U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

M1 SUPPORT SERVICES, LP,

COMPLAINANT,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 2022-0022

DATE: FEBRUARY 23, 2024

DEPARTMENT OF THE AIR FORCE,

COMPLAINANT,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 2022-0023

DEPARTMENT OF THE ARMY,

COMPLAINANT,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 2022-0067

Appearances:

For the Complainant M1 Support Services, LP:
Craig Smith, Esq., and W. Benjamin Phillips, III, Esq.; *Wiley Rein LLP*; Washington, District of Columbia

For the Complainant U.S. Department of the Air Force:
Colonel Frank Yoon, Esq., Lieutenant Colonel Christopher M. Wu, Esq., Major Alissa J.K. Schrider, Esq.; *U.S. Department of the Air Force*; Joint Base Andrews, Maryland

For the Complainant U.S. Department of the Army:
Roger W. Wilkinson, Esq.; *U.S. Department of the Army*; Washington, District of Columbia

For the Administrator, Wage and Hour Division:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., and Lindsey Rothfeder, Esq.;
***U.S. Department of Labor, Office of Solicitor*; Washington, District of Columbia**

Before HARTHILL, Chief Administrative Appeals Judge, and THOMPSON and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the McNamara-O'Hara Service Contract Act of 1965 (SCA or the Act), as amended, and its implementing regulations.[1] Complainants M1 Support Services, LP (M1), the Department of the Army (Army), and the Department of the Air Force (Air Force) each petitioned the Administrative Review Board (ARB or Board) for review of the final ruling of the Administrator (Administrator) of the United States Department of Labor's Wage and Hour Division (WHD), issued on December 17, 2021 (Ruling), and clarified on June 17, 2022 (Clarification).

In the Ruling, the Administrator determined that supplemental contributions made by M1 to rehabilitate a distressed pension plan pursuant to the Pension Protection Act (PPA) must be included in wage determinations under the SCA. However, the Administrator elected not to require the Army and the Air Force to

[1] 41 U.S.C. §§ 6701-6707; 29 C.F.R. Parts 4 and 8 (2023).

retroactively apply wage determinations reflecting the supplemental contributions for past option periods. For the reasons set forth below, we **AFFIRM** the Administrator.

BACKGROUND

1. M1's Contracts and the IAM Fund

Between 2015 and 2018, M1 entered into three SCA-covered contracts with the Air Force and one SCA-covered contract with the Army (collectively, the Contracts) to provide aircraft maintenance services to the agencies.[2] The International Association of Machinists and Aerospace Workers (IAM) represented most of M1's service employees on the Contracts under collective bargaining agreements (CBAs) it negotiated with M1.[3] The CBAs provided M1's employees with pension benefits through a multi-employer defined-benefit pension plan (MDPP),[4] referred to as the IAM Fund, that specified an hourly rate for M1 to contribute for each employee as CBA-based wage determinations under SCA Section 4(c).[5]

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[2] Ruling at 4; M1 Corrected Petition for Review (M1 Pet.) at 6. The three contracts with the Air Force were contract numbers FA3002-15-C-0006 (effective September 1, 2015 through October 31, 2022), FA3002-16-C-0006 (effective September 1, 2016 through September 30, 2023), and FA6800-16-C-0003 (effective October 1, 2016 through January 31, 2022). The contract with the Army was contract number W9124G-17-C-0104 (effective April 1, 2018 through projected completion January 15, 2028). M1 Pet. at 6.

[3] Ruling at 4; M1 Pet. at 6.

[4] An MDPP is a pension plan to which more than one employer contributes, and which provides specific, defined benefits to the employees. *See* 29 U.S.C. § 1002(23), (35), (37); *see also* Ruling at 3.

[5] Ruling at 4; *see also* M1-IAM CBA at § 29.1 ("The Company shall contribute to the [IAM Fund] for each hour or portion thereof to a maximum of forty (40) hours per workweek for which employees in all job classifications covered by this Agreement are entitled to receive pay under this Agreement as follows: $5.00 per hour effective February 1, 2019 . . . .").

2. The SCA and CBA-Based Wage Determinations

The SCA requires contractors on covered government service contracts to pay their service employees specified minimum wages and fringe benefits as determined by the Secretary of Labor.[6] Where, as here, one SCA-covered contract succeeds another,[7] Section 4(c) of the SCA provides that the successor contractor:

> 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 collective-bargaining agreement as a result of arm's-length negotiations.[8]

Stated simply, 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."[9] By requiring successor contractors to pay at least the wages and fringe benefits provided by predecessor contractors, Section 4(c) provides an important safeguard: it "operates as a 'floor' to protect employees' wage and fringe benefits throughout the procurement bidding and negotiation process."[10]

To effectuate Section 4(c)'s requirements, the Administrator issues "Collective Bargaining Agreement (Successorship) wage determinations," also known as CBA-based wage determinations.[11] Pursuant to 29 C.F.R. § 4.53, CBA-based wage determinations must "set forth by job classification each provision relating to wages . . . and to fringe benefits . . . contained in the predecessor's [CBA], as well as conditions governing the payment of such wages and fringe benefits."[12]

Although a contractor may meet its fringe benefit obligations under the SCA by offering the fringe benefit itself or by paying the employees the equivalent in cash, a contractor may also meet its obligation by "irrevocably paying the specified

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6 41 U.S.C. § 6703(1)-(2); 29 C.F.R. § 4.6(b)(1).

7 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 of the Act's provisions." 29 C.F.R. § 4.143(b). Thus, M1 was its own "successor" for the Contracts' option periods. *See* 29 C.F.R. § 4.163(e); *Innovair LLC v. Adm'r, Wage & Hour Div.*, ARB No. 2020-0070, slip op. at 5-6 (ARB Nov. 12, 2021) (citations omitted).

8 41 U.S.C. § 6707(c)(1).

9 *Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262, 1267 (Fed. Cir. 2006).

10 *Innovair*, ARB No. 2020-0070, slip op. at 5.

11 29 C.F.R. §§ 4.3(b), 4.50(b).

12 *Id.* § 4.53.

contributions for fringe benefits to an independent trustee or other third person pursuant to an existing 'bona fide' fund, plan, or program on behalf of employees engaged in work subject to the Act's provisions."[13] In such a case, the Administrator's wage determinations, including, as applicable, CBA-based wage determinations, will "specif[y] the amount of the employer's contribution to provide the benefit."[14]

3. The PPA and the IAM Fund's Rehabilitation Plan

The PPA provides funding and rehabilitation rules for MDPPs that face a funding shortfall.[15] Depending on the severity of the MDPP's financial condition, the MDPP may enter "critical" status, requiring it to develop and propose one or more "rehabilitation plans" to boost the plan's financial condition within ten years by reducing future benefits, increasing employer contributions, or both.[16]

In April 2019, the IAM Fund notified M1 and IAM that it had entered critical status.[17] Consequently, M1 and IAM negotiated supplemental CBAs reflecting the terms of a rehabilitation plan, in which M1 agreed to increase its contributions "by a compounding 2.5% while the Rehabilitation Plan remains in effect."[18]

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[13] *Id.* § 4.170(b); *accord id.* § 4.175(a)(2) ("A fringe benefit determination calling for a specified benefit such as health insurance contemplates a fixed and definite contribution to a 'bona fide' plan . . . by an employer on behalf of each employee, based on the monetary cost to the employer rather than on the level of benefits provided.").

[14] *Id.* § 4.172; *accord id.* § 4.175(a)(1) ("Most fringe benefit determinations containing . . . pension requirements specify a fixed payment per hour on behalf of each service employee.").

[15] 26 U.S.C. §§ 431-432; Ruling at 3-4.

[16] 26 U.S.C. § 432(e)(1), (3), (4). If the employer and union do not agree on supplemental CBA terms adopting a rehabilitation plan within 180 days, a default rehabilitation plan applies. *Id.* § 432(e)(3)(C). The default plan may increase employer contributions only after pension benefits are reduced as much as is legally permissible, and employers are subject to automatic surcharge payments into the pension plan until they agree to CBA terms. *Id.* § 432(c)(3)(C), (e)(7). "The PPA thus incentivizes both employers and unions to agree to supplemental CBA terms adopting a rehabilitation plan." Ruling at 4.

[17] *Id.* at 4.

[18] *Id.* at 4; IAM National Pension Fund Model Language for Adopting Rehabilitation Plan Preferred Schedule at 1.

4. M1's Request for Incorporation of the Supplemental CBA Terms in the Contracts and WHD Division of Government Contracts Enforcement (DGCE) Guidance

M1 sent the supplemental CBA terms to the Army and the Air Force and requested they incorporate them into the Contracts as revised CBA-based wage determinations. That process would allow M1 to seek reimbursement from the agencies under a federal acquisition regulation (FAR) requiring agencies to reimburse contractors for increased wage and fringe benefit costs "made to comply with" wage determinations.[19] The Air Force incorporated the supplemental CBA terms into two of the Contracts, but refused to reimburse M1 for the rehabilitation plan contributions.[20] The Air Force and the Army refused to incorporate the supplemental CBA terms into the other two Contracts or offer reimbursement.[21]

On May 30, 2019, the Air Force sought guidance from the DGCE on whether the additional contributions "constitute a *bona fide* fringe benefit under the [SCA], and, if so, whether such contributions are allowable pass-through costs for reimbursement by the federal government."[22] The Air Force argued that the rehabilitation plan contributions did not meet the definition of a "fringe benefit" under the SCA, and, therefore did not necessitate revisions to the existing wage determinations or require the Air Force to reimburse M1 for its increased costs.[23]

The DGCE issued a written opinion on October 10, 2019 (DGCE Opinion) stating that CBA-negotiated increases in employer contributions constitute an increased cost of providing an SCA-covered fringe benefit and, therefore, should be reflected in CBA-based wage determinations.[24] But it declined to opine on whether federal procurement rules required the change be reflected in price adjustment or reimbursement rates, which it described as a "procurement matter outside the administrative scope of WHD authority."[25]

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19 Ruling at 4; M1 Pet. at 9-10. Pursuant to FAR 52.222-43, a contracting agency must reimburse a contractor for the contractor's increases in wage and fringe benefit costs "made to comply with" wage determinations. 48 C.F.R. § 52.222-43(d)(1)-(2).

20 Ruling at 4; M1 Pet. at 10.

21 Ruling at 4; M1 Pet. at 10.

22 Air Force Request for Formal Opinion Letter on Pension Surcharges at 1.

23 *Id.* at 4-6.

24 DGCE Opinion at 6.

25 *Id.* at 9.

5. Administrator's Ruling

After the DGCE issued its Opinion, the Army and the Air Force continued to refuse to reimburse M1.[26] Consequently, on March 6, 2020, M1 requested a final ruling from the Administrator specifying:

> 1. When collectively bargained CBA terms implement a PPA rehabilitation plan by specifying that an employer will increase its contributions to a pension plan, those contribution increases are, for SCA purposes, an employer cost of providing a bona fide fringe benefit.
>
> 2. Contracting agencies may not refuse to incorporate collectively bargained CBA terms into contracts as new or revised CBA-based SCA wage determinations on grounds that the CBA terms implement a PPA rehabilitation plan.
>
> 3. M1's CBA supplemental agreements have been timely submitted to contracting agencies for incorporation in SCA wage determinations, and these supplemental agreements specify, for SCA purposes, increases in M1's cost of providing bona fide fringe benefits.[27]

In a December 17, 2021 Ruling, the Administrator determined that "wage determinations applicable to M1's service contacts under Section 4(c) of the SCA must incorporate the terms of governing CBAs requiring M1 to make PPA rehabilitation plan contributions to an MDPP."[28] The Administrator reasoned that the contributions "relate to" fringe benefits, and therefore must be included in CBA-based wage determinations under 29 C.F.R. § 4.53, because the contributions are part of the employer's costs of providing pension benefits.[29] The Administrator explained:

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[26] M1 Pet. at 10-11; *see also* December 30, 2019 Army Contract Officer's Final Determination; February 24, 2020 Email from Epperson to Denny Re: CBA Supplemental Agreements Applicable to Contract FA6800-16-C-0003. The Army was not copied on the DGCE Opinion when it issued, and it does not appear that the Army was aware of the DGCE Opinion until shortly before M1 requested a ruling from the Administrator on March 6, 2020. *See* M1 Pet. at 26.

[27] March 6, 2020 M1 Request for Administrator Rulings (M1 Request for Rulings) at 2.

[28] Ruling at 2.

[29] *Id.* at 5.

> [I]f a critical-status MDPP is not rehabilitated, it will be unable to pay out the pension benefits that employees are owed when they come due. This logical connection between rehabilitation plan contributions and an employee's eventual receipt of the pension benefits they are owed is sufficiently straightforward to say that CBA terms requiring M1 to make such contributions 'relat[e]' to fringe benefits.[30]

Although the Administrator agreed with M1 on the contributions, it declined to apply its Ruling retroactively, holding that it "only applies to contract actions taken after the date of this letter."[31] Thus, the Administrator declined to rule on whether M1 timely submitted its supplemental CBA terms for incorporation into the wage determinations for past option periods.[32]

6. Administrator's Clarification

M1 requested clarification from the Administrator on several points relevant to its current appeal. M1 first requested the Administrator to confirm that the rehabilitation plan contributions constituted part of the cost of providing fringe benefits for past option periods, even if the Administrator decided not to require the contracting agencies to apply wage determinations reflecting the rehabilitation plan contributions retroactively.[33] Second, M1 questioned how the Administrator's retroactivity finding could "square" with 29 C.F.R. § 4.163(b), which states that Section 4(c)—requiring a contractor to pay the wages and fringe benefits from a predecessor CBA, whether or not the terms are incorporated in the SCA-covered contract via a wage determination—is self-executing.[34]

In a June 14, 2022 Clarification, the Administrator acknowledged that its decision regarding retroactivity was a "close one," but articulated two reasons for declining to require retroactive application of its ruling.[35] First, the Administrator found no evidence of bad faith on the part of the Army and the Air Force in adhering to their position concerning the rehabilitation plan contributions, as supported by the complexity of the legal issues involved. The Administrator

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30 *Id.* at 7.

31 *Id.* at 8. As explained in more detail below, 29 C.F.R. § 4.5(c) permits, but does not require, the Administrator to retroactively apply an appropriate wage determination where it determines that one was not included in a covered contract.

32 *Id.*

33 February 22, 2022 M1 Request for Clarification at 1-2.

34 *Id.* at 3-5.

35 Clarification at 3-5.

explained: "this case presents complex legal questions. [It] involves an intersection of at least two federal statutes, not just the [SCA], and . . . questions related to the mechanisms for financing perhaps the most byzantine type of pension plan—multi-employer defined benefit plans."[36]

Second, the Administrator stated that retroactivity would not result in significant recovery of back wages to employees.[37] Recognizing that the SCA's goal is to protect employees, the Administrator stated that, in this instance, "whether we apply our ruling retroactively or prospectively presumably would have no bearing on the workers' full compensation under the Act."[38]

The Administrator also declined to opine on the parties' respective obligations before the issuance of its ruling. The Administrator explained: "As the parties recognize, in addition to questions about the retroactive effect of the ruling letter, this sort of inherent confirmation of duties as of 2019 would exist only if the Army and Air Force had been timely notified at the time—which is the very factual question that we have declined to decide."[39]

Finally, the Administrator disagreed with M1's contention that its decision conflicted with the self-executing nature of SCA Section 4(c). The Administrator stated that Section 4(c)'s self-executing language must be read in tandem with other provisions of the SCA, including Congress' express delegation to the Secretary in Section 4(a) to interpret and enforce the SCA.[40] The Administrator emphasized the interpretive authority granted to it under the SCA and its implementing regulations, and the discretion granted to the Administrator by regulation to choose between applying wage determinations prospectively or retroactively.[41] The Administrator stated that so long as the relevant factors "weigh in favor of prospective application of such a determination, [it perceived] no conflict with the self-executing nature of the core requirements of Section 4(c) or the statutory language of Section 4(c) itself."[42]

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36 *Id.* at 4.

37 *Id.*

38 *Id.*

39 *Id.* at 5.

40 *Id.* at 6.

41 *Id.* at 6-7 (citing 41 U.S.C. § 6707(a); 29 C.F.R. § 4.5(c)).

42 *Id.* at 7.

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" rendered under the SCA.[43] The ARB thus will "defer[ ] to the Administrator's interpretation of the SCA when it is reasonable and consistent with law."[44] The ARB reviews the Administrator's decision on retroactive application of wage determinations, however, under an abuse of discretion standard given the plain terms of the implementing regulation that grant the Administrator broad discretion in deciding retroactivity.[45]

DISCUSSION

M1, the Army, and the Air Force each petition the ARB for review of the Administrator's Ruling.[46] The Army and the Air Force challenge the Administrator's decision that rehabilitation plan contributions "relat[e] to" or constitute a cost of a fringe benefit under the SCA.

M1 supports the Administrator's decision regarding plan contributions, but challenges the Administrator's decision on retroactive incorporation of wage determinations. M1 relatedly argues that the Administrator abused its discretion in declining to confirm that its interpretation that rehabilitation plan contributions "relat[e] to" pension benefits under the SCA extended retroactively to past option periods, and in declining to rule on whether it timely submitted notice of the supplemental CBA terms to the Army and Air Force.

We find the Administrator's rulings and determinations to be consistent with the SCA and its implementing regulations, reasonable on these facts, and not an abuse of discretion. Accordingly, we affirm the Administrator.

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[43] 29 C.F.R. § 8.1(b); *see also* 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).

[44] *Forfeiture Support Assocs.*, ARB No. 2006-0028, slip op. at 2 (ARB May 27, 2008) (citation omitted); *accord Court Sec. Officers*, ARB No. 1998-0001, slip op. at 4 (ARB Sept. 23, 1998) ("[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, taking into account the applicable law and facts of the case.").

[45] *See Raytheon Aerospace (Raytheon)*, ARB Nos. 2003-0017, -0019, slip op. at 11-12 (ARB May 21, 2004).

[46] By orders dated February 18, 2022, and September 29, 2022, the three petitions were consolidated for purposes of rendering a decision.

1. The Administrator Reasonably Decided that Rehabilitation Plan Contributions Must be Incorporated in CBA-Based Wage Determinations

A. The Administrator Reasonably Determined That Rehabilitation Plan Contributions are Part of the Cost of Providing Pension Benefits and, Therefore, "Relat[e] to" the Benefits

In the Ruling, the Administrator concluded that the supplemental CBA terms constituted "provision[s] relating to" the pension benefits under 29 C.F.R. § 4.53 because the payments constitute part of M1's cost to provide the benefits.[47] On appeal, the Administrator explains:

> Here, in common-sense terms, the collectively bargained PPA payments at issue are a necessary cost of the provision of CBA-covered fringe benefits. Specifically, an actuary determined that without any such payments, the plan would be at significant risk of defaulting on its ability to pay the defined pension benefits owed to plan participants; essentially, the new payments reflect the true, updated cost of the negotiated IAM Pension Fund defined benefit plan.[48]

We agree. The original CBAs between M1 and IAM designated the rates M1 was obligated to contribute to the IAM Fund on behalf of each SCA-covered service employee. Those contributions funded the IAM Fund and allowed it to pay the employees the pension benefits to which they were entitled. The parties do not dispute—nor could they credibly—that M1's original contributions to the IAM Fund embodied the cost of providing pension benefits. Therefore, M1's contributions to the IAM Fund were properly reflected in the CBA-based wage determinations for the Contracts.[49]

The rehabilitation plan contributions supplemented M1's base contributions and, in combination with the base contributions, were needed to fund the IAM Fund at a sufficient level to allow it to continue to pay pensions to the service employees. Thus, as the Administrator correctly reasoned, "essentially, the new payments reflect the true, updated cost of the negotiated IAM Pension Fund defined benefit

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47 Ruling at 5-7.

48 Brief of the Principal Deputy Administrator in Response to Petitions for Review (Adm'r Response Br.) at 20.

49 *See* 29 C.F.R. §§ 4.170(b), 4.172; 4.175(a)(1).

plan."[50] As a result, the Administrator reasonably concluded that the CBA-negotiated payment of supplemental contributions, just like the base contributions, were "provision[s] relating to" the pension benefits and, consequently, had to be included in CBA-based wage determinations pursuant to section 4(c) and 29 C.F.R. § 4.53. In so finding, the Administrator reasonably rejected the Army's and the Air Force's attempt to draw a distinction between contributions "directly" for the cost of providing pension benefits, on the one hand, and supplemental contributions for fund "replenishment," on the other.[51] The contributions at issue here—whether at the original rate or at the subsequently negotiated rate—simply provide the required fringe benefit.[52]

We find unpersuasive the agencies' reliance on *Thole v. U.S. Bank N.A.*[53] to jettison their obligation under the SCA to include the negotiated pension fund contributions here at issue in CBA-based wage determinations.[54] *Thole* dealt with the issue of constitutional standing under the Employee Retirement Income Security Act of 1974, and did not involve the interpretation of the phrase "relating to" fringe benefits under the SCA. Even if, as the Army proffers, *Thole* supports the proposition that a "legal wall" exists between an interest in a pension plan fund and an interest in the benefit for standing purposes,[55] the Supreme Court did not address the unrelated issue of whether rehabilitation plan contributions to a pension fund "relat[e] to" the benefits paid out by that fund under the SCA.

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[50] Adm'r Response Br. at 20; *see Lear Siegler*, 457 F.3d at 1268-69 (concluding that the cost of providing a defined benefit required by a CBA may increase, even if the specified level of the benefit did not change).

[51] United States Department of the Army's Petition for Review (Army Pet.) at 17, 19-23; United States Air Force's Points Relied Upon and Statement of Supporting Reasons (Air Force Pet.) at 10-11, 15.

[52] *See* 29 C.F.R. §§ 4.170(b) (stating a contractor may meet its fringe benefit obligations by "irrevocably paying the specified contributions for fringe benefits to an independent trustee or other third person pursuant to an existing 'bona fide' fund, plan, or program on behalf of employees engaged in work subject to the Act's provisions."), 4.175(a)(2) ("A fringe benefit determination calling for a specified benefit such as health insurance contemplates a fixed and definite contribution to a 'bona fide' plan . . . by an employer on behalf of each employee, based on the monetary cost to the employer rather than on the level of benefits provided.").

[53] *Thole v. U.S. Bank N.A.*, 140 S.Ct. 1615 (2020).

[54] Army Pet. at 29-30; Air Force Pet. at 13-14.

[55] Army Pet. at 29.

We further reject the agencies' reliance on the decisions of the Court of Federal Claims[56] and the Federal Circuit[57] in *Call Henry, Inc. v. United States* for similar reasons.[58] *Call Henry* has no application to this case. There the courts addressed a breach of contract claim and a contractor's entitlement to a price adjustment under the FAR price adjustment clause.[59] The issue here, in contrast, is whether rehabilitation plan contributions "relat[e] to" fringe benefits under the SCA.

As the Federal Circuit indicated, the two issues require different analyses. Critically, the Federal Circuit explained that "[e]ven if [they] held that MPPAA withdrawal liability may, in some cases, be a cost of providing fringe benefits covered by the SCA, Call Henry's breach of contract claim [concerning the FAR price adjustment clause] would still fail."[60] Thus, the Federal Circuit declined to answer whether the contractor's additional payments were a "cost of providing fringe benefits covered by the SCA"—the relevant issue here—and instead opted to resolve the reimbursement dispute on the absence of contractual language obligating Call Henry to make the withdrawal liability payments.[61] *Call Henry* does not answer the question of whether rehabilitation plan contributions are a cost of, or are related to the provision of, fringe benefits under the SCA.

We further reject the Army's contention that the Administrator's interpretation of "relating to" in the context of fringe benefits is overbroad compared to the meaning and use of the phrase "relating to wages" in the same regulation.[62] We agree with the Administrator that the Army overlooks fundamental differences in the SCA's treatment of wages and fringe benefits, and the manner in which an employer can fulfill its obligations with respect to each type of compensation.[63] Unlike with wages, the SCA regulations recognize that employers often fulfill their

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56 *Call Henry, Inc. v. United States (Call Henry I)*, 125 Fed. Cl. 282 (Ct. Cl. 2016).

57 *Call Henry, Inc. v. United States (Call Henry II)*, 855 F.3d 1348 (Fed. Cir. 2017).

58 Army Reply Brief (Army Reply Br.) at 9; Air Force Reply Brief (Air Force Reply Br.) at 11-12.

59 *Call Henry II*, 855 F.3d at 1354.

60 *Id.* at 1355.

61 In fact, the Federal Circuit contrasted *Call Henry II*, where the withdrawal liability was not a contractual requirement, with *Lear Siegler*, where the contractor was "contractually bound to the [contracting agency] to make the contributions necessary to provide its employees with certain defined benefits. When the cost of those contributions increased, that constituted an increased wage determination applied by operation of law to [the contractor]'s contract with the [contracting agency]." *Id.* at 1355-56.

62 Army Pet. at 21.

63 *See* Adm'r Response Br. at 26 n.2.

fringe benefit obligations by paying into a third-party fund or plan.[64] In this type of intermediary arrangement, the employer's costs of providing the benefit—and the extent of its SCA fringe benefit obligation—may vary, even when the value or amount of the benefit remains fixed.[65] Thus, the same type of immediately traceable, one-to-one correlation between the dollars paid by the employer and the fringe benefit received may not exist. Therefore, the Army's analogy fails.

Finally, we reject the agencies' contention that the Administrator's Ruling is "inconsistent with" the Pension Benefit Guarantee Corporation and the American Rescue Plan Act of 2021 (ARPA), which they argue creates a "well-funded, comprehensive scheme to address the problems of severely underfunded pension plans."[66] By treating rehabilitation plan contributions as SCA obligations, the Army and the Air Force contend the Administrator improperly "duplicat[ed]" or made an "*ad hoc* workaround" of Congress's established programs.[67] But alternative fallback funding programs for failing pension plans do not replace an employer's obligation to make rehabilitation plan payments under the PPA. Notwithstanding the passage of ARPA, Congress left the PPA intact.

We thus find that the Administrator reasonably determined that rehabilitation plan contributions must be incorporated in CBA-based wage determinations as terms "relating to" pension benefits under the SCA.

B. Rehabilitation Plan Contributions are not Fringe Benefits "Required by Federal, State, or Local Law"

Although the SCA generally requires contracts to specify the fringe benefits, it excludes those "required by Federal, State, or local law to be provided by the contractor."[68] Thus, benefits like unemployment compensation, workers' compensation, and social security do not constitute "fringe benefits" for purposes of the SCA and need not be specified in SCA-covered contracts or applicable wage determinations.[69]

The Air Force contends that "[t]here is no dispute that the PPA *requires* employers to incur rehabilitation costs."[70] Consequently, the Air Force contends

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64 29 C.F.R. § 4.170(b).

65 *Lear Siegler*, 457 F.3d at 1268-69*; see also* 29 C.F.R. § 4.175(a)(2).

66 Army Pet. at 33; *accord* Air Force Pet. at 13-14.

67 Army Pet. at 33-34; *accord* Air Force Pet. at 13-14.

68 41 U.S.C. § 6703(2); *see also* 29 C.F.R. § 4.171(c).

69 29 C.F.R. § 4.171(c).

70 Air Force Pet. at 17 (emphasis original).

that these payments are excluded from the SCA's requirements as "fringe benefits . . . required by Federal [law]."[71]

We disagree. The SCA and its implementing regulations make clear that *benefits* required by federal or other law are excluded from the SCA's requirements. Although the PPA may require M1 to incur additional costs to provide pension benefits, it does not obligate M1 or any other employer to offer pension benefits in the first place. Consequently, the SCA does not exclude the increased costs from wage determinations.[72]

C. Rehabilitation Plan Contributions Are Not Administrative Costs Incurred by the Contractor

Finally, the Air Force argues that rehabilitation plan contributions should be excluded because they "very likely will fund an assortment of administrative expenses or business costs necessary to run and manage the plan."[73] In support of its argument, the Air Force cites 29 C.F.R. § 4.172, which provides:

> Where a fringe benefit determination specifies the amount of the employer's contribution to provide the benefit, the amount specified is the actual minimum cash amount that must be provided by the employer for the employee. No deduction from the specified amount may be made to cover any **administrative costs which may be incurred by the contractor** in providing the benefits, as such costs are properly a business expense of the employer.[74]

By its plain terms, the regulatory carveout for administrative expenses applies only to those costs "which may be incurred by the contractor in providing

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71 *Id.* at 16-17.

72 The Air Force similarly asserts that demanding that legally required rehabilitation plan contributions be included in wage determinations would "lead to an absurd result, where an actual benefit is excluded from a wage determination because it is required by Federal law, but the costs of providing that excluded benefit are incorporated into the wage determination." *Id.* at 18. If a fringe benefit is not included in a wage determination because it is required by federal law, then the costs of that required benefit would, by extension, also not be part of the wage determination. In contrast, if the fringe benefit is not required by federal law—like the pension benefit here—then the wage determination must incorporate the costs of providing that fringe benefit, whether a portion of those costs are necessitated by law or not.

73 *Id.* at 15.

74 29 C.F.R. § 4.172 (emphasis added).

the benefits."[75] Any portion of M1's rehabilitation plan contributions that go towards the IAM Fund's administrative expenses[76] are incurred by the fringe benefit plan, not the contractor. Thus, the carveout does not apply.

2. The Administrator Did Not Abuse Its Discretion in Declining to Retroactively Require Incorporation of CBA-Based Wage Determinations Reflecting Rehabilitation Plan Contributions

The SCA's implementing regulations grant the Administrator wide discretion to decide whether to require a contracting agency to retroactively incorporate an appropriate wage determination for past contract periods:

> 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 [SCA] did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract . . . the Administrator **may require retroactive application of such wage determination**.[77]

The regulation's plain terms only require the Administrator to apply its decision prospectively; retroactivity is not required. Furthermore, the regulation does not provide specific criteria the Administrator must consider in deciding whether to apply a wage determination retroactively. Accordingly, we will only overturn the Administrator's decision if the opposing party demonstrates the Administrator abused this broad discretion.[78] Under that deferential standard, we conclude the Administrator did not abuse its discretion in determining that the lack of bad faith and the lack of harm to the service employees did not warrant applying the Ruling retroactively.[79]

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75 *Id.*

76 The Air Force fails to offer any evidence of what, if any, portion of the rehabilitation plan contributions are used exclusively for the IAM Fund's "administrative expenses."

77 29 C.F.R. § 4.5(c) (emphasis added).

78 *U.S. Dep't of the Air Force v. Adm'r, Wage & Hour Div., U.S. Dep't of Lab. (Air Force)*, ARB Nos. 2021-0071, 2022-0001, slip op. at 17 (ARB Feb. 28, 2022); *see also Raytheon*, ARB Nos. 2003-0017, -0019, slip op. at 11-12.

79 The preamble to 1981 SCA regulations highlights how good faith is considered in making retroactivity decisions: "In the case of a substantially completed contract, the Department of Labor has and will consider whether a contracting agency made a good faith decision not to include the required provisions of the Act in a particular contract." Service Contract Act; Labor Standards for Federal Service Contracts, 46 Fed. Reg. 4320, 4323 (Jan.

Regarding the lack of bad faith, the Administrator explained that this case involves a novel legal issue of first impression at the intersection of several federal laws.[80] M1 argues on appeal that the agencies' adherence to their position regarding plan contributions after the DGCE Opinion establishes bad faith.[81] Likewise, the Administrator recognized in the Clarification that the Army's and the Air Force's decisions in spite of the DGCE Opinion "weigh[ed] against a prospective-only application of our holding in the [Ruling]."[82] But the Administrator ultimately concluded that the Air Force's and the Army's decisions were made in good faith because the DGCE Opinion, "like the area of law generally, was complex."[83] Although the Administrator later affirmed the DGCE Opinion, we cannot say that the Administrator abused its discretion in finding that the agencies acted in good faith in steadfastly maintaining their defensible, although ultimately incorrect, legal position.[84]

We further reject M1's similar contentions that the Air Force and the Army demonstrated bad faith by failing to request a final ruling from the Administrator

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16, 1981); *see also Raytheon*, ARB Nos. 2003-0017, -0019, slip op. at 12; *Air Force*, ARB Nos. 2021-0071, 2022-0001, slip op. at 17-18 n.75 (explaining interchangeably of good faith and the absence of bad faith).

80 The closest cases identified by the Army and the Air Force were *Call Henry I* and *II*. Although the *Call Henry* decisions were not directly on point, the Administrator recognized that the cases could have reasonably caused confusion on the issue given some similarities between the circumstances there and the circumstances here, including the existence of supplemental employer payments and the intersection with other federal law, as well as the Court of Federal Claims' holding in *Call Henry I* that "[w]ithdrawal liability is not a fringe benefit" for purposes of the SCA. Clarification at 4. M1 asserts that the facts and issues in *Call Henry* are far too distinguishable to have contributed to any confusion here. M1 Pet. at 24. We agree with M1 that the *Call Henry* cases are materially distinguishable, but that does not mean it was unreasonable for the Administrator to conclude that they might have contributed to some confusion, especially in the absence of other cases more directly on point.

81 M1 Pet. at 25-26.

82 Clarification at 4.

83 *Id*.

84 *See Air Force*, ARB Nos. 2021-0071, 2022-0001, slip op. at 17-18 (affirming the Administrator's reliance on the absence of bad faith as a factor in its retroactivity analysis); *Raytheon*, ARB Nos. 2003-0017, -0019, slip op. at 13 ("The fact that the contracting agency has zealously advocated its position, however, cannot be used to impute bad faith to the [contracting agency] in this instance."); *see also* 46 Fed. Reg. 4320, 4323 (Jan. 16, 1981) (identifying the contracting agency's good faith as a relevant factor in the retroactivity analysis).

sooner.[85] M1 likewise could have requested a ruling when the parties reached an impasse. Moreover, both parties took other steps in the meantime, including seeking guidance from DGCE.[86] Thus, we do not see a basis to disturb the Administrator's conclusion that the parties acted in good faith.

Turning to potential harms that flow from the Administrator's decision, M1 contends on appeal that paying its workers in accordance with the SCA should weigh in favor of requiring retroactive incorporation of wage determinations.[87] M1 asserts that holding otherwise punishes it for complying with its obligations, and that it should not be left responsible for "millions of dollars in increased compensation costs because they had every reason to view the costs as required by the SCA under Section 4(c)."[88] But M1's compliance does not invalidate the Administrator's conclusion that retroactivity would not further the purposes of the SCA. The SCA protects service employees, not contractors.[89] Nothing would change for the service employees if the Administrator applied its decision retroactively.[90]

M1 contends on appeal that the Administrator abused its discretion by giving no weight to the other factors the Administrator considered. For example, M1 contends there would be little disruption to service contracts if the Ruling were applied retroactively "because the Army and Air Force knew or should have known that the SCA price-adjustment clause placed the risk of significant increases in fringe-benefit costs 'squarely' on their shoulders."[91] M1 similarly argues that retroactivity would impose a minimal administrative burden on the Army and the Air Force because the "calculations are finished" and the "contracting officers need

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85 M1 Pet. at 26.

86 In fact, the Air Force appears to have sought guidance from DGCE in May 2019, one month after the IAM Fund entered critical status and two months before M1 provided notice of the supplemental CBA terms to the Air Force. *See* May 30, 2019 Email from DeQuiroga to King Re: "DoL opinion letter."

87 M1 Pet. at 26-27.

88 *Id.* at 27; *accord* M1 Corrected Consolidated Reply Brief (M1 Reply Br.) at 36.

89 *See Lear Siegler*, 457 F.3d at 1265 (stating the SCA "serves generally to protect the wages and fringe benefits of service workers"); *Biospherics, Inc.*, ARB Nos. 1997-0086, 1998-0141, slip op. at 26 (ARB May 28, 1999) ("The SCA was enacted to protect rightful wages of the service workers." (internal quotations and citation omitted)).

90 *Compare Raytheon*, ARB Nos. 2003-0017, -0019, slip op. at 13-14 (affirming Administrator's decision to decline to apply ruling retroactively where workers received combined wages and fringe benefits comparable to amounts required under the SCA), *with Biospherics, Inc.*, ARB Nos. 1997-0086, 1998-0141, slip op. at 25 (affirming Administrator's decision to require retroactive application of wage determination where it was necessary to "protect rightful wages of the service workers" (internal quotations and citation omitted)).

91 M1 Pet. at 29.

only review and address them as they have other aspects of SCA price-adjustment requests submitted and approved in the ordinary course of performance."[92] The Administrator counters that M1 "significantly underestimates the processes and impacts involved" because the agencies "would need to reach back several years to adjust project fund allocations, and given the nature of government budgeting and procurement" it "would be a significant undertaking."[93]

We find the Administrator's assessment reasonable. As M1 concedes, the dispute reaches back more than two years before the Administrator issued the Ruling and concerns millions of dollars in fringe benefit costs and potential reimbursement by the agencies.[94] Moreover, three of the Contracts were approaching their expected completion—one of the Contracts was approximately 75% complete, one was approximately 88% complete, and one was approximately 98% complete.[95] In similar circumstances, the Board has held that retroactive application "could be an overly onerous administrative and economic burden to the" contracting agency and could "constitute a severe disruption in the agency procurement practices."[96]

Finally, M1 contends the Administrator "missed the most important factor for retroactivity here: the agencies, not M1, expressly bore the financial risk of the increased cost of pension contributions at issue."[97] Specifically, M1 cites FAR 52.222-43, which was incorporated into the Contracts and which requires contracting agencies to reimburse contractors for increased wage and fringe benefit costs "made to comply with" a wage determination issued by the Administrator or otherwise applied to the contract by operation of law.[98] The Administrator gave this consideration "scant weight,"[99] but M1 asserts that the Administrator must hold the Army and the Air Force to this contractual "promise" to cover increased costs by applying the Ruling retroactively.[100]

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92 *Id.*

93 Adm'r Response Br. at 35 n.10.

94 M1 Pet. at 8-10, 27.

95 *See id.* at 6, 40-41; M1 Request for Rulings at 15-17.

96 *Raytheon*, ARB Nos. 2003-0017, -0019, slip op. at 13; *see also Air Force*, ARB Nos. 2021-0071, 2022-0001, slip op. at 18 (affirming Administrator's assessment that retroactive application of wage determination "could impose a large administrative and economic burden on the [contracting agency] to cover a comparatively small amount of the Contract's service work," and that these "burdens could disrupt the agency's procurement practices.").

97 M1 Pet. at 18-19.

98 48 C.F.R. § 52.222-43(d)(1)-(2).

99 Adm'r Response Br. at 37.

100 M1 Pet. at 20.

But even assuming that the FAR's cost-shifting mechanism might be an appropriate consideration, M1 has not adequately explained why it must be regarded as "the most important factor," let alone why it overrides the other factors to render the Administrator's decision an abuse of discretion. As the Administrator aptly summarizes, M1's argument concerns "essentially, which party [M1 or the contracting agencies] should bear the costs of those rehabilitation payments during the period when the requirement to reflect those payments in the wage determinations had yet to be clarified."[101] The Administrator reasonably considered this a contractual dispute beyond its exclusive jurisdiction.[102] Under the circumstances presented, the Administrator did not abuse its discretion in giving the issue of contractual cost allocation between a contractor and contracting agencies little weight, in comparison to other relevant considerations, like the recovery (or lack thereof) of back wages for the contractor's service employees, which directly bear on the primary and fundamental purposes of the SCA.[103]

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[101] Adm'r Response Br. at 37-38. M1 repeatedly concedes that its fundamental concern, including with respect to FAR 52.222-43, is its contractual dispute with the Army and the Air Force over reimbursement. M1 Pet. at 29 (accusing the Administrator of "dancing around the fundamental question at work here: Why should M1 have to bear these increased pension costs?"); M1 Reply Br. at 1 ("These appeals are really about the petitioner Army's and Air Force's ongoing efforts to avoid contractual obligations totaling millions of dollars."), 3 ("The Administrator's refusal [ ] has handed the Air Force and Army obstacles to use to delay and ultimately try to avoid their reimbursement obligations."), 33 ("[T]he Administrator's refusal has all but invited the Army and Air Force to prolong the dispute over reimbursement and even try to persuade another forum [the applicable board of contract appeals] to relieve them of their reimbursement obligations for the pre-Decision option years entirely.")

[102] Adm'r Response Br. at 38; *see also* Section 3, *infra*.

[103] M1 similarly argues that the factors considered in *Raytheon* and *Air Force* are irrelevant or should be given different weight in the retroactivity analysis, especially as compared to the FAR cost-shifting mechanism, because of the different circumstances presented. M1 Pet. at 21; M1 Reply Br. at 30-31. Specifically, M1 observes that in both *Raytheon* and *Air Force*, the contracting agencies failed to include any wage determination upon determining the SCA did not apply to the contracts. In contrast, wage determinations were incorporated here because there was no dispute the SCA applied, and the issue instead is whether those wage determinations were correct. Thus, M1 states that "[n]either *Raytheon* nor [*Air Force*] required considering this cost-shifting *quid pro quo* because neither contract had been subject to the SCA." M1 Pet. at 21. This distinction does not erode the relevance or application of the factors and considerations identified in *Raytheon* or *Air Force*, including the absence of bad faith or the lack of recovery of wages for employees. The SCA's implementing regulations give the Administrator equal discretion in deciding whether to require application of an appropriate wage determination retroactively in cases where no wage determination was applied and in cases where an incorrect or inappropriate wage determination was applied. *See* 29 C.F.R. § 4.5(c). We disagree with M1

3. The Administrator Did Not Abuse Its Discretion in Declining to State Whether its Underlying Interpretive Conclusion Applied Retroactively

In addition to the other relief it requests, M1 asserts that the Administrator should independently declare that its underlying "interpretive conclusion" applies retroactively.[104] M1 asserts that an important "practical" reason mandates distinguishing between retroactively applying wage determinations, on the one hand, and confirming that the Administrator's legal interpretation applies retroactively, on the other.[105] M1 emphasizes that the Air Force already incorporated the supplemental CBA terms reflecting rehabilitation plan contributions into two of the four Contracts.[106] Thus, even if the Administrator declines to require retroactive incorporation of wage determinations on the remaining Contracts, M1 asserts that it may still be entitled to a price adjustment for past option periods on the first two Contracts if, as a matter of legal interpretation, the increased pension contributions represent the cost of providing a bona fide fringe benefit under the SCA.[107]

We agree with the Administrator that M1 is requesting it to weigh in on the reimbursement dispute and the parties' respective rights and obligations under the Contracts. If, as M1 requests, the Administrator proclaims that its rehabilitation plan contributions were part of the cost of providing a fringe benefit under the SCA for past option periods—even if not retroactively incorporated into CBA-based wage determinations—M1 could use that proclamation to advance its contractual argument that the Air Force is required to reimburse it for its increased costs for those periods. Indeed, M1 concedes that its goal in requesting the Administrator declare that its interpretation extends retroactively to past option periods is to aid M1 in its eventual contract enforcement action against the Air Force.[108]

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that the absence of bad faith and the unlikelihood of significant recovery are less relevant to the retroactivity analysis in the circumstances presented here, as compared to the circumstances presented in *Raytheon* and *Air Force*.

104 M1 Reply Br. at 46-50; *see also* M1 Pet. at 43-46; February 22, 2022 M1 Request for Clarification at 2 ("M1 thus requests confirmation that the December 17 ruling means: rehabilitation plan contributions are and have been the costs of a bona fide fringe benefit for SCA purposes whether made before or after the date of the ruling.").

105 M1 Pet. at 4-5.

106 *Id.*

107 *See id.* at 44.

108 *Id.* ("The answer [to the interpretive question] would help M1 and the Air Force resolve their dispute over M1's entitlement to price adjustments under the [Contracts] by helping determine whether those supplemental CBA terms—which, again, were already

The Administrator did not abuse its discretion in declining to accede to M1's request. M1 can pursue its contract action, and the resolution of the parties' respective rights and obligations for past option periods, in a claim under the Contracts Dispute Act (CDA), which sets forth a comprehensive scheme for resolving contractual disputes between a contractor and a contracting agency.[109] While the Administrator "has the primary and final authority and responsibility for administering and interpreting the [SCA],"[110] the applicable board of contract appeals and the Court of Federal Claims have jurisdiction over disputes "center[ing] on the parties' mutual contract rights and obligations."[111]

In this case, the Administrator has interpreted the SCA and made a ruling that rehabilitation plan contributions are "relat[ed] to" a fringe benefit under the SCA. The remaining issue—the impact of that interpretation on the parties' respective rights and obligations under the Contracts[112]—is a matter that the Administrator reasonably left to resolution by and through other, appropriate forums.

4. The Administrator Did Not Abuse Its Discretion in Declining to Rule on Whether M1 Timely Submitted Notice of the Supplemental CBA Terms to the Army and the Air Force

Having affirmed the Administrator's decision not to require the Army and the Air Force to incorporate wage determinations reflecting rehabilitation plan contributions retroactively, we likewise affirm the Administrator's decision to decline to rule on whether M1 provided notice of the supplemental CBA terms in time for them to be incorporated in wage determinations for past option periods. As

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incorporated—increased M1's costs to provide bona fide fringe benefits required by the SCA.").

109 41 U.S.C. §§ 7101-7109.

110 29 C.F.R. § 4.101(b).

111 *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1580 (Fed. Cir. 1993) (citations omitted); *see also Aleman Food Servs., Inc. v. United States*, 25 Cl. Ct. 201, 209 (Ct. Cl. 1992), *rev'd on other grounds by Aleman Food Servs., Inc. v. United States*, 994 F.2d 819 (Fed. Cir. 1993) (stating that the Claims Court—the predecessor to the Court of Federal Claims—had jurisdiction over "disagreement concern[ing] the contractual allocation of the risk of an increase in the cost of certain fringe benefits," even if determinations of the Department of Labor formed a part of the factual predicate of the dispute).

112 *See* M1 Pet. at 45 (confirming that what it seeks from the Administrator is an "interpretation of terms already included in two contracts"), 46 ("At bottom, two contracts already incorporate the supplemental CBA terms. The Administrator should interpret what they mean.").

the Administrator correctly reasoned, whether M1 submitted the supplemental terms in time for them to be incorporated into wage determinations for past option periods would only be relevant if the Administrator required the Army and the Air Force to retroactively incorporate wage determinations into the Contracts.

In its request for clarification to the Administrator and on appeal, M1 modified its reason for requesting a ruling on the timeliness of its submissions. Whereas it originally requested a ruling as to whether its submissions were timely "for incorporation in SCA wage determinations," M1 subsequently asserted that the timeliness of its submissions is also relevant to the "independent" issue of whether M1's "direct statutory obligations" under SCA Section 4(c) automatically applied by operation of law to the past option periods.[113]

As explained above, SCA Section 4(c) requires a successor contractor to pay service employees no less than the wages and fringe benefits paid under a predecessor contractor's CBA.[114] As M1 states, if the successor contractor provides timely notice of the CBA terms to the contracting agency, Section 4(c) is "self executing," meaning the successor contractor must pay the wages and fringe benefits reflected in the predecessor CBA regardless of whether a wage determination has been issued or incorporated reflecting the CBA's terms.[115] Thus, M1 contends that if it timely submitted the supplemental CBA terms to the Army and the Air Force, then, pursuant to Section 4(c), the CBA terms became part of M1's SCA "obligations" by operation of law, even if the Administrator declines to compel the Army or the Air Force to retroactively incorporate the new terms in a wage determination.[116]

The "obligation" under Section 4(c) to which M1 refers is the duty of a contractor, like M1, to pay not "less than the wages and fringe benefits the service employee would have received under the predecessor contractor, including . . . any prospective increases in wages and fringe benefits provided for in a [CBA]."[117] M1 acknowledges this is the specific duty it believes is enforceable by the Administrator

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113 *Id.* at 31, 34-35.

114 41 U.S.C. § 6707(c)(1); *see also* 29 C.F.R. § 4.163(b).

115 29 C.F.R. §§ 4.1b(b)(2), 4.163(b).

116 M1 Pet. at 32-33.

117 41 U.S.C. § 6707(c)(1); *accord* 29 C.F.R. § 4.163(b) ("Section 4(c) is self-executing. Under section 4(c), **a successor contractor** in the same locality as the predecessor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which were contained in the predecessor contractor's collective bargaining agreement. This is a direct statutory obligation and requirement **placed on the successor contractor** by section 4(c) . . . ." (emphasis added)).

as self-executing.[118] Yet, there does not appear to be any question that M1 satisfied its obligation to pay the required fringe benefit rate on behalf of its service employees, in accordance with the supplemental CBA terms. It would be fruitless to require the Administrator to determine whether the CBA terms were submitted in time to "trigger Section 4(c) obligations," where there is no dispute that those obligations were fulfilled.[119] Thus, we find that the Administrator did not abuse its discretion in declining to make factual findings as to the timeliness of M1's submissions to the contracting agencies.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Administrator's Ruling, as clarified by the Clarification.

SO ORDERED.[120]

SUSAN HARTHILL
Chief Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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[118] M1 Reply Br. at 40 ("[E]ven if the supplemental CBA terms are not retroactively incorporated into the contracts as wage determinations, Section 4(c) nonetheless made them part of **M1's SCA obligations** anyway." (emphasis added)), 42 ("[W]hen Section 4(c) applies, **the successor contractor must meet** *all* the wage and fringe benefit obligations of the predecessor CBA." (emphasis added)).

[119] As with its request that the Administrator apply its interpretive conclusion retroactively, M1's goal in seeking a ruling on the timeliness of its submissions to the Army and the Air Force may be to aid it in its eventual contract dispute with the Army and the Air Force in a CDA claim. The Administrator reasonably deferred to other, appropriate fora to resolve that dispute. *See* Section 3, *supra*.

[120] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.