



In the Matter of:

INNOVAIR LLC,

ARB CASE NO. 2020-0070

PETITIONER,

DATE: November 12, 2021

v.

**ADMINISTRATOR,
WAGE AND HOUR DIVISION,**

RESPONDENT.

Appearances:

For the Petitioner:

Melissa A. Hamann, Esq.; *ReavesColey, PLLC*; Chesapeake, Virginia

For the Respondent:

Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., Shelley E. Trautman, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

**Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek,
*Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965 (SCA), as amended, and its implementing regulations.¹ AMVAC LLC (AMVAC), filed a request for review and reconsideration of a wage determination

¹ 41 U.S.C. §§ 6701-6707, and its implementing regulations at 29 C.F.R. Parts 4 and 8.

issued under Section 2(a) of the SCA. After a review, the Division of Wage Determinations (DWD) found that the wage rates and fringe benefits in a May 15, 2019 collective bargaining agreement (CBA 3 or May 2019 IAM CBA) were not the SCA-required rates for the successor contract between INNOVAIR LLC (Innovair) and the General Services Administration (GSA).² The Administrator issued a final ruling affirming the DWD's determination. Innovair petitioned the Administrative Review Board (ARB or the Board) for review. As discussed below, we affirm the Administrator's final ruling.

BACKGROUND

GSA and Innovair were parties to Contract Number GS08Q15BPC0006 (the Contract), which obligated Innovair to provide aircraft maintenance support at Marine Corps Air Station Miramar in San Diego, California.³ Innovair's employees were members of the International Association of Machinists and Aerospace Workers, District Lodge 725 (IAM) which is the union representing the employees.⁴

The Contract had a one-year base performance period and four one-year option periods. The third option period was set to expire on April 30, 2019. The GSA Contracting Officer (CO) informed Innovair that it would not exercise the final option period but instead would exercise its right to extend performance until September 30, 2019, pursuant to 48 C.F.R. § 52.217-8.⁵

At the time GSA and Innovair entered into the Contract, there was a collective bargaining agreement (CBA 1) between Innovair and IAM. CBA 1 was effective from May 15, 2013, to May 14, 2016.⁶ Prior to CBA 1's expiration, Innovair and IAM negotiated a replacement collective bargaining agreement (CBA 2), which was effective from May 15, 2016, to May 14, 2019.⁷

On March 26, 2019, Innovair informed the CO that it had renegotiated a collective bargaining agreement with IAM (CBA 3), provided the new collective bargaining agreement's effective date, requested reimbursement for travel costs and

² Innovair is a joint venture and its managing member is AMVAC. Administrative Record (AR) at 109.

³ *Id.* at 136.

⁴ *Id.* at 60, 109.

⁵ *Id.* at 130.

⁶ *Id.* at 109.

⁷ *Id.*

expenses, and attached a copy of CBA 3 to the e-mail.⁸ CBA 3's effective start date was May 15, 2019.⁹

On April 15, 2019, the CO issued a unilateral extension of the Contract, Modification 15. Modification 15 extended the period of performance from April 30, 2019, to September 30, 2019.¹⁰ However, Modification 15 did not include a wage determination for the extension period.¹¹

On May 2, 2019, Innovair requested that the CO modify the contract extension's rates to account for the wage adjustments that would take effect under CBA 3 as of July 1, 2019.¹² The CO denied Innovair's request for an adjustment on May 15, 2019.¹³ The CO determined that the wage rates and fringe benefits established in the 2017 Wage Determination applied throughout the extension period.¹⁴

On May 17, 2019, Innovair requested that the CO reconsider its request for an adjustment.¹⁵ On June 28, 2019, the CO denied reconsideration, stating that a price adjustment under 48 C.F.R. § 52.222-43(d) was not appropriate because the 2017 Wage Determination was the current and applicable wage determination at the beginning of the extension period.¹⁶ As a result of the CO's denial of the price adjustment, Innovair asserts it incurred higher direct labor rates and fringe expenses than those specified in the contract between Innovair and GSA.¹⁷ Specifically, Innovair claims that the price adjustment denial resulted in \$624,556.44 in additional costs.¹⁸

On July 10, 2019, AMVAC filed a request on behalf of Innovair seeking a review of the wage determination, alleging that the wage rates and fringe benefits

⁸ *Id.* at 127-128.

⁹ *Id.* at 60, 110.

¹⁰ *Id.* at 120-121.

¹¹ *Id.* at 110, 120-121.

¹² *Id.* at 110.

¹³ *Id.* at 111.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Innovair Petition for Review at 3

¹⁸ *Id.*

in CBA 3 were the SCA-required rates for the extension period from May 1 to September 30, 2019.¹⁹ The DWD reviewed the request and found that AVMAC's request for review and reconsideration was untimely.²⁰ The DWD also found that Innovair did not actually pay wages and fringe benefits in accordance with CBA 3 during the term of the predecessor SCA-covered contract, and as a result, were not the SCA-required rates pursuant to Section 4(c).²¹

On November 27, 2019, Innovair requested a review and reconsideration by the Administrator of the Wage and Hour Division (Administrator).²² On August 7, 2020, the Administrator issued a final ruling affirming the DWD's conclusions.²³

On December 4, 2020, Innovair petitioned the ARB for review of the Administrator's final ruling. The Administrator filed a brief in response to the petition, and Innovair filed a reply brief. Upon review of the parties' briefs, the Board determined that additional briefing was necessary. The Board issued an Order Directing Supplemental Briefing on June 22, 2021. The parties filed timely briefs in response to the Order Directing Supplemental Briefing. For the reasons discussed below, we affirm the Administrator's final ruling.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide in its discretion questions of law and fact arising from the Administrator's final determination under the SCA.²⁴ The ARB's review is in the nature of an appellate proceeding.²⁵ While the Board reviews

¹⁹ AR at 1-2.

²⁰ *Id.* at 100-101.

²¹ *Id.* at 101.

²² *Id.* at 103-106.

²³ *Id.* at 136-141.

²⁴ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020). *See* 29 C.F.R. §§ 8.1(b)(1), 8.1(c), 8.6.

²⁵ 29 C.F.R. §§ 8.1(b)(1), 8.1(d), 8.6; *see ServiceStar Landmark Properties-Fort Bliss LLC*, ARB No. 2017-0013, slip op. at 2 (ARB June 25, 2018); *see also Ct. Sec. Officers*, ARB No. 1998-0001, slip op. at 4 (ARB Sept. 23, 1998) (stating that "[t]he Wage and Hour Administrator is the primary interpreter of the contract labor standards and implementing regulations, with the Board acting in an appellate capacity.").

questions of law de novo, the Board “defers to the Administrator’s interpretation of the SCA when it is reasonable and consistent with the law.”²⁶

DISCUSSION

The SCA requires federal contractors to pay covered service employees prevailing hourly wages and fringe benefits as determined by the Secretary of Labor or his authorized representative.²⁷ The Wage and Hour Division (WHD) primarily issues two types of wage determinations: 1) prevailing in the locality determinations, also known as area-wide wage determinations, and 2) collected bargaining agreement (CBA) wage determinations.²⁸ The WHD issues CBA wage determinations in accordance with Section 4(c) of the SCA. Section 4(c) requires the successor contractor to ensure service employees are paid wage and fringe benefits that are no less than those offered by a predecessor contract for substantially the same services when such employees were under a CBA during the predecessor contract period.²⁹ Specifically, Section 4(c) provides that:

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 providing for in a [CBA] as a result of arm’s-length negotiations.³⁰

Thus, Section 4(c) operates as a “floor” to protect employees’ wage and fringe benefits throughout the procurement bidding and negotiation process.

When a contracting agency extends the term of an existing contract, “the contract extension is considered to be a new contract for purposes of the application

²⁶ *In re Forfeiture Support Assocs.*, ARB No. 2006-0028, slip op. at 2 (May 27, 2008).

²⁷ 41 U.S.C. § 6703(1)-(2); 29 C.F.R. § 4.6.

²⁸ 41 U.S.C. § 6703(1)-(2); 29 C.F.R. §§ 4.50-4.55.

²⁹ 41 U.S.C. § 6706(c)(1).

³⁰ *Id.*

of the Act's provisions."³¹ Therefore, a contractor may be its own successor for purposes of Section 4(c).³²

Innovair argues on appeal that the Administrator misinterprets 29 C.F.R. § 4.163(f), a regulation that implements Section 4(c).³³ Specifically, Innovair claims that the Administrator's interpretation is unreasonable because it precludes the effect of a CBA during the term of the successor contract if that CBA was not effective during the predecessor contract term.³⁴ In response, the Administrator reiterates that under 29 C.F.R. § 4.163(f), a 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 required for the successor contract period.³⁵ Because Innovair did not pay its employees in accordance to CBA 3 during the course of the predecessor contract, the Administrator determined that CBA 3's wage rates and fringe benefits were not the SCA-required wage rates and fringe benefits during the extension period.³⁶

Upon consideration of the parties' briefs on appeal,³⁷ and having reviewed the evidentiary record as a whole, we conclude that the Administrator acted reasonably and within her discretion in finding that CBA 3's wage rates and fringe benefits were not the SCA-required wage rates and fringe benefits pursuant to Section 4(c) for the extension period.

³¹ 29 C.F.R. § 4.143(b); *see* 29 C.F.R. § 4.163(e); *accord Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 312 (5th Cir. 1998) ("a contractor may become its own successor.").

³² 29 C.F.R. § 4.143(e).

³³ Innovair Reply Br. at 2.

³⁴ *Id.* at 7-9.

³⁵ Administrator's Resp. Br. at 18.

³⁶ *Id.* at 17-19.

³⁷ The Administrator argues that AMVAC's Request for Review and Reconsideration of the wage determination was untimely pursuant to 29 C.F.R. § 4.56(a)(1) because it was submitted more than two months after the May 1, 2019 effective date of the contract extension. Administrator's Resp. Br. at 15-17; AR at 1-2. Because we affirm the Administrator's finding that the wage rates and fringe benefits for CBA 3 were not the SCA-required wage rates and fringe benefits for the contract extension period, we make no determination on this issue.

Regulation 29 C.F.R. § 4.163(f) provides that “Section 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].”³⁸ Innovair became its own successor when GSA extended the Contract from May 1, 2019, to September 30, 2019. Thus, Innovair was required to not pay less than the wages and fringe benefits its employees would have received under the predecessor contract. CBA 3 was not applicable to the predecessor contract scheduled to expire on April 30, 2019, because Innovair’s obligations under CBA 3 did not commence until May 15, 2019, which was approximately two weeks after the predecessor contract expired. It is uncontested that Innovair did not actually pay its workers in accordance with CBA 3 during the term of the predecessor contract term, which would be required in order to be the SCA-required wage rates and fringe benefits for the successor contract pursuant to Section 4(c). Therefore, we conclude the Administrator acted reasonably and within her discretion finding that CBA 3’s wage rates and fringe benefits were not the required rates for the extension period.

Accordingly, we **AFFIRM** the Administrator’s final ruling.

SO ORDERED.

³⁸ 29 C.F.R. § 4.163(f).