a)(1). *Id*. In particular, the Administrator explained that, according to its submissions, Innovair was on notice by no later than May 15, 2019 that the GSA CO would not adopt the 2019 CBA's rates under section 4(c) for the contract's extension period. *Id*. However, Innovair, through AVMAC, did

not request the Administrator's review of the wage determination until July 10, 2019—nearly two months after the GSA CO's decision and more than two months after the beginning of the extension period at issue. AR 139.

Notwithstanding her determination that the July 10, 2019 request for review and reconsideration was untimely, the Administrator addressed the merits of Innovair's request for further review and reconsideration. AR 139-40. The Administrator agreed with DWD that, consistent with 29 C.F.R. §§ 4.143(b) and 4.163(e), Innovair succeeded itself as the SCA-covered contractor when the contract was extended. AR 139. Thus, the Administrator reasoned, to the extent that Innovair actually paid its service employees in accordance with the 2019 CBA under the predecessor contract (i.e., the contract that was scheduled to expire on April 30, 2019), section 4(c) of the SCA could render the rates in the 2019 CBA the SCA-required rates for the successor contract period (i.e., the extension period from May 1, 2019 to September 30, 2019). *Id*. The Administrator noted, however, that Innovair did not actually pay its workers in accordance with the 2019 CBA during the predecessor contract term because Innovair's obligations under the 2019 CBA did not commence until *after* the predecessor contract term expired. *Id*. Thus, the Administrator concluded that the 2019 CBA's rates were not the SCA-required rates for the contract's extension period of May 1, 2019 to September 30, 2019. *Id*.

In reaching her conclusion, the Administrator also considered and rejected Innovair's various arguments. AR 140. The Administrator explained that the date on which Innovair provided notice of the CBA to GSA (March 26, 2019, *see* AR 127) is irrelevant to the controlling issue of whether Innovair's workers were paid in accordance with the 2019 CBA during the predecessor contract period. *Id*. Similarly, Innovair's contention that the GSA CO did not properly request a wage determination that incorporated the 2019 CBA's terms was incorrect because Innovair's workers were not paid in accordance with the 2019 CBA during the predecessor contract period. *Id*. For the same reason, the Administrator concluded that the June 2019 wage determination that incorporated the 2019 CBA's rates did not apply to the extension period under section 4(c). *Id*.

On September 28, 2020, Innovair filed the instant petition seeking ARB review of the Administrator's final determination. Pet. Rev. 1.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

Innovair seeks review of the Administrator's August 7, 2020 final ruling rejecting Innovair's contention that the 2019 CBA established the wage and fringe benefit rates applicable to the contract extension period from May 1, 2019 to September 30, 2019 under section 4(c) of the Service Contract Act. The Secretary of Labor has delegated authority and assigned responsibility to the Board to act for the Secretary in review of final decisions of the Administrator under the Service

Contract Act. *See* U.S. Dep't of Labor, Sec'y's Order 01-2020, Delegation of Auth. & Assignment of Responsibility to the Admin. Review Bd., § 5(a)(2), 85 Fed. Reg. 13186–01, 2020 WL 1065013 (Mar. 6, 2020) (Final Rule).

The Board's review of final rulings of the Administrator issued pursuant to the SCA "is in the nature of an appellate proceeding." *ServiceStar Landmark Properties-Fort Bliss LLC*, ARB Case No. 17-013, 2018 WL 6978220, at *1 (ARB June 25, 2018); *Court Sec. Officers*, ARB Case No. 98-001, 1998 WL 686632, at *3 (ARB Sept. 23, 1998) ("The Wage and Hour Administrator is the primary interpreter of the contract labor standards and implementing regulations, with the Board acting in an appellate capacity."). While the Board reviews questions of law de novo, the Board "defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law." *Forfeiture Support Assocs.,* ARB Case No. 06-028, 2008 WL 2265203 (ARB May 27, 2008) (citing *Alcatraz Cruises LLC*, No. 07-024, 2009 WL 250456, at *3 (ARB Jan. 23, 2009)); *see also Court Sec. Officers*, 1998 WL 686632, at *3 ("[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.").

ARGUMENT

THE ADMINISTRATOR CORRECTLY CONCLUDED THAT AVMAC'S INITIAL REQUEST WAS UNTIMELY AND THAT, IN ANY EVENT, THE 2019 CBA'S RATES WERE NOT THE SCA-REQUIRED RATES FOR THE SUCCESSOR CONTRACT PERIOD BECAUSE INNOVAIR DID NOT ACTUALLY PAY THOSE RATES DURING THE PREDECESSOR CONTRACT PERIOD.

A. AVMAC's Request for Review and Reconsideration was Untimely Because it was Submitted More than Two Months After the May 1, 2019 Contract Extension Date at Issue and Innovair Has Not Made Any Arguments for Why the Request Should be Considered Timely.

The SCA's implementing regulations clearly require that an interested party seeking the review and reconsideration of a wage determination submit such request no later than ten days before the exercise of a contract extension. *See* 29 C.F.R. § 4.56(a)(1). The request must be made no later than ten days before the exercise of a contract extension because the regulations preclude the Administrator from reviewing a wage determination later than ten days before the exercise of a contract extension. *Id*. As stated in the regulation, "[t]his limitation is necessary in order to ensure . . . an orderly procurement process." *Id*.

There is no dispute that AVMAC's July 10, 2019 request on behalf of Innovair was filed more than two months *after* the May 1, 2019 effective date of the contract extension at issue. AR 1. Thus, the Administrator correctly determined that the request was untimely under the governing regulation set forth at 29 C.F.R. § 4.56(a). *See also EG&G Tech. Servs.*, 2002 WL 1482176

(explaining that 29 C.F.R. § 4.56(a)(1) "…unambiguously establishes a deadline precluding the Administrator from reviewing a wage determination later than 10 days 'before commencement of a contract option or extension'."); *FlightSafety Servs. Corp*., ARB Case Nos. 02-085, 03-075, 2003 WL 22496025 (ARB Oct. 31, 2003) (noting while citing 29 C.F.R. § 4.56(a)(1) that "a late filer" should not expect the Administrator to rule on its request for review and reconsideration of a wage determination).

Moreover, Innovair has not made any arguments for why AVMAC's request should be considered timely under 29 C.F.R. § 4.56, despite having multiple opportunities to do so. In particular, Innovair's Petition for Review does not contain any analysis regarding the timeliness issue. Pet. Rev. 1-5. Instead, Innovair submissions demonstrate that AVMAC, on behalf of Innovair, delayed submitting a request to the Administrator for nearly two months even after Innovair learned that the GSA CO would not adopt the 2019 CBA's rates as the SCA-required rates for the contract extension period. AR 111 (stating that the GSA CO declined Innovair's request for an equitable adjustment of the contract extension's rates on May 15, 2019). As the Administrator explained in the final ruling letter, even assuming arguendo that Innovair did not know as of the May 1, 2019 effective date of the contract extension at issue that the GSA CO disagreed that the 2019 CBA rates should be applied to the contract extension, Innovair

submissions demonstrate that Innovair was on notice of the GSA CO's determination no later than May 15, 2019. *See id*; AR 139. However, AVMAC did not request review and reconsideration of the wage determination until July 10, 2019, nearly two months after the CO's determination. AR 1; 139.

Because AVMAC did not request review and reconsideration of the relevant wage determination on Innovair's behalf at least ten days prior to the exercise of the contract extension at issue (and did not offer any explanation for its failure to do so), the Administrator correctly concluded that the July 10, 2019 request for review and reconsideration was untimely and that, therefore, Innovair's request for review and reconsideration of DWD's determination was likewise barred. The Board should affirm her determination.

B. The 2019 CBA's Rates are Not the SCA-Required Rates for the Contract Extension Period because Innovair Did Not Actually Pay Those Rates During the Predecessor Contract Period.

While the Board can and should determine this case on the timeliness issue alone, the Administrator will address the merits of the issues raised in Innovair's Petition for Review. The central issue that Innovair raises is whether the Administrator correctly concluded that the 2019 CBA did not establish the SCA-required rates for the contract's extension period of May 1, 2019 to September 30, 2019. Pet. Rev. 5. The Administrator correctly resolved this issue in the final ruling letter by applying section 4(c) of the SCA and its implementing regulations.

While section 4(c) prohibits a successor contractor from paying its employees less than its predecessor had paid its employees pursuant to the predecessor's CBA, a predecessor contractor must *actually pay* its employees in accordance with the CBA applicable to the predecessor contract for section 4(c) to render that CBA's rates the SCA-required rates for the successor contract period. *See* 29 C.F.R. § 4.163(f). *See also* 41 U.S.C. § 6707(c)(1) (successor contractor may not pay "less than the wages and fringe benefits the service employee would have received under the predecessor contract."). Although Innovair became its own successor when GSA extended the contract from May 1, 2019 to September 30, 2019 (the "successor contract"), the 2019 CBA was not applicable to the predecessor contract—the contract term that was scheduled to expire on April 30, 2019—because Innovair's obligations under the 2019 CBA did not commence until after the predecessor contract expired. AR 30 (demonstrating that the CBA became effective on May 15, 2019). The 2019 CBA did not take force and effect until approximately two weeks *after* the expiration of the predecessor contract. *See id*. Therefore, as the Administrator explained, Innovair did not actually pay its workers in accordance with the 2019 CBA during the predecessor contract term because its obligations under the CBA did not commence until the predecessor contract expired; thus, the 2019 CBA's rates are not the SCA-required rates for the contract extension at issue. AR 139-40.

For this reason, the Administrator correctly concluded that, pursuant to 29 C.F.R. § 4.163(f), the 2019 CBA's rates are not the SCA-required rates for the successor contract in effect from May 1, 2019 to September 30, 2019. The Board should affirm her determination.

C. Innovair's Arguments that the 2019 CBA's Rates Should Apply to the Contract Extension Period are Without Merit.

In its Petition for Review, Innovair makes several arguments in support of its claim that the 2019 CBA established the SCA-required rates for the contract extension period. *See* Pet. Rev. 4-5. However, each of these arguments fails for the reasons given by the Administrator in the Administrator's final ruling letter.

First, Innovair contends that the GSA CO should have requested a new wage determination that incorporated the 2019 CBA's terms. Pet. Rev. 5. However, as explained, *supra* 17-19, the 2019 CBA did not establish the SCA-required rates for the contract's extension period because no service employees on the predecessor contract were actually paid in accordance with the 2019 CBA. Therefore, there is no basis on which to conclude that the GSA CO should have incorporated a wage determination based on the 2019 CBA. Alternatively, Innovair argues that the June 2019 wage determination incorporating the terms of the 2019 CBA should have been applicable to the extension period at issue. Pet. Rev. 5. However, as the Administrator explained in her final ruling, it would have been improper under section 4(c) to incorporate this wage determination (which was not issued by the

Department of Labor) into the successor contract (i.e., the extension period) because the 2019 CBA did not establish the SCA-required rates for the contract's extension period of May 1, 2019 to September 30, 2019 for the reasons explained *supra* 17-19.[3] AR 140. Thus, these arguments are without merit.

Finally, Innovair asserts that it "satisfied the timing requirements of 29 C.F.R. § 4.1b(b)" by providing notice to the GSA CO of the new 2019 CBA prior to the beginning of the contract extension period. Pet. Rev. 4. Innovair appears to argue that this advance notice entitles it to a section 4(c) "variation" under 29 C.F.R. § 4.1b(b). Pet. Rev. 4-5. However, as the Administrator explained in her final ruling, 29 C.F.R. § 4.1b(b) does not support Innovair's position that the 2019 CBA's rates are the SCA-required rates for the contract extension period. AR 141.

Contrary to Innovair's apparent interpretation of 29 C.F.R. § 4.1b(b) that a new CBA's rates will become the SCA-required rates as long as GSA has certain advance notice of the new CBA, 29 C.F.R. § 4.1b(b) actually identifies specific circumstances under which a CBA that otherwise *would* establish the SCA-

[3] The record does not reflect why GSA issued the June 12, 2019 wage determination incorporating the wage and fringe benefit rates set forth in the 2019 CBA. The wage determination may well have been intended to apply to a follow-on contract that GSA awarded to Innovair commencing October 1, 2019, AR 109, for which the 2019 CBA presumably would have established the SCA-required wage and fringe benefit rates under section 4(c) because service employees were actually paid in accordance with that CBA during the predecessor contract from May 1, 2019 to September 30, 2019.

required rates for a successor contract is deemed to *not* establish the SCA-required rates for the successor contract. Specifically, the regulation details exceptions to the general rule that a CBA that is applicable to work performed under a predecessor contract will establish the section 4(c) rates for the successor contract. *See* 29 C.F.R. § 4.1b(b). These exceptions contemplate situations in which a CBA has been finalized during a predecessor contract's performance—*and is applicable to the work performed under that predecessor contract*—but where the contracting agency does not have sufficient notice of the new CBA's terms to bind the successor contractor to that CBA's terms under section 4(c). *See id*. Thus, as the Administrator explained in her final ruling, 29 C.F.R. § 4.1b(b) actually narrows, rather than expands, section 4(c)'s application. AR 118.

Innovair's Petition for Review quotes the regulation in full but does not explain how it supports Innovair's argument other than stating that Innovair's notice of the new CBA to the GSA CO "…[was] more than 30 days prior to the 'start of performance' under the extension period and [was] more than 10 days 'before commencement' of the extension period." Pet. Rev. 4. This reference is presumably to 29 C.F.R. § 4.1b(b)(2), which states that a CBA that has been finalized during a predecessor contract's performance, *and is applicable to the work performed under that predecessor contract*, will *not* be effective for purposes of a successor contract if notice of the new CBA is received by the contracting

agency after the award of the successor contract and the contract's start of performance is within thirty days of the extension. *See* 29 C.F.R. § 4.1b(b)(2).

This section contains its own exception, which Innovair underlined and made bold in its Petition for Review. *See id*; Pet. Rev. 4-5. The exception provides that if the successor contract does not specify a start date of performance which is within thirty days from the award or if performance does not start within this thirty day period, a new CBA will be effective for purposes of the successor contract under section 4(c) if notice of the new CBA was received by the contracting agency no less than ten days before the commencement of the successor contract. 29 C.F.R. § 4.1b(b)(2). Innovair appears to cite to 29 C.F.R. § 4.1b(b)(2) to argue that the 2019 CBA's rates are the SCA-required rates for the extension period because Innovair provided notice of the 2019 CBA to the GSA CO at least thirty days prior to the start of the extension period at issue. Pet. Rev. 4-5. However, this is a misreading of the regulation. First, the "thirty days" reference in 29 C.F.R. § 4.1b(b)(2) refers to whether the successor contract commenced performance within thirty days from the contract's award date or if the contract did not specify a start date within thirty days; it does not refer to when the contracting agency was notified of a new CBA.

More importantly, by its terms, this regulation is only pertinent to "any collective bargaining agreement applicable to the performance of work under the

predecessor contract." 29 C.F.R. § 4.1b(b). As explained, *supra* 17-19, the 2019 CBA was not "applicable to the performance of work under the predecessor contract," as it did not take force and effect until approximately two weeks *after* the expiration of the predecessor contract. Therefore, 29 C.F.R. § 4.1b(b) and its subsections, including the exception set forth in 29 C.F.R. § 4.1b(b)(2) on which Innovair most heavily relies, are wholly inapplicable to the facts presented by Innovair in its Petition for Review. For these reasons, Innovair's argument that a "[s]ection 4(c) 'variation' should apply" is without merit. *See* Pet. Rev. 4.

CONCLUSION

For the foregoing reasons, the Administrator requests that the Board affirm the Administrator's August 7, 2020 final ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response Brief for the Administrator was served on this 18th day of December, 2020, by email on the following:

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