U.S. Department of Labor

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

In the Matter of:

UNITED STATES DEPARTMENT OF THE AIR FORCE,

PETITIONER,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 2021-0071

FLIGHTSAFETY DEFENSE CORP. (f/k/a FLIGHTSAFETY SERVICES CORPORATION),

PETITIONER,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

ARB CASE NO. 2022-0001

DATE: February 28, 2022

Appearances:

***For Petitioner, United States Air Force*:**
Jeffrey P. Hildebrant, Esq.; Major Darren S. Gilkes, Esq.; Bruce D. Page, Jr., Esq.; *United States Air Force*, Washington, District of Columbia

For Petitioner, FlightSafety Corp.:
Howard A. Wolf-Rodda, Esq.; Daniel B. Abrahams, Esq.; *Abrahams Wolf-Rodda, LLC*

For Respondent, Acting Administrator, Wage and Hour Division:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Jonathan T. Rees, Esq.; Steven W. Gardiner, Esq.; *United States Department of Labor*, *Office of the Solicitor*; Washington, District of Columbia

For Interested Party, International Association of Machinists and Aerospace Workers (IAMAW):
William H. Haller, Esq.; *IAMAW*; Upper Marlboro, Maryland

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965 (SCA), as amended, and its implementing regulations.[1] On August 2, 2021, the Acting Administrator (Administrator) of the Wage and Hour Division (WHD) issued a Final Ruling (Ruling), which found that the SCA applied to a contract (Contract) between the United States Department of the Air Force (Air Force) and FlightSafety Defense Corporation (FlightSafety). Accordingly, the Administrator directed the Air Force to incorporate SCA clauses and applicable wage determinations into the subject Contract with an effective date of January 1, 2022.

Both the Air Force and FlightSafety petitioned for review of the Administrator's Ruling, and the Administrative Review Board (Board or ARB) consolidated the appeals. Subsequently, on December 29, 2021, the Board issued an Order Granting the Air Force's Motion to Stay the Administrator's Ruling pending review by the ARB. For the following reasons, we vacate the stay and affirm the Administrator's Ruling.

BACKGROUND

The SCA applies to Federal service procurement contracts that have "as [their] *principal purpose* the furnishing of services in the United States through the use of service employees."[2] Any contract meeting the SCA's requirements and

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[1] 41 U.S.C. §§ 6701-07, and its implementing regulations at 29 C.F.R. Parts 4 and 8.

[2] 41 U.S.C. § 6702(a) (emphasis added).

having a principal purpose of furnishing services must include SCA contract clauses requiring the payment of wage rates and fringe benefits set forth in wage determinations issued by WHD.[3]

On May 1, 2013, the Air Force awarded FlightSafety a Contract for the development, building, and operation of the Aircrew Training System (ATS) for the KC-46 aerial refueling tanker.[4] The Contract has supply and service components requiring FlightSafety both to develop and manufacture training devices—including weapons system trainers, boom operator trainers, fuselage trainers, and associated equipment—and to provide classroom instruction, simulator training, equipment maintenance, and other services.[5] The 13-year Contract ends December 31, 2026.[6]

The Contract contains "contract line item numbers" related to the development, production, and delivery of new training devices (supply CLINs), and for operations and support work (service CLINs).[7] On November 28, 2017, the Air Force informed FlightSafety that it would exercise the first Contract service CLIN.[8] On December 11, 2017, FlightSafety requested that the Air Force add the SCA clauses and wage determinations to the Contract.[9] FlightSafety has indicated that such inclusion could increase the Contract cost by approximately $125.1 million.[10]

On February 16, 2018, the Air Force denied FlightSafety's request to add SCA clauses because it determined that the Contract was primarily a supply contract and the SCA did not apply. Similarly, on April 18, 2019, the Director of the WHD's Branch of Government Contracts Enforcement (BGCE) issued a ruling letter, concluding that the Contract is not principally for services and the SCA does not apply. FlightSafety, the International Association of Machinists and Aerospace Workers (IAMAW), and a group of FlightSafety workers led by two pilot instructors

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3 *See* 29 C.F.R. § 4.6.

4 Administrator Ruling (AR) at 1.

5 *Id.*

6 *Id.*

7 *Id.* at 1-2, 5, 8.

8 *Id.* at 1-2.

9 *Id.* at 2.

10 *Id.*

filed separate requests for Administrator review and reconsideration of the BGCE ruling letter.[11]

ADMINISTRATOR RULING

On August 2, 2021, the WHD Administrator ruled that the Contract between the Air Force and FlightSafety is principally for services and is therefore subject to the SCA. To determine coverage, the Administrator applied the three factors from the Board's decision in *Raytheon*: (1) the contract's stated purpose; (2) the amount and percentage of service labor hours performed on the contract; and (3) the amount and percentage of contract costs attributable to services.[12]

First, the Administrator examined the Contract's stated purpose. The Administrator explained that the first *Raytheon* factor hinged largely on the meaning of the term "aircrew training system" in the Contract because the Contract's Statement of Work reads: "The objective of the KC-46 ATS acquisition is to support the KC-46 aircraft program by furnishing the using commands an integrated contractor operated and supported aircrew training system that provides total KC-46 aircrew training."[13] The Administrator concluded that the record demonstrated that the Contract defined ATS to encompass both supplies and services, including training devices for supplies and "instructor-provided training" for services.[14] In addition, the Administrator determined that supply and service work were both instrumental ATS components.[15] The Administrator determined that the Contract had a hybrid stated purpose and that both supplies and services were critical to ATS.[16] Therefore, the Administrator concluded that the first *Raytheon* factor did not appreciably favor or disfavor SCA coverage.

Second, the Administrator examined Contract labor hours. The Administrator chose to use the Air Force's figures.[17] The Administrator analyzed

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11 *Id.*

12 *Id.* at 3; *Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 8 (ARB May 21, 2004).

13 AR at 3-4.

14 *Id.* at 4-5.

15 *Id.* at 5-9.

16 *Id.* at 9.

17 *Id.* at 14.

the Air Force's submissions and interpreted them as estimating approximately 1.9 million service and 1.6 million supply hours—a disparity the Administrator concluded supported SCA coverage under *Raytheon's* second factor.[18]

Finally, the Administrator examined Contract cost. As with labor hours, the Administrator examined coverage using the Air Force's estimates—$450,481,105 in supply costs and $194,849,688 in service costs.[19] The Administrator concluded that the disparity between Contract supply and service costs weighed against SCA coverage, but not heavily or decisively because service costs were significant, exceeding those in *Raytheon*, and a substantial percentage of supply costs were not for labor.[20]

In collectively considering the *Raytheon* factors, the Administrator noted "[t]his is a very close case."[21] However, the Administrator determined that the second factor outweighed the third factor. Therefore, the Administrator concluded that the Contract is principally for services and SCA coverage applies to the Contract.[22] The Administrator directed the Air Force to incorporate the SCA clauses and applicable wage determinations into the Contract so that the SCA would apply beginning January 1, 2022.[23] In addition, the Administrator exercised her discretion not to apply the SCA retroactively.[24] Finally, the Administrator ruled that equitable factors raised by the Air Force did not outweigh the *Raytheon* analysis.[25]

Both parties have appealed the Ruling.[26] The ARB consolidated the cases.

JURISDICTION AND STANDARD OF REVIEW

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18 *Id.* at 10-17.

19 *Id.* at 20-21.

20 *Id.* at 23.

21 *Id.*

22 *Id.*

23 *Id.* at 24.

24 *Id.* at 24-25.

25 *Id.* at 29-30.

26 IAMAW also filed a notice of appearance as an interested party.

The ARB has jurisdiction to hear and decide in its discretion questions of law and fact arising from the Administrator's final determination under the SCA.[27] The ARB's review is in the nature of an appellate proceeding.[28] The Board has jurisdiction to decide appeals concerning questions of fact and law from final decisions of the Administrator arising under the SCA.[29] The Board may affirm, modify, or set aside, in whole or in part, the decision under review.[30] The Board shall modify or set aside only findings of fact that are not supported by a preponderance of the evidence.[31] Questions of law are reviewed de novo, but the Board defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with the law.[32]

DISCUSSION

The Air Force challenges the Administrator's determination that the Contract's principal purpose is for services and the Contract is therefore subject to the SCA. In particular, the Air Force argues that (1) the Administrator erred in considering post-award information in determining whether SCA coverage applies to the Contract; (2) the Administrator unreasonably applied the *Raytheon* factors when she determined the factors favor SCA coverage; and (3) equitable considerations support excluding SCA coverage from the Contract. In addition, FlightSafety challenges the Administrator's decision to prospectively apply SCA coverage on January 1, 2022, rather than retroactively applying SCA coverage or prospectively applying SCA coverage within 30 days of her August 2, 2021 Ruling.[33]

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

[28] 29 C.F.R. §§ 8.1(b), 8.1(d).

[29] 29 C.F.R. § 8.1(b).

[30] 29 C.F.R. § 8.9(b).

[31] *Id.*

[32] *See ServiceStar Landmark Props.-Fort Bliss LLC*, ARB No. 2017-0013, slip op. at 2 (ARB June 25, 2018) (citations omitted).

[33] FlightSafety raised other issues on appeal, but it acknowledged that the issues only needed to be addressed if the Board reversed the Administrator's Ruling as to SCA coverage. Therefore, we do not consider or address those issues.

Upon consideration of the parties' briefs and arguments on appeal, and having reviewed the evidentiary record, we affirm the Administrator's Ruling for the reasons below.

1. The Administrator May Evaluate Post-Award Information to Determine SCA Coverage

The SCA applies to Federal service procurement contracts that have "as [their] *principal purpose* the furnishing of services."[34] The SCA's implementing regulations make clear that determining a contract's principal purpose "is largely a question to be determined on the basis of all the facts in each particular case."[35]

On appeal, the Air Force argues that the Administrator erred in using post-award data to determine that SCA coverage applies to the Contract. In support of its argument, the Air Force contends: (1) the SCA's implementing regulations require pre-award coverage notice, thereby precluding the Administrator from considering post-award data; (2) the Administrator's determination that the Contract is subject to SCA coverage based on post-award data conflicts with the Competition in Contracting Act (CICA); (3) the *Blue & Gold* waiver rule requires a contractor to object pre-award to a contract's lack of SCA coverage, otherwise the contractor waives the ability to object post-award to a lack of SCA coverage.

We disagree with the Air Force. As detailed below, the Administrator reasonably evaluated the Contract's principal purpose with post-award data.

A. Pre-Award Notice Does Not Preclude Consideration of Post-Award Data

The Air Force argues that the Administrator erred by considering post-award data in determining SCA coverage. The Air Force claims pre-award notice requirements imply that the Administrator must consider only pre-award information in determining SCA coverage. In support of its argument, the Air Force highlights how § 4.104 requires pre-award notice of SCA coverage to employees and contractors.[36] However, the Air Force's argument is not persuasive because the

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[34] 41 U.S.C. § 6702(a) (emphasis added).

[35] 29 C.F.R. § 4.111(a).

[36] 29 C.F.R. § 4.104. When a contract is subject to the SCA, § 4.104 requires that "notice be given to such employees of the compensation due [to] them." *Id.* Similarly, § 4.104 requires notice to contractors, as well. "Contractors performing work subject to the Act thus

Administrator's consideration of post-award data is consistent with the SCA's implementing regulations, the SCA's purpose, and the ARB's precedent in *Raytheon*. Therefore, the Administrator reasonably relied on post-award data to determine SCA coverage.

First, the Administrator's use of post-award data is consistent with the SCA's implementing regulations. Section 4.5(c) allows the Administrator to order the incorporation of SCA provisions when the Administrator determines whether before or after a contract award, "that a contracting agency made an erroneous determination that the SCA did not apply to a particular procurement."[37] The regulation empowers the Administrator to make post-award SCA determinations, and it does not limit the Administrator's consideration to pre-award information.

Furthermore, § 4.111 explains how a contract's principal purpose is "largely a question to be determined on the basis of *all the facts* in each particular case."[38] Thus, the plain language of § 4.111 allows the Administrator to determine SCA coverage based on "all the facts," which would include post-award information. Moreover, the regulation clearly does not limit the Administrator's examination to pre-award information. Therefore, consistent with the implementing regulations, the Administrator reasonably relied on "all the facts," including post-award information, in determining SCA coverage.

Second, the SCA's purpose supports the use of post-award data. The SCA's purpose is to prevent the "unfair depression of wages and standards of employment."[39] If post-award developments support SCA coverage, it is reasonable for the Administrator to rely on the post-award information to remedy a prior erroneous SCA determination, thereby preventing the unfair depression of wages in accordance with the SCA's purpose. It would be unreasonable for the Administrator to rely solely on pre-award data and disregard the purpose of the SCA.

Finally, the Administrator's use of post-award information is consistent with ARB precedent in *Raytheon*. In *Raytheon*, the Board relied on post-award data in

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enter into competition to obtain Government business on terms of which they are fairly forewarned by inclusion in the contract." *Id.*

37 29 C.F.R. § 4.5(c).

38 29 C.F.R. § 4.111 (emphasis added).

39 29 C.F.R. § 4.104.

affirming the Administrator's ruling.[40] Thus, in this case, the Administrator similarly relied on post-award data, which was reasonable and consistent with the Board's approach in *Raytheon*. Thus, for the foregoing reasons, the Administrator reasonably relied on post-award data in determining SCA coverage.

B. CICA and the SCA Are Not in Conflict When the Administrator Relies on Post-Award Information

The Air Force argues that the SCA must be interpreted in a way that does not conflict with another statute, CICA.[41] In particular, the Air Force contends that contract modification to incorporate SCA coverage based on post-award data could conflict with CICA's competition requirements, because CICA prohibits changes to awarded contracts that should have been competed in a new procurement. We disagree because CICA is still enforceable through other forums and the Administrator is not tasked with interpreting CICA.

CICA requires an executive agency's procurement to "obtain full and open competition through the use of competitive procedures."[42] CICA's competition requirements apply not only to original procurements, but also to certain post-award contract modifications when the modification is "*outside the scope of the original competed contract*."[43] In such circumstances, CICA requires a separate competitive procurement and further bidding procedures.[44]

Here, the Administrator's post-award determination is not in conflict with CICA because CICA is still enforceable in other forums. Post-award contract modifications can be protested as beyond the scope of the original competed contract at the Government Accountability Office (GAO) and the Court of Federal Claims

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40 S*ee Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 9-10; Acting Admin. Resp. Br. at 19 (citing the Administrator's Ruling in *Raytheon*).

41 The Air Force cites to *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (The Court "must read the statutes to give effect to each if [the Court] can do so while preserving their sense and purpose.") (citations omitted).

42 41 U.S.C. § 3301(a).

43 *AT&T Communications Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993) (emphasis added).

44 *Id.*

(COFC).[45] Furthermore, the Administrator's role is to determine whether a contract is principally for services, and if so, apply SCA coverage. It is beyond the Administrator's authority and expertise to assess potential CICA implications when the Administrator determines SCA coverage. Violations of CICA are best resolved in other forums. Therefore, the Administrator reasonably interpreted the SCA in a manner that does not conflict with CICA.

C. Blue & Gold Waiver Rule Does Not Preclude the Administrator from Determining SCA Coverage Based on Post-Award Information

The Air Force also argues that if a contractor fails to object to the omission of SCA clauses before contract award, the contractor should not be allowed to claim that the SCA applies to the contract after award based on post-award information. In support of its argument, the Air Force relies on the *Blue & Gold* waiver rule. In *Blue & Gold*, the Federal Circuit ruled that a disappointed offeror to a procurement had waived its ability to bring a post-award challenge—claiming the government's solicitation was improper for lack of SCA compliance—because the disappointed offeror had failed to object pre-award to the terms of the solicitation.[46] The Air Force's argument is not persuasive because *Blue & Gold's* waiver rule applies in a different context (bid protest), to a different party (the party who lost a bid protest), and in a different jurisdiction (Federal Circuit). Therefore, it is inappropriate for the Administrator to apply the rule when determining SCA coverage.

2. Administrator Reasonably Applied the *Raytheon* Factors to Determine that the Contract is Subject to the SCA

To determine whether the Contract's principal purpose is for services and requires SCA coverage, the Administrator applied the three factors from the Board's decision in *Raytheon*: (1) the contract's stated purpose; (2) the amount and percentage of service labor hours performed on the contract; and (3) the amount and

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[45] *See* Air Force Reply Brief at 14. For example, in *Booz Allen Hamilton Eng'g Servs., LLC.*, the GAO Comptroller General considered a similar issue and ruled that a post-award modification of a task order to incorporate SCA coverage "was not outside the scope of the underlying task order" because the "nature and purpose of the task order has not changed, [and] a substantial price increase alone does not establish that the modification is beyond the scope of the order." B-411065, 2015 WL 2329290, at *5, *8 (Comp. Gen. May 1, 2015).

[46] *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308, 1313, 1315-16 (Fed. Cir. 2007).

percentage of contract costs attributable to services.[47] Based on the three factors, the Administrator concluded the Contract's principal purpose is for services.

The Air Force argues that the Administrator unreasonably applied the *Raytheon* factors and erred in determining that the *Raytheon* factors support SCA coverage. However, we disagree and conclude that the Administrator properly applied the *Raytheon* factors and reasonably determined that the Contract is subject to SCA coverage.

A. *First Raytheon Factor—Administrator Reasonably Concluded the Contract's Hybrid Stated Purpose Does Not Favor or Disfavor SCA Coverage*

The Air Force contests the Administrator's determination that the Contract's hybrid stated purpose neither favors nor disfavors SCA coverage. Specifically, the Air Force asserts that the Administrator erred because *Raytheon* requires "an affirmative determination" that the Contract's stated purpose is either primarily for supplies or services, even if it is a hybrid Contract.[48] In addition, the Air Force argues that the Administrator erred because the evidence supports a stated purpose of a supply contract. We disagree with the Air Force.

First, we reject the Air Force's assertion that *Raytheon* required the Administrator to make an affirmative determination that a contract's stated purpose is either primarily for supplies or services, even if it is a hybrid contract. In *Raytheon*, the Board affirmed the Administrator's conclusion that the stated purpose of the contract was for services. However, in reaching that determination, the Board did not declare that the first factor analysis could only result in a stated purpose of either a supply or service contract. Similarly, the Board did not instruct that the first factor had to definitively favor or disfavor SCA coverage. Therefore, consistent with *Raytheon*, the Administrator reasonably determined that the Contract's hybrid stated purpose neither favored nor disfavored SCA coverage.

Second, we disagree with the Air Force's argument that the evidence shows the Contract has a supply stated purpose. The Administrator explained how the Contract's stated purpose hinges largely on the meaning of "aircrew training

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47 AR at 3; *Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 8.

48 Air Force Petition for Review (AF Pet.) at 15-16.

system."[49] As a result, the Administrator reviewed the definitions in the Contract and determined that "aircrew training system" encompassed both supply and service components, including training devices for supplies and "instructor-provided training" for services.[50] Therefore, the Administrator determined that the Contract has a hybrid stated purpose. However, the Administrator also examined whether supply or service work is more critical to the hybrid stated purpose. The Administrator found that both service and supply work are critical to the Contract's stated purpose, but "neither is sufficient."[51] Therefore, the Administrator found that the Contract has a hybrid stated purpose that does not primarily focus on supplies or services. These findings are supported by the preponderance of the evidence. Thus, we conclude that the Administrator reasonably determined that the first *Raytheon* factor does not favor or disfavor SCA coverage.

B. Second Raytheon Factor—Administrator Reasonably Concluded the Contract's Labor Hours Supported SCA Coverage

The Administrator relied on the Air Force's labor hour submissions to determine that the service hours performed exceeded supply hours, thereby supporting SCA coverage for the second *Raytheon* factor. The Administrator reached her conclusion by interpreting the Air Force's submissions as providing "a service hours estimate of approximately 1.9 million hours and a supply hours estimate of approximately 1.6 million hours."[52]

The Air Force asserts that the second *Raytheon* factor should not favor SCA coverage because the Administrator erred in her interpretation of the Air Force's labor hour submissions. Specifically, the Air Force argues that the 300,000-hour difference between service and supply labor hours would "more than disappear when service hours are properly calculated."[53]

We see no reason to disturb the Administrator's findings. First, the Administrator relied on the Air Force's own submissions to assess the second factor, rather than rely on FlightSafety's submissions. Second, the Administrator

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49 AR at 4.

50 *Id.* at 4-5.

51 *Id.* at 9.

52 *Id.* at 16.

53 AF Pet. at 20.

thoroughly analyzed the Air Force's labor hour submissions, reasonably interpreted the submissions, and provided labor hour estimates that are supported by a preponderance of the evidence.[54] Finally, we acknowledge as an appellate body that the Administrator was in the best position to assess the complex evidence, especially since the Administrator had also worked with the parties to obtain their labor hour submissions.

Based on the foregoing, we conclude the Administrator's estimates are supported by a preponderance of the evidence. Accordingly, we determine the Administrator reasonably concluded that the second *Raytheon* factor favors SCA coverage.

C. *Third Raytheon Factor—Administrator Reasonably Concluded the Contract's Costs Do Not Favor SCA Coverage and Reasonably Applied Less Weight to the Third Factor*

The Administrator applied the third *Raytheon* factor using the Air Force's figures of $450,481,105 in supply costs and $194,849,688 in service costs.[55] Due to the roughly $250 million disparity between supply and service costs, the Administrator concluded that the third factor does not favor SCA coverage. Nonetheless, the Administrator decided not to weigh the third factor heavily. The Air Force argues the Administrator unreasonably reduced the weight of the third factor. We disagree because the Administrator had two reasonable bases to apply less weight to this factor.

The first reasonable basis was that the "service costs [were] so significant."[56] In fact, the service costs "exceed[ed] those in *Raytheon*," when viewed "both as a raw number ($194,849,688 versus $55,000,000) and as a percentage of total costs (approximately 30% versus 20%)."[57] However, when supply costs exceed services costs, high service costs alone are insufficient to afford the third factor less weight,

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[54] The Administrator highlighted the difficulties in determining the labor hour figures, noting how the parties' labor hour "estimates have fluctuated significantly." AR at 10. In addition, the Administrator noted how "[a]pplying the *Raytheon* factors is not an exact science, and it would be impractical … to require foolproof estimates." *Id.* at 16. We agree with the Administrator that it is unnecessary to require "foolproof estimates."

[55] *Id.* at 19-21.

[56] *Id*. at 23.

[57] *Id*.

especially because the service portion percentage of total contract costs could still be considered low.[58]

Therefore, the second reasonable basis was the Administrator's determination that "a substantial amount of the supply costs [were] not for labor."[59] The Administrator interpreted *Raytheon* as supporting the rule that "when contract supply costs exceed service costs, the greater the portion of supply costs attributed to labor, the more heavily the third *Raytheon* factor weighs against SCA coverage."[60] Thus, to determine how to weigh the third factor, the Administrator assessed the supply costs attributed to labor.

The Administrator distinguished the current case's facts from *Raytheon*'s facts, noting "how supply labor costs are more central to the [present] Contract than in *Raytheon*, where the high cost of equipment (C-21A jet engines and/or replacement parts) seems to have had an outsized role."[61] Nonetheless, the Administrator found that "a significant (albeit indeterminate) percentage of supply costs are not labor related."[62] Therefore, due to both the high service costs and substantial amount of supply costs not for labor, the Administrator decided to weigh the third factor less heavily.

We agree with the Administrator that when supply costs exceed service costs, the Administrator should afford the third factor less weight if expensive supplies have driven up supply costs and only a minor portion of the supply costs are supply labor costs.[63] Here, we would prefer that the Administrator had relied on a more concrete determination as to supply labor costs, but the *Raytheon* decision similarly

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58 *See Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 10.

59 AR at 23.

60 *Id.* at 21. *See also Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 10. The implementing regulations also make clear that non-labor supply costs do not preclude SCA coverage. *See* 29 C.F.R. § 4.131(a) ("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."); *see also* 29 C.F.R. § 4.111(a).

61 AR at 23 (citation omitted).

62 *Id*.

63 *See id.* at 22 ("Pairing service work with expensive supplies will not necessarily defeat SCA coverage."); *see also Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 10.

did not include labor supply cost estimates.[64] Furthermore, we understand the difficulties faced in obtaining labor cost estimates and we agree with the Administrator that "[a]pplying the *Raytheon* factors is not an exact science, and it would be impractical … to require foolproof estimates."[65] We also acknowledge that the Administrator is in the best position to make a finding of fact, and we affirm that the Administrator's supply labor cost finding is supported by the preponderance of evidence. Thus, based on both the high service costs and the significant percentage of supply costs not attributed to supply labor, the Administrator reasonably applied less weight to the third factor.[66]

3. Equitable Considerations Do Not Outweigh the Administrator's Reasonable Application of the *Raytheon* Factors

The Air Force argues that equitable considerations complement its other arguments regarding the Administrator's misapplication of the *Raytheon* factors, and therefore, the Administrator's Ruling was unreasonable. Specifically, the Air Force contends that FlightSafety has engaged in an opportunistic practice by bidding on a supply contract, then seeking a post-award determination that the Contract is subject to the SCA and higher payment. The Air Force claims that the alleged practice undermines the integrity of the federal procurement process and incentivizes similar practices.

The Air Force raises real concerns as to potential opportunistic practices, but the role of the WHD is to determine whether a Contract is subject to SCA coverage, and the concerns raised do not outweigh the Administrator's *Raytheon* analysis. However, we echo the Administrator's cautionary note that the "SCA's principal purpose test is contract-specific, and the facts in this case are unlikely to mirror

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64 AR at 23 n.35.

65 *Id.* at 16, 22.

66 The Air Force also argues that the Administrator unreasonably applied *Raytheon* because the third factor should outweigh the second factor. The Air Force claims in support: (1) the third factor is based on concrete numbers, while the second factor relies on speculation for some of its estimates; and (2) the third factor has a larger gap between supply and services (70% supply vs. 30% service) than the second factor (54% service vs. 46% supply). We disagree with the Air Force. Fixed-price contracts make it difficult to determine the precise number of labor hours in a contract. Thus, if the ARB relies more on the third factor due to the certainty of the cost data in a fixed-price contract, it could result in the contract type influencing SCA coverage determinations. We conclude that the Administrator has reasonably exercised her authority.

future cases."[67] Therefore, contractors who "make bids expecting WHD to order mid-contract incorporation of the SCA, do so at their peril."[68] We conclude that the Administrator reasonably determined that equitable considerations do not outweigh the Administrator's *Raytheon* analysis.

4. Administrator Reasonably Declined to Apply the SCA Retroactively and Reasonably Applied the SCA Prospectively, Beginning January 1, 2022

On August 2, 2021, the Administrator decided not to apply the SCA retroactively. Instead, the Administrator directed the Air Force to prospectively incorporate the SCA into the Contract by January 1, 2022. On December 29, 2021, the ARB issued an Order to Stay the Administrator's Ruling pending the ARB's adjudication of the appeal. On appeal, FlightSafety argues that the SCA should apply retroactively. Alternatively, FlightSafety contends that prospective application must begin no later than 30 days after the Administrator's August 2, 2021 Ruling.

We disagree with FlightSafety and affirm the Administrator's Ruling. To effectuate the Ruling, we vacate the Stay Order and require that the SCA apply retroactively to the Ruling's original effective date of January 1, 2022.

A. Administrator Reasonably Declined to Retroactively Apply SCA

The Administrator declined to retroactively apply SCA coverage to the Contract, citing the Air Force's lack of bad faith, the potential administrative burden, and the case's complexity, uncertainty, and novelty.[69] FlightSafety claims that the Administrator erred in forgoing retroactive application, and FlightSafety seeks retroactive application of two years from the Administrator's Ruling.[70] However, FlightSafety has not demonstrated that the Administrator abused her discretion or that the decision was unreasonable. We therefore affirm that decision.

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67 AR at 30.

68 *Id.*

69 *Id.* at 24-26.

70 FlightSafety's Reply Brief clarifies that it only seeks retroactive application of two years. FlightSafety's Reply Brief at 4.

Under certain circumstances, retroactive application of the Act is authorized under the SCA's implementing regulations. Regulation 29 C.F.R. § 4.5(c) 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.[71] Section 4.5(c) specifically states that "the Administrator may require retroactive application of such wage determination." The regulation provides that the Administrator *may* require retroactive application. It does not require retroactive application, nor does it provide specific criteria constraining the Administrator's determination.[72]

Accordingly, we will examine whether the Administrator abused her discretion in not ordering retroactive application of the SCA. The Board generally defers to the Administrator as being "in the best position to interpret those rules in the first instance."[73] Thus, "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."[74]

We conclude that the Administrator had several reasonable bases for declining to require retroactive application. First, the record supports the Administrator's determination that the Air Force did not act in bad faith.[75] The Air

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[71] *See* 29 C.F.R. § 4.5(c); s*ee also Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 10.

[72] *Id.* at 12.

[73] *Id.*

[74] *Id.* (citations omitted).

[75] 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." 46 Fed. Reg. 4320, 4323 (Jan. 16, 1981); s*ee also Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 12. Even though the Administrator referred to the Air Force's absence of bad faith, rather than the Air Force's good faith, the distinction is without major difference. Therefore, the Administrator properly applied the good faith standard. *See id.* at 12-13 (referring interchangeably to good faith and the absence of bad faith); s*ee also Cont'l Cas. Co. v. City of Jacksonville*, 550 F. Supp. 2d 1312, 1337 (M.D. Fla. Sept. 11, 2007) ("Essentially, good faith and bad faith are two sides of the same coin. Put differently, the absence of 'good faith' constitutes 'bad faith.'"). Contrary to FlightSafety's concern, the

Force omitted SCA clauses from the contract in good faith because it was not clear that the Contract was for services. The record shows that the Contract had significant supply costs, and the amount of service hours were difficult to estimate. Given these circumstances, the BGCE initially agreed with the Air Force that the SCA does not apply. Moreover, even though the Administrator determined the Contract is subject to the SCA, the Administrator acknowledged that "[t]his is a very close case."[76] We agree that "[t]his is a very close case" and it is understandable why the Air Force omitted the SCA clauses from the Contract. Thus, the record supports that the Air Force acted in good faith.

Second, we agree with the Administrator that retroactive application could impose a large administrative and economic burden on the Air Force to cover a comparatively small amount of the Contract's service work, given that the Contract is supply-heavy in the early years and service-heavy in the latter years.[77] These burdens could disrupt the agency's procurement practices.[78] Thus, the Administrator's determination is reasonable.

Finally, the Administrator decided that retroactive application should not apply due to the case's complexity, uncertainty, and novelty. The record supports that the case dealt with significant complexity and uncertainty due to widely divergent and fluctuating cost and hour estimates. In addition, the case presented a novel issue of whether a particular aircrew training system is principally for services. Under those circumstances and given that this is a "very close case," the Administrator properly exercised her discretion and reasonably decided not to apply the SCA to the Contract retroactively.

B. Administrator Reasonably Applied SCA Coverage Prospectively Beginning January 1, 2022

On August 2, 2021, the Administrator directed the Air Force to incorporate the SCA into the Contract, effective January 1, 2022. FlightSafety argues that 29 C.F.R. § 4.5(c) required the Administrator to order the Air Force to include the

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Administrator did not place the burden on FlightSafety to prove bad faith. FlightSafety Reply at 37-38.

[76] AR at 24.

[77] *Id.* at 25.

[78] *See Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 13.

SCA clauses within 30 days of the August 2, 2021 Ruling. We disagree with FlightSafety.

Section 4.5(c) states that when the "Department of Labor discovers and determines . . . that a contracting agency made an erroneous determination that the Service Contract Act did not apply … the contracting agency, within 30 days of notification by the Department of Labor, shall include" the SCA clauses and applicable wage determinations in the contract.[79]

We interpret § 4.5(c) as establishing a default deadline for contracting agencies, not a limit on the Administrator's broad discretion.[80] Section 4.5(c)'s language concerns a situation where the Administrator ordered a contracting agency to prospectively incorporate the SCA clauses, but the Administrator did not provide a specific incorporation date. The regulation does not address or limit the Administrator's authority to select a specific date for SCA incorporation. Thus, the 30-day language is the default requirement, ensuring timely incorporation following notification by the Administrator. Accordingly, we conclude that the Administrator reasonably determined that the SCA prospectively applied to the Contract on January 1, 2022.

Furthermore, because we affirm the Administrator's Ruling, we rule that the SCA provisions apply retroactively only insofar as they effectuate the Administrator's original effective date of January 1, 2022.

CONCLUSION

For the reasons stated above, we **VACATE** the ARB's Order Staying the Administrator's Ruling, and **AFFIRM** the Administrator's Ruling with retroactive effect to January 1, 2022.

SO ORDERED.

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79 29 C.F.R. § 4.5.

80 We understand this is a different position from *Raytheon*. *See Raytheon Aerospace*, ARB No. 2003-0017, -0019, slip op. at 14.