



In the Matter of:

RAYTHEON AEROSPACE

**ARB CASE NOS. 03-017
03-019**

**Dispute concerning wage
determinations for Raytheon Aerospace
employees working for the United States
Air Force On Contract F34601-94-0950
at Scott AFB, IL, and other U.S. Air Force
locations.**

DATE: May 21, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner United States Air Force:

Marcia J. Bachman, Esq., United States Air Force, Washington, D.C.

For Petitioner Michael Gatton:

Michael Gatton, pro se, Breese, Illinois

For Intervenor International Association of Machinists and Aerospace Workers, AFL-CIO:

Terry R. Yellig, Esq., Sherman, Dunn, Cohen, Leifer and Yellig, Washington, D.C.

For Respondent Administrator, Wage and Hour Division:

Ford F. Newman, Esq., Doug Davidson, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Solicitor, U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (the Board) pursuant to the Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. §§ 351-358 (West 1994), the Walsh-Healey Public Contracts Act (the PCA), 41 U.S.C.A. §§ 31-35, the regulations at 29 C.F.R. Parts 4 and 8, and Secretary's Order (SO) 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).¹

¹ Under SO 1-2002, the Secretary of Labor delegated to the Board jurisdiction to hear and decide administrative appeals arising, inter alia, under the SCA and PCA.

The United States Air Force (USAF) and Michael Gatton (Gatton), an employee working under the captioned contract, seek review of a ruling issued by the Administrator, Wage and Hour Division (the Administrator). The Board granted intervenor status to the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), which has joined Petitioner Gatton in his appeal and presented separate arguments in its support.

The Administrator found that the principal purpose of the referenced ten-year contract for maintenance and logistical support of the USAF's fleet of C-21A aircraft is to furnish services. Accordingly, the Administrator first ruled that the contract was subject to the SCA's prevailing wage labor standards provisions and applicable wage determinations, which establish the minimum rates of wages and fringe benefits payable to service employees subject to the Act. Secondly, the Administrator determined that the provisions of the Act should apply to the final two years of the contract commencing after she issued her August 29, 2002 final ruling, i.e., October 1, 2002, to September 30, 2004. The USAF appealed these two determinations. In the event that the Board affirms these two determinations, the USAF alternatively requests that the Board order that implementation of the Administrator's ruling be delayed for two years, i.e., through the duration of this contract.

With respect to the first eight years of the contract, however, the Administrator declined to require retroactive application of the SCA. Petitioner Gatton appealed this portion of the ruling and the IAM also seeks its reversal, arguing that the Administrator erred when she did not direct retroactive application of the SCA and wage determinations for the first eight years of the contract.

We conclude that each of the Administrator's three determinations was consistent with the Act and the regulations, was reasonable and was not an abuse of discretion. We therefore affirm her final ruling for the reasons stated in this final decision and order.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide "appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative" rendered under the SCA. *See also* SO 1-2002. Our review of the Administrator's final rulings issued pursuant to the Act is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). We review the Administrator's decision to determine whether it is consistent with the statutes and regulations and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the SCA (and also, in this case, the PCA). *United States Dep't of Energy, Richland, Wash.*, ARB No. 03-016, slip op. at 2 (Mar. 31, 2004) (dispute concerning competing claims for application of either SCA labor standards provisions or those for Federal construction contracts under the Davis-Bacon Act (DBA), as amended, 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003)). *See also Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (May 11,

2000) (DBA conformance proceeding); *Department of the Army*, ARB Nos. 98-120/121/122, slip op. at 16 (Dec. 22, 1999) (SCA), citing *ITT Fed. Services Corp. (II)*, ARB No. 95-042A (July 25, 1996), and *Service Employees International Union (I)*, Board of Service Contract Appeals (BSCA ²) No. 92-01 (Aug. 28, 1992).

BACKGROUND

The parties and the IAM agree on the material facts relevant to this labor standards dispute. The USAF awarded Contract No. F34601-094-0950 (the C-21A contract) in 1994. Raytheon is now the prime contractor, having replaced an earlier prime contractor which is not a party to this matter. The contract consisted of an initial performance year and nine option years. The first year commenced in Fiscal Year (FY) 1995; the final option year of the contract is to end on September 30, 2004.³

The USAF has described the C-21A contract, stating generally that “Raytheon’s contract provides maintenance and logistical support for the C-21A fleet at various locations in the United States and abroad.” Administrative Record (AR) at Tab J, page 1. The C-21A is a small (10 seat) jet aircraft and is the USAF version of the Lear Jet Model 35A. Petitioner Gatton has noted that the USAF uses the C-21A fleet “in support of pilot seasoning, medivac support, passenger transport, and high priority cargo.” AR Tab E. Raytheon and its subcontractors perform the requirements of the C-21A contract at nine locations in the United States and several located in foreign countries.

During the process of its solicitation and award, the USAF determined that the C-21A contract was not subject to the SCA. Therefore, the USAF did not include the SCA’s labor standards provisions and applicable wage determinations in the contract as awarded. Rather, the USAF determined that the C-21A contract was subject only to the PCA’s labor standards requirements. The PCA applies to Federal contracts for the “manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding \$10,000.” 41 U.S.C.A. § 35.⁴

² The BSCA rendered final agency decisions pursuant to the SCA prior to this Board’s establishment in 1996.

³ By letter dated April 21, 2004 (apparently not served on the other parties or IAM), Petitioner Gatton requested that the Board issue its final decision and order in this matter prior to June 1, 2004, in order to facilitate the USAF contract solicitation for a new C-21A contract cycle.

⁴ Generally, the Department has not enforced the PCA’s prevailing wage provisions since issuance of the decision in *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963). In *Baldor*, the court held that the PCA required the Secretary of Labor to conduct public hearings in determining prevailing rates under that statute. Choosing rather to issue no wage determinations,

Continued . . .

After a lengthy investigation, the Administrator determined that most of the work hours performed by employees under the contract should properly have been subject to the labor standards of the SCA. The remaining work hours, consisting of the work required to perform major engine overhauls (essentially engine remanufacturing), was subject to the PCA.

Under the C-21A contract, Raytheon provides the USAF with two general categories of work: Contractor Logistical Support (CLS) and Contractor Operated and Maintained Base Supply (COMBS). AR Tab A at 2; Tab J at 4. Under the CLS portion of the contract, the Administrator found that Raytheon furnishes the USAF with “organizational level maintenance services for the C-21A fleet at each site” AR Tab A at 2. The Wage and Hour Division conducted investigations at three of the C-21A contract sites in the United States: Scott Air Force Base (AFB), Offutt AFB, Nebraska, and Maxwell AFB, Alabama. The “day-to-day work” at those USAF facilities, the Administrator found, included such service work as “fueling, washing, and towing the aircraft, servicing, testing, and repairing avionics, cleaning the interior and exterior of the aircraft, inspections of the aircraft, replacement of the aircraft wheels, tires, and lights, and removing broken aircraft components and replacing them with new or overhauled components.” *Id.* This description of contract requirements essentially adopts information the USAF provided. *See* AR Tab J at 4. Based on the investigations, the COMBS, the Administrator found, “is essentially a parts supply store that is staffed by service personnel.” AR Tab A at 2. The USAF has generally conceded that the CLS and COMBS functions under the C-21A contract are services that would be covered by the SCA. *See* AR Tab J at 4.

Based on findings obtained during inspections of three separate contract performance sites, the Administrator estimated that approximately 91 workers were employed full-time in performing services at the United States locations. The C-21A contract work performed at the sites in the United States amounted to approximately 190,000 hours of service work for each year of the contract and its option years. AR Tab A at 3. Moreover, the Administrator estimated that, each year, approximately 50 employees worked approximately 104,000 hours performing the same types of service work at the foreign locations encompassed by the C-21A contract.

At the USAF’s request, the Administrator also examined the amount of another type of C-21A contract work performed by one of Raytheon’s subcontractors, here generally referred to as “Garrett Aviation.” This work, the Administrator found, “involves major aircraft engine overhaul and repair” AR Tab A at page 3. The investigation disclosed that Garrett Aviation completely tore down and rebuilt approximately 50 C-21A engines yearly. Each engine overhaul required approximately 350 hours of labor, making a yearly total of about 17,850 hours for the C-21A engine overhaul work. The Administrator

the Secretary now enforces PCA wage provisions only to the extent of ensuring that employees are paid at least the general Federal minimum wage established under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. § 201 *et seq.* (West 1998).

concluded that this major aircraft engine overhaul and repair was “remanufacturing” work and that the USAF properly determined that it was subject to the PCA rather than the SCA.

Additional Raytheon subcontractors perform various other tasks under the C-21A contract. These work items include repairs, painting and furnishing and installing component parts for the C-21A fleet. *See* AR Tab B, listing of Raytheon subcontractors and responsibilities. However, despite being requested to do so during the investigation, neither the USAF nor Raytheon provided “specific information” regarding the numbers of hours and exact nature of work these subcontractors performed. AR Tab A at 3. Given no information to support a conclusion as to the nature or a reasonable estimate of these work hours, the Administrator concluded that the only substantial amount of PCA work hours under the contract were those Garrett Aviation performed in remanufacturing the C-21A jet engines.

During the investigation, the USAF reported that it had expended approximately \$55,000,000 for the service hours portion of the contract, about \$203,000,000 for “non-SCA” items, and approximately \$20,000,000 was for undetermined purposes. *Id.* at 4. Thus, the service hours and “non-SCA” items (i.e., remanufacturing) under the contract constituted approximately 20% and 73% of contract costs, respectively. *Id.*

STATEMENT OF ISSUES

The parties and the intervenor have presented the Board with the following three issues for resolution:

1. Whether the Administrator properly concluded that that the “principal purpose” of the C-21A contract was to provide services and was therefore subject to the SCA’s prevailing wage provisions.
2. Whether the Administrator’s determination not to retroactively apply the SCA was a reasonable exercise of the discretion afforded her in administering the Act.
3. Whether the Administrator properly determined that the Act should be applied to the final two years of the C-21A contract.

THE ADMINISTRATOR’S FINAL RULING

The Administrator ruled that the USAF should have applied the SCA to the service work portions of the contract and option years, on the basis of her determination that the “principal purpose” of the contract was to provide services in the United States. *See* 41

U.S.C.A. § 351(a). She further ruled that as an exercise of her discretion in enforcing the SCA, she would not require retroactive application of the Act and wage determinations to the commencement of the contract, i.e., for the first eight years of its performance. Finally, she ruled that the USAF should apply the Act to the final two contract years arising after issuance of her August 29, 2002 final determination.

The Administrator prefaced her analysis by noting that a contract's principal purpose "is 'largely a question to be determined on the basis of all of the facts in each particular case,' that the SCA is a 'remedial Act ... intended to be applied to a wide variety of contracts,' and that 'even where tangible items of substantial value are important elements of the subject matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case.'" AR Tab A at 1, quoting 29 C.F.R. § 4.111(a). She also noted that the regulations provide "that if the contract's principal purpose is to furnish services, the Act will apply 'even though the use or furnishing of nonlabor items may be an important element in the furnishing of the services,' and that 'the proportion of the labor cost to the total cost of the contract and necessity of furnishing or receiving tangible nonlabor items in performing the contract obligations will be considered but are not necessarily determinative.'" *Id.* quoting 29 C.F.R. § 4.131(a). From these regulations, the Administrator distilled three factors as being relevant to determining the principal purpose of the C-21A contract: 1) the stated purpose of the contract; 2) the amount and percentage of service labor hours performed on the contract; and 3) the amount and percentage of contract costs attributable to the service portion of the contract. *Id.* at page 2.

Examining each of these factors, the Administrator observed that the USAF itself repeatedly characterized its C-21A contract as being for maintenance and logistical support necessary to keep the fleet in airworthy condition. This description, noted the Administrator, requires "in other words, all work and materials necessary to keep the aircraft in excellent flying condition. This is essentially a service, and our regulations specifically list the maintenance and repair of aircraft among the examples of covered SCA contracts" AR Tab A. at page 4. *See* 29 C.F.R. § 4.130(a)(33). Secondly, the Administrator concluded that the number of service hours under the contract was 293,000 annually (including the hours worked overseas) and that this number of hours was very substantial, both in "absolute terms" and as a percentage of all labor hours (both SCA and PCA) under the contract. Finally, the Administrator acknowledged the predominant amount of PCA costs (\$203,000,000) under the contract. However, she nevertheless concluded that the \$55,000,000 amount of the acknowledged service work and the percentage of that work's cost compared to the overall contract cost (20%) were both "quite significant." AR Tab A, at page 4. After considering these three factors, the Administrator concluded under all of the circumstances, "that the principal purpose of the contract is to furnish services, and that the contract is therefore subject to the SCA." *Id.*

DISCUSSION

I. The Administrator Correctly Determined that the “Principal Purpose” of the C-21A Contract Was to Provide Services to the USAF.

In this case, the USAF has taken the position that, except for the CLS and COMBS functions, the principal purpose of the C-21A contract is not to supply services to the United States; rather, the principal purpose of the contract is to provide “supplies and remanufacturing⁵” which are subject to the terms of the PCA and therefore exempt from SCA coverage. USAF Petition for Review (Pet. for Rev.) at 14.

The SCA applies to all Federal service procurement contracts “the principal purpose of which is to furnish services in the United States through the use of service employees” 41 U.S.C.A. § 351(a); 29 C.F.R. § 4.104. Certain categories of contracts, however, are exempt from SCA coverage. One such exemption is for “any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act” 41 U.S.C.A. § 356(2) (citation omitted). As previously discussed, the USAF determined that the C-21A contract in its entirety was subject to the PCA, because in the view of the contracting agency, the principal purpose of the contract was not to furnish services, but rather to provide the USAF with equipment or supplies, i.e., remanufactured engines and the C-21A fleet.

The Act’s implementing regulations make clear that determining the principal purpose of a contract is not subject to a “bright line” test. Where, as here, the subject matter of the contract may require a contractor to furnish a mix of services and equipment, determining a contract’s principal purpose within the meaning of the Act:

is largely a question to be determined on the basis of all the facts in each particular case. *Even where tangible items of substantial value are important elements of the subject*

⁵ The Department of Labor considers the ordinary repair and maintenance of equipment to be covered by the SCA. However, repair of certain equipment under a contract can be so extensive as to constitute “remanufacturing,” which the Department holds to be covered by the PCA and therefore SCA-exempt. Included in this category are “contracts principally for remanufacturing of equipment which is so extensive as to be equivalent to manufacturing.” 29 C.F.R. § 4.117(b). In this case, the Administrator concluded that the USAF had failed to demonstrate that any significant amount of PCA work (including remanufacturing) was performed to any significant degree other than the major engine overhaul work Garrett Aviation performed. Approximately 17,850 annual labor hours were devoted to this PCA work under the contract. On the other hand, service labor hours in the annual amount of 189,000 were performed in the United States; another 104,000 service labor hours are performed annually at overseas locations.

matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case.

29 C.F.R. § 4.111(a); (emphasis added). *See EG&G of Fla., Inc.*, BSCA No. 95-05, slip op. at 4 (Oct. 31, 1995). Another SCA regulation is relevant to determining a contract's principal purpose where the contract involves furnishing services which involve more than the use of labor. That regulation, 29 C.F.R. § 4.131(a), specifically notes that where the principal purpose of a contract is to furnish services, the Administrator deems the SCA applicable "even though the use or furnishing of nonlabor items may be an important element in the furnishing of the services" Regarding this, the regulation states further:

The proportion of the labor cost to the total cost of the contract and the necessity of furnishing or receiving tangible nonlabor items in performing the contract obligations will be considered but are not necessarily determinative. A procurement that requires tangible items to be supplied to the Government or the contractor as a part of the service furnished is covered by the Act so long as the facts show that the contract is chiefly for services, and that the furnishing of tangible items is of secondary importance.

Id. (emphasis added).

Thus, in rendering her decision, the Administrator noted that pursuant to the regulations, "factors for consideration which are clearly relevant in determining if the contract is subject to the SCA include the stated purpose(s) of the contract, the amount and percentage of service labor hours performed on the contract, and the amount and percentage of contract costs attributable to services." AR Tab A at 1-2. Our review of the Administrator's treatment of these factors leads the Board to conclude that she properly determined that the principal purpose of the C-21A contract is to furnish services and that it is therefore subject to the SCA.

In the first place, the Administrator noted that the USAF had described the contract as for the provision of "maintenance and logistical support for the C-21A fleet at various locations in the United States and abroad." AR Tab J at 5. The Administrator accepted this description of the work and concluded that the C-21A contract required Raytheon to provide all materials, supplies, and labor "to keep the aircraft in excellent flying condition" AR Tab A at 4. Since the vast majority of work under the contract was utilized to keep the fleet airworthy and mission-capable, the Administrator concluded that primary purpose of the contract was to furnish services and not material, supplies or equipment. Thus, the USAF's own description of the C-21A contract and the actual nature of the day-to-day work required to be performed thereunder (see AR Tab A at 2; Tab G at 2; Tab J at 4) demonstrate that the Administrator reasonably concluded that the stated purpose of the contract was to furnish

services.

Secondly, the Administrator examined the amount and percentage of labor hours performed under the contract. This demonstrates that the Administrator had a reasonable basis to conclude that the principal purpose of the C-21A contract was to furnish services. During the investigation process, the Administrator discovered that workers performed approximately 189,000 labor hours at locations in the United States and that all of these work hours were of a service nature. The number of service hours worked at the United States sites alone is large enough to convince us that the principal purpose of the contract was to furnish services. Moreover, the number of verifiable PCA-covered hours (aircraft engine remanufacturing) was a minor percentage of the overall number of labor hours on the contract, less than 10%.⁶

The USAF also argues that the Administrator improperly failed to consider additional work performed by Raytheon subcontractors which could be considered PCA work, in addition to the hours for aircraft engine remanufacturing. Therefore, argues the USAF, the Administrator should have extrapolated the number of PCA work hours performed in engine remanufacturing by Garrett Aviation to each of the remaining C-21A contract sites in the United States. We reject this argument because the USAF has failed to demonstrate that any significant amount of PCA work was performed at any of the C-21A contract sites other than the engine remanufacturing by Garrett Aviation.

In this regard, the USAF provided a list of Raytheon subcontractors, their locations, and the work each performed for Raytheon under the C-21A contract. *See* AR Tab B. However, neither the USAF nor Raytheon ever provided any “specific information regarding the hours spent in the performance of these contract work items.” AR Tab A at 3.

⁶ Of course, there were an additional 104,000 estimated service work hours performed at overseas locations annually. In her decision, the Administrator included these hours in determining the second factor; accordingly, the total number of service hours under the C-21A contract was 293,000 and the percentage of contract hours dedicated to service work becomes approximately 94% of the total work hours. The USAF objects to use of the data for work at the foreign locations, since the Act applies only to services furnished “in the United States.” 41 U.S.C.A. § 351(a). We accept the Administrator’s use of the work hours performed overseas, because neither the Act nor the regulations prohibit such use in making “principal purpose” determinations. Moreover, the regulatory preamble implies that services to be performed overseas may be considered in making the determination of principal purpose. Thus, the Secretary noted that “any portion” of a service contract performed in the United States is covered by the Act. This clearly indicates that, while both the domestic and the foreign contract work must be examined to make a principal purpose determination, only the domestic portion of a service contract is subject to the Act. *See* 48 Fed. Reg. 49736, 49743-49744 (Oct. 27, 1983). In any event, even if the foreign C-21A contract hours were excluded from consideration, an overwhelmingly large number of hours (189,000) and percentage of work (90%) was attributable to services.

Furthermore, during the investigation, neither the USAF nor Raytheon provided a description of the work that the subcontractors (other than Garrett Aviation) performed. We do not accept the USAF's protestation that it had "no direct knowledge" of the work that Raytheon's subcontractors performed. Under the Federal Acquisition Regulations, applicable to, inter alia, USAF procurements, a contracting agency has the right to inspect the operations of a prime contractor and its subcontractors. 48 C.F.R. § 52.246-3, -4, -5. Thus, we see any lack of useful information regarding the subcontractors as being attributable to the USAF and, since there was no reliable basis to do so, conclude that the Administrator reasonably declined to extrapolate the number of PCA work hours Garrett Aviation performed to the other domestic subcontractors and locations.

Finally, we conclude that the Administrator reasonably determined that the proportion of labor costs to the total cost of the contract was substantial. Moreover, the Administrator also reasonably concluded that the high cost of the PCA contract items was not determinative of the question of the C-21A contract's principal purpose.

The record demonstrates that the dollar amount of contract costs attributable to service work amounted to approximately \$55,000,000, a sum which constituted approximately 20% of the total C-21A contract costs. Based on the dollar amount and the percentage of total contract costs, we agree with the Administrator that the cost of the service work hours was extremely substantial. While the service portion percentage of total contract costs could be considered low, we believe that the Administrator's approach was more reasonable. The Administrator discounted the significance of the relatively high value of the PCA work under the contract, because that amount included the cost of the C-21A jet engines and/or replacement parts required in the tear-down and remanufacture of the engines. Given the inherent high cost of these parts, the Administrator accorded this factor less weight in her determination of the contract's principal purpose. We conclude that it was reasonable for the Administrator to discount the importance of the total PCA-related cost, given that the relatively minor amount of PCA labor hours "does not change the basic service nature of the contract as a whole." AR Tab A at 4. The principal purpose of the C-21A contract was not to provide the USAF with aircraft or remanufactured engines; rather, the principal purpose was the furnishing of services to provide maintenance and logistical support for the fleet of aircraft. Although the fleet would not be airworthy if the jets had no engines, it is still clear that the principal purpose of the contract was not to procure rebuilt or remanufactured jet engines. The vast disparity in the number of service labor hours (nearly 300,000 annually) compared to the relatively few number of PCA remanufacturing labor hours demonstrates that the principal purpose of the contract was to furnish the myriad services necessary to service, maintain, and keep the fleet airworthy on a day-to-day basis.

Therefore, we conclude that the Administrator's determination that the principal purpose of the C-21A contract was to furnish services was a reasonable exercise of the Administrator's authority. *See EG&G of Fla. Inc.*, slip op. at 6 (work on K-bottles under NASA contract held to be SCA work where labor did not rise to level of remanufacturing items). Thus, we affirm the Administrator's ruling that the C-21A contract is subject to the

prevailing wage provisions of the SCA.

II: The Administrator Reasonably Exercised Her Discretion in Determining Not to Require Retroactive Application Of SCA to the First Eight Years of the C-21A Contract.

Regarding the second aspect of her August 29, 2002 ruling, the Administrator noted the discretion afforded her under the Act's implementing regulations and ruled that she would not require retroactive application of the Act and wage determinations for the first year of the contract and its first seven option periods. AR Tab A at 5. (At the time of the ruling, there remained only slightly more than one month of the seventh option period – the eighth year - of the C-21A contract.) She based this determination on several factors: “that the agency’s coverage determination does not appear to have been unreasonable in this instance, that almost eight years of work has been completed on the contract, and [the Wage and Hour Division’s] earlier investigation disclosed that many of the affected workers were receiving combined wages and fringe benefits comparable to” the wages and fringe benefits required under applicable SCA wage determinations. *Id.*

Petitioner Gatton and Intervenor IAM argue that the Administrator erred in not retroactively applying the SCA to the start of the C-21A contract. To convince us that the Administrator erred, Gatton and the IAM must demonstrate that the Administrator abused the discretion the Act and regulations afford her. They have failed to make this showing. The Administrator’s determination not to require retroactive application for the first eight years of the contract was reasonable and not an abuse of discretion. We therefore affirm that decision.

Under certain circumstances, retroactive application of the Act is authorized under the SCA’s implementing regulations. 29 C.F.R. § 4.5(c)(2) affords the Administrator broad discretion in determining whether retroactive application of the Act is appropriate, where, as in this matter, the contracting agency has incorrectly determined that the SCA does not apply to a particular contract. The regulation provides:

Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by the Department of Labor, shall include in the contract the stipulations contained in [29 C.F.R. Part 4] Sec. 4.6 and any applicable wage determination issued by the Administrator or his authorized representative through the exercise of any and all authority that may be needed (including, where necessary, its authority

to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). With respect to any contract subject to section 10 of the Act, *the Administrator may require retroactive application of such wage determination.*

29 C.F.R. § 4.5(c)(2) (emphases added). Thus, the plain language of this regulation *requires* a contracting agency to *prospectively apply* the Act within 30 days of notification by the Administrator that the agency erroneously concluded the SCA did not apply to a service contract. However, *retroactive application* is not required by this regulation; it merely provides that the Administrator *may* require retroactive application. Furthermore, the regulation does not provide specific criteria constraining the Administrator's decision regarding retroactive application.

Accordingly, we will examine whether the Administrator abused her discretion in not ordering retroactive application of the SCA. As previously noted, under our standard of review, the Board generally defers to the Administrator as being “in the best position to interpret those rules in the first instance ... and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside and will reverse the Administrator's decision only if it is inconsistent with the regulations.” *Central Energy Plant*, ARB No. 01-057, slip op. at 15 (Sept. 30, 2003). *See also Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

We conclude that the Administrator had three eminently reasonable bases for declining to require retroactive application here. First, the record does not demonstrate that the USAF acted in bad faith when it determined that the PCA applied to the C-21A contract. As discussed in Section I, *supra*, one of the factors to be considered in making SCA “principal purpose” coverage determinations is the amount of labor costs and its proportion of the total cost of the contract. Here, the record demonstrates that the service portion of labor costs was approximately \$55,000,000, which is patently significant when one considers that contracts with a monetary threshold of \$2,500.00 are subject to the SCA. However, the amount was only approximately 20% of the total contract cost; the lion's share of the costs (nearly 75%) was attributable to the PCA engine remanufacturing work under the C-21A contract. This, of course, was due to the high cost of aircraft engine parts, rather than to the 17,850 yearly PCA work hours of engine remanufacturing.

The Secretary of Labor explained the development of Section 4.5(c) in the preamble to this regulation. The Secretary noted that in making retroactivity decisions concerning substantially completed service contracts, the Administrator would continue the previous practice of considering a contracting agency's good faith and possible disruptions to a service contract procurement. *See* 46 Fed. Reg. 4320, 4323 (Jan. 16, 1981). In choosing to codify this existing practice, the Secretary rejected an alternative to “help insure the retroactive

application of wage determinations to contracts where the agency has omitted the SCA requirements.” *Id.*

Gatton and the IAM raise several arguments challenging the Administrator’s determination that the USAF acted in good faith. Gatton principally argues that the record demonstrates the USAF’s lack of good faith. Gatton quotes from several passages of the Administrator’s brief to support his contention. *See* March 8, 2003 Gatton Br. at 2-3. Counsel for the Administrator, however, was merely engaging in good advocacy to demonstrate the correctness of the Administrator’s coverage ruling and was not undercutting their client’s finding that the USAF acted in good faith. The IAM chiefly points to a law review article written by an USAF procurement attorney. *See* Major Paul L. Snyders, *Applicability of the Service Contract Act to Maintenance and Overhaul Contracts for Major Weapons Systems Components*, *Army Lawyer*, 2, 4 (1991). The IAM urges that we construe certain portions of the article to infer that the USAF has a bias toward making determinations of PCA coverage in situations where the SCA might apply. It is true that the record here does not support a conclusion that the USAF made an evaluation – contemporaneous to award of the C-21A contract – of all the facts surrounding this procurement as the author of the law review article urges upon contracting officers faced with contracts split between SCA and PCA elements. But the fact that there is no documentation of the contracting process does not lead to the inevitable conclusion that the USAF failed to conduct a proper review of this matter. In any event, we note that the article is not an official directive to USAF procurement officials.

It is also true, as the IAM noted, that the USAF has historically resisted the Administrator’s position regarding application of the Act to aircraft maintenance and logistical support contracts. The fact that the contracting agency has zealously advocated its position, however, cannot be used to impute bad faith to the USAF in this instance. But a finding of good faith could well be precluded in future SCA coverage disputes having a similar mix of SCA and PCA work in the same contract.

The Board therefore holds that the Administrator reasonably concluded that the USAF acted in good faith when it determined that the PCA, not the SCA, governed the C-21A contract.

Furthermore, the Administrator also based her decision not to require retroactive application on the fact that nearly eight years of the ten-year contract were completed at the time she issued her ruling. Retroactive application to the first eight years of the contract could be an overly onerous administrative and economic burden to the USAF. These burdens could well constitute a severe disruption in the agency’s procurement practices. Thus, we conclude that the Administrator reasonably declined to require retroactive application based on possible disruption to the USAF’s procurement program.

Finally, the Administrator also decided not to order retroactive application of the SCA because her “earlier investigation disclosed that many of the affected workers were receiving

combined wages and fringe benefits comparable to the combined wages and fringe benefits required” under SCA wage determinations. AR Tab A at 5. The record supports the Administrator’s reasoning with respect to at least one location (Maxwell AFB) under the C-21A contract. Gatton and the IAM have proffered no information which would tend to disprove the Administrator’s reasoning. Thus, we find that the affected workers were receiving wages and fringe benefits comparable to those they would have received under the SCA.

III. We Deny the USAF’S Request to Delay Implementation of the Administrator’s Ruling.

The USAF argues that if we conclude that the C-21A contract is subject to the SCA, the Board should delay the Administrator’s final ruling for “at least two program years” so that it can “implement this decision through the budget process.” These two years refer to the two contract option periods commencing after the Administrator’s August 29, 2002 final ruling, the option years for FY 2003 and FY 2004, which conclude on September 30, 2004. We deny the USAF’s request to delay implementation of the August 29, 2002 final ruling.

The USAF has not cited, nor are we aware of, any authority for the Administrator to delay implementation of her determination that the SCA should be applied to the final two C-21A contract years. Accordingly, we agree with the Administrator’s contention that although the regulations grant her discretion to waive retroactive application of the Act where appropriate, the statute and regulations do not “provide the Secretary [i.e., the Administrator or this Board] the authority to grant the type of relief requested by the USAF in this matter.” Statement for the Administrator at 36. The plain language of the applicable regulation requires that a contracting agency apply the labor standards provision and a wage determination within 30 days of being notified of the determination. *See* 29 C.F.R. § 4.5(c)(2).

Accordingly, we conclude that the Administrator reasonably determined that the provisions of the Act and applicable wage determinations should be incorporated in the C-21A contract for the two contract years commencing October 1, 2002, and ending on September 30, 2004.

CONCLUSION

The Administrator’s final determination that the C-21A was subject to the SCA contract was consistent with the Act and applicable regulations. Moreover, her conclusion was well-reasoned and supported by the results of her extensive investigation. Finally, her determination to require only prospective application of the Act’s provisions was also a reasonable decision, based on the USAF’s good faith belief in the validity of its PCA-coverage decision, the amount of contract time elapsed, and the apparent general comparability of SCA

wages and actual wages-paid. For the foregoing reasons, the Administrator's August 29, 2002 final ruling is **AFFIRMED** and the Petitions for Review are **DENIED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge