



In the Matter of:

BIOSPHERICS, INC.

**ARB CASE NOS. 98-141
97-086**

*In re: General Services Administration
Contract Nos. GS00K90AFC2893 and
GS00K94AFD2465 for information
services, Cumberland, Allegany County,
Maryland*

**(Formerly Nos. 98-027
97-001)**

DATE: May 28, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Susan L. Schor, Esq., *McManus, Schor, Asmar & Darden, L.L.P., Washington, D.C.*

For the Administrator, Wage and Hour Division:

Barbara Eby Racine, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,
Henry L. Solano, Esq., *U.S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

These captioned matters – having previously been consolidated for consideration – are before the Administrative Review Board pursuant to the McNamara-O’Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (1994) (SCA or the Act) and the regulations at 29 C.F.R. Part 8 (1998).^{1/} Petitioner Biospherics, Inc. (Biospherics) seeks review of two final rulings, dated February 14, 1997, and June 22, 1998, issued by the Acting Administrator, Wage and Hour Division (Administrator). In the first ruling, the Administrator approved three service employee classifications proposed by Biospherics to be conformed for utilization under two service contracts. However, the Administrator rejected the hourly wage and fringe benefits rates

^{1/} The first of the two Petitions for Review now before the Board was filed by Petitioner on April 14, 1997, and was docketed as ARB Case No. 97-086. Petitioner filed a second Petition for Review on July 13, 1998, and that matter was docketed as ARB Case No. 98-141. ARB Case Nos. 97-086 and 98-141 were consolidated by the Board’s Order of September 2, 1998.

which Biospherics proposed for the three classifications and established other, higher, rates. In the June 22, 1998 final determination, the Administrator decided the applicability of certain wage determinations to various contract periods, option periods, and extensions under the two Biospherics contracts. Moreover, the Administrator ruled that to the extent any of the contracts, option periods and extensions were not modified by the contracting agency to include the specified wage determinations, those wage determinations were to be retroactively applied.

We have examined the pleadings and administrative record in the proceedings closely, and conclude that the Administrator's determinations are in accordance with the statute and regulations. We deny the Petitions for Review.

BACKGROUND

In Part I of this section, we review the procedural history of these cases. In Part II, we review the specific facts underlying the Administrator's conformance decision, particularly with regard to the methodology devised by the Administrator for calculating the conformed wage rates to be paid to employees working on Biospherics' government procurement contracts.

I. *Procedural History*

The two cases in this consolidated matter have a protracted procedural history. The following overview of this history is useful in understanding the issues before us as well as explaining the extended period of time that these disputes have been awaiting final resolution.

In 1989 and 1994 Biospherics was awarded federal service contracts by the General Services Administration (GSA) to operate the Federal Information Center, Contract Numbers GS00K0AFC2893 (Contract No. 2893) and GS00K94AFD2465 (Contract No. 2465), respectively. Contract No. 2893 commenced January 1, 1990, and – with options and extensions – continued until June 30, 1994; Contract No. 2465 commenced on July 1, 1994, and with option years continued until September 30, 1998. Administrative Record (AR) I², Tab J. The place of performance for the contracts was Cumberland, Allegany County, Maryland.

Although the contracts required Biospherics to “furnish services in the United States through the use of service employees,” 41 U.S.C. §351(a), the wage determinations required under the SCA were not timely incorporated into the procurement contract. Contract No. 2893 first had a wage determination incorporated on January 5, 1993. A wage determination was first incorporated into Contract No. 2465 on October 6, 1994. AR I, Tab J.

On June 28, 1996, the Wage and Hour Division's Chief, Branch of Service Contract Wage Determinations, notified a representative of GSA that an investigator with the Wage and

² Administrative Record I (AR I) concerns the proceeding docketed as ARB Case No. 97-086. A second Administrative Record (AR II) was submitted in connection with ARB Case No. 98-141.

Hour Division had requested that SCA wage and fringe benefit rates be established for employees of Biospherics providing information services on the contracts. The wage and fringe benefit rates would be determined under the so-called “conformance” regulations found at 29 C.F.R. §4.6(b). In that communication, the Wage and Hour Division established conformed classifications and wage rates for service classifications of Information Specialist (IS) -I, -II, and -III with corresponding hourly wage rates and fringe benefits. The Wage and Hour Division also advised GSA that those conformed rates were minimum required hourly wages and that payment of fringe benefits as provided other classes of service employees contained in the referenced wage determinations (Wage Determination (WD) 92-0418 (Rev. 1) and (Rev. 2) and WD 94-2249 (Rev. 2)) also was required. The Wage and Hour Division further notified GSA in this communication that the wage and fringe benefit rates for the Information Specialists were to be effective retroactive “to the commencement dates of the contract[s].” AR I, Tab R.

The Wage and Hour Division again contacted GSA by letter dated July 31, 1996, supplementing the June 28, 1996 letter. In that letter, the Wage and Hour Division specifically rejected the wage rates which Biospherics had earlier proposed to pay its Information Specialist service employees under *both* Contract Nos. 2893 and 2465 and reaffirmed the hourly wages and fringe benefits as stated in its June 28 letter.^{3/} The Wage and Hour Division also explained the basis for rejecting the rates proposed by Biospherics. AR I, Tab P.

On September 24, 1996, Biospherics filed a Petition with this Board seeking “review of the decision of the U.S. Department of Labor, Wage and Hour Division, not to grant Petitioner its requested conformance for certain wage categories for GSA [General Services Administration] Contract No. GS00K94AFD2465 (Contract No. 2465).”^{4/} The Board docketed this Petition for Review as ARB Case No. 97-001 and issued a Notice of Appeal and Order Establishing Briefing Schedule on October 1, 1996. The Administrator was directed to file the administrative record of the case and a brief in response to the Petition for Review.

On October 22, 1996, the Administrator filed a Motion to Dismiss Case No. 97-001, arguing that there had been no final agency action and that the matter was therefore not ripe for review by the Board. The Administrator explained that the two Wage and Hour Division letters issued on June 28, 1996, and July 31, 1996, were not final agency rulings and were therefore not appealable to the Board. The Administrator also noted that the Wage and Hour Division would consider the Petition for Review filed in Case No. 97-001 to be a request for reconsideration of the July 31 letter and that the Division would issue a final ruling on the conformance dispute.

^{3/} A discussion of the various proposals and counter proposals for the conformed wage rates follows at pages 9 to 16, *infra*.

^{4/} In its Petition, Biospherics notes that the Administrator issued conformed rates for both of its contracts with GSA (*i.e.* Contract Nos. 2893 and 2465), even though Biospherics requested conformed rates only for the second GSA contract, No. 2465. Biospherics argues that because the company did not *request* conformed Information Specialist wage rates for the first procurement, it was improper for the Administrator to issue them. This challenge is discussed at pages 23-24, *infra*.

October 22, 1996 Motion to Dismiss, p. 5. The Administrator further requested that the Board dismiss the petition for review in Case No. 97-001 without prejudice.

On October 25, 1996, Biospherics advised the Board that it did not oppose the Administrator's Motion to Dismiss and joined in the request to dismiss Case No. 97-001 without prejudice. Petitioner's Response to the Administrator's Motion to Dismiss. Biospherics further requested that the matter be remanded to the Administrator for final determination. *Id.* By Order of October 28, 1996, the Board dismissed Case No. 97-001 without prejudice and remanded the matter to the Administrator for reconsideration and issuance of a final determination.

On February 14, 1997, the Administrator issued a ruling letter on reconsideration of Biospherics' request, noting that it was a final determination and therefore appealable to the Administrative Review Board. AR I, Tab F. Biospherics filed a Petition for Review of the February 14 ruling on April 14, 1997. The matter was docketed by the Board as ARB Case No. 97-086 and the Board issued a Notice of Appeal and Order Establishing Briefing Schedule on April 15, 1997.

Prior to filing its opening statement as directed under the briefing schedule, Biospherics requested that the Board stay consideration of ARB Case 97-086 for 60 days in order for Petitioner to pursue settlement negotiations of the underlying disputes with the Wage and Hour Division and GSA. On May 16, 1997, the Board granted the request. Subsequently, the Board twice more stayed consideration of Case No. 97-086 for 60 days at Biospherics' request, again for the stated purpose of allowing the parties to pursue settlement. No settlement was ever reached and on November 7, 1997, Biospherics requested issuance of a revised briefing schedule.

On November 10, 1997, Biospherics filed a document entitled Amended Petition for Review seeking the Board's determination concerning the applicability of SCA wage determinations to its contracts, contract option years and contract extension periods. The Petitioner alleged that the initial contracts, option contracts and extensions failed to include or timely incorporate wage determinations. These questions had not been raised in Biospherics' original Petition for Review, which dealt only with the appropriateness of the Administrator's conformed wage rates for the various classes of Information Specialists.^{8/} On November 21, 1997, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule, docketing the Amended Petition for Review as Case No. 98-027 and directing Petitioner to file a brief in support of both the original Petition filed in Case No. 97-086 and the Amended Petition. Further, the Administrator was directed to file a statement in response to the Petition for Review and the Amended Petition for Review, as well as the administrative record.

^{8/} The "Amended Petition for Review" did not actually amend the original petition, but instead offered completely new arguments. As such, it was misnamed. It would be more accurate to characterize the "Amended Petition" as a second or supplemental petition for review.

In response to the original Petition for Review, the Administrator filed a statement in opposition to the petition and the administrative record in Case No. 97-086 on January 21, 1998. Biospherics filed its statement in support of the petition on May 12, 1998. The Administrator filed a reply brief on May 28, 1998, and Biospherics filed a surreply brief on June 30, 1998.

With regard to the Amended Petition for Review, on December 10, 1997, the Administrator filed a Motion to Dismiss on the ground that no final agency ruling had been issued concerning the issues raised by Biospherics in the Amended Petition. Biospherics opposed dismissal of the Amended Petition.

On April 21, 1998, the Board granted the Administrator's motion to dismiss the Amended Petition for Review on the ground that the Administrator had not issued an appealable ruling with respect to the new matters raised by Biospherics. The April 21 Order dismissed the Amended Petition without prejudice and remanded the issues raised in the Amended Petition to the Wage and Hour Division for reconsideration and issuance of a final determination.

On June 22, 1998, the Administrator issued a ruling which addressed the issues raised in Biospherics' Amended Petition for Review. On July 13, 1998, Biospherics appealed that final determination to the Board. Biospherics' second Petition for Review was docketed as Case No. 98-141. The Administrator filed a statement in opposition to the petition for review in Case No. 98-141 and the administrative record on October 7, 1998.

Biospherics filed several preliminary motions for the Board's consideration: Motion to Consolidate, Motion for Protective Order, Motion to Strike Brief, and Motion for Hearing. By Order of September 2, 1998, the Board addressed Petitioner's four preliminary motions. The Motion to Consolidate was granted "[i]n view of the common facts and related issues presented in [the] two cases, and in the interest of administrative efficiency."

With respect to the Motion for Protective Order, Biospherics had alleged that its Petition for Review contained confidential, proprietary wage rate information. Petitioner further asserted that an interested party in these matters – Darlene Summerfield, a self-described employee of Biospherics^{2/} – was, upon information and belief, disseminating this allegedly sensitive information to other parties and employees of Biospherics, who in turn may have been distributing the information to competitors. The Board examined the wage information referenced in the Second Petition for Review, found that it was not proprietary or confidential business information, and denied Biospherics' motion for a protective order.

^{2/} Throughout the course of these proceedings, Summerfield has filed case status inquiries with the Board and also has filed comments regarding the issues before the Board. As an "interested person" within the meaning of the Board's regulations (*see* 29 C.F.R. §8.11), she filed a statement with the Board on May 28, 1998 "from the employees of Biospherics." However, Summerfield did not formally intervene in the proceedings.

The Board also denied Biospherics' motion to strike Summerfield's May 28, 1998 brief and accepted the brief as a part of the record, with the proviso that the Board would consider Biospherics' arguments concerning purported inaccuracies and irrelevancies in the May 28 brief. Finally, the Board declined to rule on Biospherics' motion for oral argument of the issues raised in the petitions for review, deferring consideration of that motion until after conclusion of briefing.^{10/}

II. *Facts*

A. *General factual background concerning this SCA labor standards matter*

Petitioner, a federal service contractor, is party to two contracts with GSA to provide federal government information services. Specifically, under the contracts, Biospherics' employees staff a federal government information center that serves as a central location to receive, process and answer telephone inquiries about the functions and operations of the federal government.

The place of performance for the contracts is Cumberland, Allegany County, Maryland. GSA awarded Contract No. 2893 to Biospherics on December 6, 1989; the term of this first contract was from October 1, 1989, through September 30, 1990, with 2 one-year option performance periods of October 1, 1991, through September 30, 1991, and October 1, 1991, through September 30, 1992. Thereafter, Contract No. 2893 was extended by the parties for periods varying from one to four months until it expired on June 30, 1994. AR I, Tab J. While no wage determination was made applicable to Contract No. 2893 at its outset, the following wage determinations were subsequently incorporated into this contract: WD No. 92-0418 (Rev. 1) was incorporated on January 5, 1993, by Modification PA 13, and WD No. 92-4018 (Rev. 2) was incorporated on September 13, 1993, by Modification PA 19. *Id.*

During the course of a Wage and Hour Division investigation conducted in or around the early months of 1996, the fact that SCA hourly wage rates and fringe benefits had not been paid (and were not being paid) under either of Biospherics' information service contracts was reported. *See* AR I, Tabs X, Y, Z, AA. On March 16, 1996 the Wage and Hour Division's investigator informed GSA's contracting officer of the need to request additional classifications

^{10/} The regulation at 29 C.F.R. §8.16(b) provides that "[i]n its discretion, the Board or a single presiding member may permit oral argument in any proceeding." Based on our consideration of the petitions for review, the statements of the parties and the intervenor, and the administrative records of these consolidated matters, we deny Petitioner's motion for oral argument. We conclude that the issues raised for review in the instant petitions, although somewhat detailed, are not novel; the principal issues before the Board – conformed classifications and wage rates and retroactive application of wage determinations – have previously been before both the Board of Service Contract Appeals (BSCA) and the Deputy Secretary of Labor, who issued final decisions under the SCA prior to the creation of the Administrative Review Board in 1996. In our view, oral argument would further delay disposition of these SCA labor standards disputes and would add little of value to our consideration of the issues.

and wage rates through the SCA conformance procedures. AR I, Tab X, p.2; *see* 29 C.F.R. §4.6(b)(2).

GSA submitted a Standard Form 1444 (Request for Authorization of Additional Classification and Wage Rate) to the Wage and Hour Division on June 27, 1996, for the second procurement contract, Contract No. 2465; Biospherics' request to GSA for the additional classifications was noted to be May 7, 1996. GSA also specified that Contract No. 2465 had been awarded and that work was to commence on July 1, 1994. AR I, Tab S. Wage Determination WD 94-2249 (Rev. 2) was listed as the applicable wage determination. Biospherics proposed wage rates of \$5.00, \$6.00 and \$7.00 hourly for the classifications of Information Specialist (IS) -I, -II, and -III, respectively.^{11/} Hourly fringe benefits of \$.92 were proposed for each of the three requested conformed classifications. GSA's contracting officer recommended approval of the proposed classifications and wage rates. In the Standard Form 1444, a Biospherics employee classified as an Information Specialist III purported to approve the proposed wage rates on behalf of Petitioner's employees. AR I, Tab S. Job descriptions for the information specialist classifications, Biospherics' rationale for the proposed classifications and wage rates, and an explanation supporting the proposed fringe benefits payment were attached to the request for conformed classifications. *Id.*

Although accepting Biospherics' proposed classifications, the Administrator established wage and fringe benefit rates higher than the rates proposed by Biospherics. In addition, the Administrator did not merely issue conformed wage and fringe benefit rates for the then-current contract (GSA Contract No. 2465), but also issued conformed wage rates retroactive to the beginning of the first GSA procurement. AR I, Tab R.

In order to understand the conformance dispute in this matter, it is necessary to elaborate the methodology employed by the Administrator in making the Wage and Hour Division's principal ruling, *i.e.*, the conformance determination rendered February 14, 1997, establishing the conformed wage rates for Biospherics' contracts. The following information provides the factual background explicating the Administrator's ruling.^{12/}

^{11/} These classifications were actually denominated as "Telephone Information Specialists" I, II, and III. However, the parties generally refer to the classification as Information Specialists and we will follow this practice.

^{12/} The Administrator's final ruling letter of February 14, 1997, like the earlier non-final conformance letter of June 28, 1996 (AR I, Tabs F, R) presents the conformed wage rates without providing any explanation of the methodology utilized by the Wage and Hour Division to reach the results. As a consequence, it falls to the Administrator's counsel in this case to articulate the first clear explanation of the methodology used by the Administrator for determining the conformed wage rates. *See* Statement of the Acting Administrator in Opposition to Petition for Review, dated January 21, 1998 (Adm. Stmt. I) at pp. 10-15.

(continued...)

B. *The Administrator’s methodology in conforming wage rates under Biospherics’ contracts*

In conforming the wage rates at issue in this matter, the Administrator began with and adhered to the premise that the conformed rates should bear a “reasonable relationship” to the wage rates for jobs of comparable skill level that were listed in the applicable wage determinations. 29 C.F.R. §4.6(b)(2)(i); AR I, Tab O (Wage and Hour Division letter of July 31, 1996). Under the SCA regulations, the Administrator is not limited to a single methodology for establishing conformed wage rates, but instead has broad discretion to adapt a methodology to the available data. 29 C.F.R. §4.6(b)(2)(iv).

In this case, a principal consideration for the Administrator was to select “benchmark” service employee classifications from among the various job classifications already contained in the applicable wage determinations, *i.e.*, classifications involving skill levels comparable to Biospherics’ Information Specialist job classifications. Once these benchmark classifications were selected from among the classifications in the wage determination, it would be possible to construct a set of conformed wage and fringe benefit rates to apply to the Information Specialist positions bearing a reasonable relationship to the other job classifications already listed in the wage determinations.

In order to select these benchmark classifications, the Administrator looked to the job descriptions for Biospherics’ IS-I, -II, and -III employees. Biospherics had provided the following job descriptions for the employees working under the GSA contracts:

- *Information Specialist I (IS-I)* – “provides information and referral via telephone to the general public about the programs, agencies, and services available from the federal government”
- *Information Specialist II, Research Specialist (IS-II)* – performs the duties of an IS-I, and “also performs research using an array of resources to resolve telephone or written inquiries”
- *Information Specialist II, Data Entry Specialist (IS-II)* – “demonstrates proficient keyboard skills including speed and accuracy”

¹²/(...continued)

In the future, it would be preferable for the Wage and Hour Division to issue final rulings that include more specificity and explanatory detail than seen in this matter. The Administrator’s failure to provide an adequate contemporaneous explanation of the rationale underlying his determination holds the potential for causing delay in the Board’s decision making. *See Aleutian Constructors and Universal Services, Inc.*, Wage Appeals Board (WAB) Case No. 90-11 (Apr. 1, 1991), slip op. at 3-4.

- *Information Specialist II, Topic Writer (IS-II)* – “assists the Manager in reviewing information and preparing it in written form as database topic text, factsheets, topic procedurals, or other products and assists in maintenance of [Federal Information Center] Library and document files”
- *Information Specialist III (IS-III)* – “performs the duties of IS-I and IS-II” and also is “responsible for providing comprehensive public service by the accurate, appropriate, and complete dissemination of government related information and referral.”

AR I, Tab T.^{13/}

Next, the Wage and Hour Division examined the job classifications already found in the wage determinations to find positions and wage rates that would reasonably relate to Biospherics’ Information Specialist job descriptions. As a first step in this comparison, the Wage and Hour Division determined the “federal grade equivalent” (FGE) of the classifications to be conformed (Information Specialists I, -II, and -III), and then analyzed the applicable wage determinations to identify wage rates for listed SCA positions with the same FGE levels involving comparable skill level among the Administrative Support and Clerical job titles; the classification selected in this analysis became the benchmark classification.

Initially, the Wage and Hour Division concluded that the IS-I, -II and -III positions were comparable to GS-5, GS-6 and GS-7 FGE positions, and these rankings were reflected in the initial set of conformed wage rates issued on June 28, 1996. AR I, Tabs F, R. However, these FGE rankings subsequently were revised downward by the Division. The Division ultimately concluded that the IS-I position was equivalent to a federal GS-3, the IS-II Research Specialist and IS-II Data Entry Specialist positions were equivalent to a GS-4, the IS-II Topic Writer was equivalent to a GS-5, and the IS-III was equivalent to a GS-6. AR I, Tabs F. Significantly, these lower rankings (GS-3, -4, -5 and -6) that were used by the Administrator in the final determination now before us coincided with the FGE rankings that had been proposed by GSA and Biospherics when transmitting the conformance request. AR I, Tab S.

1. Conformed wage rates for the 1/5/93 - 3/8/94 contract performance period.

The wage determinations applicable to Contract No. 2893 were WD Nos. 92-0418 (Rev. 1) and (Rev. 2). The Wage and Hour Division selected the service employee classification “Computer Operator I” as the benchmark position and wage rate for computing the conformed Information Specialist rates for the contract. Adm. Stmt. I at p. 11, n6.

^{13/} When transmitting the conformance request to the Wage and Hour Division, GSA and Biospherics indicated that the different categories of Information Specialists (-I, -II and -III) were comparable in skill level to federal GS-3, GS-4, GS-5 and GS-6 positions. AR I, Tab S.

The FGE for Computer Operator I is GS-4. The wage rate for Computer Operator I – \$6.00/hr. – was the lowest potentially applicable wage rate among the job classifications listed in these two wage determinations.^{14/} Computer Operator I was selected as the benchmark classification to which Biospherics’ Information Specialist positions could be considered to be reasonably comparable in the level of skills and training required.

Because the Computer Operator I position has a federal grade equivalent of a GS-4, the Administrator assigned the same \$6.00/hr. wage rate to the conformed IS-II Research Specialist and IS-II Data Entry Specialist positions, the two Biospherics job classifications that had been found to be equivalent to a GS-4 in federal grade equivalency. Having established this benchmark for conforming the wage rates for Contract No. 2893, the next step in the Administrator’s methodology was to establish an appropriate pay relationship between the benchmark Computer Operator I classification (GS-4) and the remaining Biospherics classifications: IS-I (FGE GS-3), IS-II Topic Writer (FGE GS-5) and IS-III (FGE GS-6).

To establish this pay relationship, the Wage and Hour Division looked to the federal government’s General Service (GS) wage schedule for guidance. *See* Table 1, *infra*. The Division had determined that the IS-II Data Entry and Research Specialist positions (both GS-4 equivalents) would be paid the same \$6.00/hr. rate as the Computer Operator I rate in the wage determination; in order to derive a wage rate for the Information Specialist I position (FGE GS-3), the Division mathematically derived a differential between the GS-3 and GS-4 pay levels from the federal general wage schedule for 1992 (the year in which WD No. 92-0418 (Rev. 1) was issued), and then derived similar ratios between the GS-4 and GS-5 and -6 wage rates:

TABLE 1. Federal White-Collar Pay Schedule, 1/92^{15/}

Federal Wage Grade	Pay rate (per hour)	Comparison (ratio) to GS-4 rate
GS-3	\$6.77	0.8907
GS-4 (benchmark)	7.60	1.0000
GS-5	8.50	1.1184
GS-6	9.48	1.2470

^{14/} There was, in fact, a single wage rate contained in these two wage determinations which was lower than that for Computer Operator I. However, that rate – for Key Entry Operator I – was applicable to workers employed on federal service contracts in Washington County, Maryland, only. AR I, Tab T.

^{15/} *See* AR I, Tab U.

AR I, Tab U.

As noted above, the Administrator had selected the Computer Operator I classification from the wage determination (GS-4) to use as the benchmark occupation. The hourly wage rate for the Computer Operator I in WD 92-0418 (Rev. 1) was \$6.00. Using this \$6.00/hr. benchmark figure, the Administrator created a series of conformed wage rates for all the Information Specialist positions by applying the ratios derived from the federal wage schedule, *i.e.*, the ratios found in the third column of Table 1. Table 2 illustrates this process.

TABLE 2. Conformed rates for contract period 1/5/93 - 3/8/94

Conformed Classification	FGE	“Benchmark” GS-4 wage rate (from wage determination)	Ratio to GS-4 wage rate (from GS schedule)	Conformed Wage Rate
IS-I	GS-3	\$6.00 x	.8907 =	\$5.34
IS-II, Research Specialist (benchmark)	GS-4	6.00 x	1.00 =	\$6.00^{16/}
IS-II, Data Entry Specialist (benchmark)	GS-4	6.00 x	1.00 =	\$6.00
IS-II, Topic Writer	GS-5	6.00 x	1.1184 =	\$6.71
IS-III	GS-6	6.00 x	1.2470 =	\$7.48

AR I, Tabs C, F. In other words, the Administrator (a) noted the wage differentials between the federal pay levels of GS -3, -4, -5 and -6; (b) applied those differentials to the benchmark classification; and (c) arrived at the respective conformed wage rates. In selecting the appropriate wage level for the FGEs, the Wage and Hour Division utilized the federal GS pay schedules for the year during which each respective wage determination and/or revision was issued. *See* AR I, Tab U.

2. *Conformed wage rates for the 3/9/94 - 6/30/94 contract performance period.*

^{16/} The wage rate originally established in the Administrator’s final ruling of February 14, 1997, for IS-II Research Specialist and Data Entry Specialist had been determined to be \$6.15 hourly. This amount was in error due to a mathematical mistake and was corrected to \$6.00 by the Wage and Hour Division’s letter of August 4, 1997. AR I, Tab C.

The conformed wage rates for Biospherics' Contract No. 2893 during the period January 5, 1993, to March 8, 1994, are found at Table 4, *infra*. A new revision of WD 92-0418 – Revision 1 – had been issued in September, 1993, with a slightly higher wage rate for the benchmark Computer Operator I (GS-4) job classification. Like the process described above in connection with the 1992-93 procurement cycle, when developing the conformed wage rates for the 1993-94 period the Administrator first looked to the 1993 General Schedule wage rates, and again derived a series of ratios comparing the GS-3, -5 and -6 rates with the “benchmark” GS-4 rate:

TABLE 3. Federal White-Collar Pay Schedule, 1/93^{17/}

Federal Wage Grade	Pay rate (per hour)	Comparison (ratio) to GS-4 rate
GS-3	\$7.02	0.8908
GS-4 (benchmark)	7.88	1.0000
GS-5	8.82	1.1192
GS-6	9.83	1.2475

AR I, Tab U. As before, the Administrator again applied these ratios to the Computer Operator I job classification – now having a \$6.17/hr. wage rate under WD 92-0418 (Rev. 2) – to develop a proportionate series of conformed rates for the Information Specialist classifications:

TABLE 4. Conformed rates for contract period 3/9/94 - 6/30/94

Conformed Classification	FGE	“Benchmark” GS-4 wage rate (from wage determination)	Ratio to GS-4 wage rate (from GS schedule)	Conformed Wage Rate
IS-I	GS-3	\$6.17 x	.8908 =	\$5.49
IS-II, Research Specialist (benchmark)	GS-4	6.17 x	1.00 =	\$6.17
IS-II, Data Entry Specialist (benchmark)	GS-4	6.17 x	1.00 =	\$6.17

^{17/} See AR I, Tab U.

IS-II, Topic Writer	GS-5	6.17 x	1.1192 = \$6.91 ^{18/}
IS-III	GS-6	6.17 x	1.2475 = \$7.70

AR I, Tab F; Adm. Reply Stmt., p. 1 n.1; attachment.

3. *Conformed wage rates for the 7/1/94 - 9/30/96 contract performance period.*

The same general methodology was used for developing conformed wage rates to be paid under Contract No. 2465 for the performance period July 1, 1994, to September 30, 1996. The applicable wage determination during this period was WD 94-2249 (Rev. 2). Unlike the prior two contract periods, when the Administrator had used the Computer Operator I as the “benchmark” job classification, the Administrator now chose the SCA classification “Switchboard Operator-Receptionist” as the appropriate benchmark. The Switchboard Operator-Receptionist had been cited favorably for comparison by GSA and Biospherics in the initial conformance request (*see* AR I, Tab S), and was among the lowest wage rates in the wage determination at \$6.55/hr. It has a federal grade equivalency of GS-3. The position performs the following duties:

At a single-position telephone switchboard or console, acts both as an operator – see Switchboard Operator – and as a Receptionist. *Receptionist’s work involves such duties as greeting visitors; determining nature of visitor’s business and providing appropriate information; referring visitor to appropriate person in the organization or contacting that person by telephone and arranging an appointment; keeping a log of visitors.*

AR I, Tab T; emphasis added.

The wage determination that would form the basis for the wage rates for this new contract period – WD 94-2249 (Rev. 2) – had been issued in August, 1994, and the Administrator therefore looked to the federal 1994 General Schedule to determine an appropriate differential between jobs at different pay grades. Unlike the earlier calculations, however, which relied on a GS-4 grade job classification as the benchmark, this third effort used the Switchboard Operator-Receptionist’s GS-3 pay level as the starting point:

^{18/} In the Administrator’s final ruling letter of February 14, 1997, the wage rate for IS-II, Topic Writer was originally stated to be \$7.45 hourly. This figure was revised by the Wage and Hour Division’s letter of May 22, 1998, which explained that the “error occurred due to a miscalculation.” AR II, Tab F; *see also* Adm. Reply Stmt., p. 1 n.1; attachment.

TABLE 5. Federal White-Collar Pay Schedule, 1/94^{19/}

Federal Wage Grade	Pay rate (per hour)	Comparison (ratio) to GS-3 rate
GS-3 (benchmark)	\$7.32	1.0000
GS-4	8.21	1.1215
GS-5	9.19	1.2555
GS-6	10.24	1.3989

AR I, Tab U. As before, the Administrator again applied these ratios to the benchmark GS-3 equivalent Switchboard Operator-Receptionist job classification under WD 94-2249 (Rev. 2) to develop a proportionate series of conformed rates for the Information Specialist classifications. However, the starting point for this last computation – the \$6.55/hr. rate for the GS-3 position, per the wage determination – was substantially higher than the rate that had been calculated during the prior contract period (*see* Table 4, *supra*):

TABLE 6. Conformed rates for contract period 7/1/94 - 9/30/96

Conformed Classification	FGE	“Benchmark” GS-3 wage rate (from wage determination)	Ratio to GS-3 wage rate (from GS schedule)	Conformed Wage Rate
IS-I (benchmark)	GS-3	\$6.55 x	1.0000 =	\$6.55
IS-II, Research Specialist	GS-4	6.55 x	1.1215 =	\$7.35
IS-II, Data Entry Specialist	GS-4	6.55 x	1.1215 =	\$7.35
IS-II, Topic Writer	GS-5	6.55 x	1.2555 =	\$8.22
IS-III	GS-6	6.55 x	1.3989 =	\$9.16

AR I, Tab F.

DISCUSSION

^{19/} See AR I, Tab U.

I. *First Petition for Review*

In the first of the two petitions for review before us (Pet. I) – filed April 14, 1997 – Biospherics sought the Board’s review of the Administrator’s February 14, 1997 ruling establishing conformed wage rates for the Information Specialist positions. This final determination, addressed to GSA as the contracting agency and received by Petitioner on March 20, 1997, reconsidered and revised the earlier, nonfinal Wage and Hour Division conformance letter of June 28, 1996, issued with respect to both Contract Nos. 2893 and 2465. AR I, Tab F.

In the February 14, 1997 ruling the Administrator informed Petitioner that the Wage and Hour Division had reexamined the position descriptions for the conformed Information Specialist classifications and the Federal Grade Equivalencies (FGE) which the Wage and Hour Division had used to establish the conformed rates for the service employee classifications in the June 28, 1996 preliminary (and unappealable) conformance letter. *Id.* at 1. The Administrator determined that for conformance purposes, the job classifications requested by Biospherics would be viewed as comparable to the following federal grade classifications: a GS pay level of FGE GS-3 for IS-I employees; GS-4 for IS-II Research Specialist and Data Entry Specialist employees; GS-5 for IS-II Topic Writer employees; and GS-6 for IS-III. These conformed wage rates reduced the FGE levels – and thus, the conformed wage rates were substantially lowered – compared with the Wage and Hour Division’s preliminary conclusions stated in the June 28 communication.^{20/} These lower federal grade equivalencies also had been recommended by GSA and Biospherics in the conformance request. AR I, Tab S.

In addition to the February 14, 1997 reduction in the FGE levels assigned to the Information Specialist classifications (and the reduction in the conformed wage rates), on August 4, 1997, the Wage and Hour Division again modified the wage rates downward by amending the February 14, 1997 ruling letter, correcting the conformed hourly rate for an IS-II (Research Specialist and Data Entry Specialist) from \$6.15 hourly to \$6.00 hourly. The conformed rate was revised downward to correct a mathematical error. AR I, Tab C. This revision affected Contract No. 2893 during the contract period of January 5, 1993 through March 8, 1994.

A. *Relevant legal principles governing conformance determinations*

The principal purpose of the SCA is to insure that employees on federal service contracts are paid no less than prevailing wages in the locality. Accordingly, the SCA requires that

^{20/} FGE levels of GS-5, -6, and -7 were originally required in the June 28, 1996 letter for the service employee classifications of IS-I, -II, and -III, respectively. The hourly wage rates required under that superseded FGE structure for IS-I, -II and -III were: \$6.81, \$7.48 and \$8.31 under WD No. 92-0418 (Rev. 1); \$6.91, \$7.70 and \$8.55 under WD 92-0418 (Rev. 2); and \$7.53, \$8.39, and \$9.33 under WD 94-2249 (Rev. 2). Additionally, the Wage and Hour Division indicated that the appropriate SCA fringe benefit rates were \$.83, \$.89 and \$.90 hourly under the respective wage determinations. AR I, Tab O.

every contract . . . entered into by the United States or the District of Columbia in excess of \$2,500 . . . the principal purpose of which is to furnish services in the United States through the use of service employees . . . shall contain a provision specifying the minimum monetary wage to be paid the various classes of service employees in the performance of the contract . . . as determined by the Secretary[.]

41 U.S.C. §351(a) (1994). Pursuant to this mandate, the Secretary has adopted regulations governing the issuance of wage determinations applicable to federal service contracts. *See* 29 C.F.R. Part 4 (1998).

Ordinarily, a wage determination establishing the wage rates and fringe benefits for all classes of service employees is incorporated into a contract prior to its award; however, sometimes it is necessary to add – after award of a contract – service employee classifications and wage rates which were not contained in a particular wage determination, using the procedure known as conformance. The object of a conformance action is to establish wage rates for the omitted job classifications which conform to the classifications and wages which already are contained in the particular wage determination. The regulations governing SCA wage and fringe benefits standards for classifications of employees not listed in a contract wage determination are found at 29 C.F.R. §4.6. In part, these regulations require that:

the contracting officer shall require that any class of service employee which is not listed [in the wage determination incorporated in the service contract] . . . and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed class of employees shall be paid the monetary wages and furnished the fringe benefits as are determined pursuant to the procedures in this section.

29 C.F.R. §4.6(b)(2)(i); emphasis added.

Although the procedures utilized by the Wage and Hour Division for issuing an initial wage determination typically involve extensive analysis of statistical data (*see* 29 C.F.R. §4.51), the process of determining the appropriate hourly wage for classifications conformed under the Act and the regulations is not the same. Sound policy underlies this distinction: “The conformance process should not replicate the initial wage determination procedure, since that could create an unfair advantage for some contractors, and also create more lengthy post-contract-award conformance procedures.” *CACI, Inc.*, Case No. 86-SCA-OM-5, Dep. Sec. Dec., Mar. 27, 1990, slip op. at 17.

General guidance for the Administrator’s conformance procedure is spelled out in the regulation at 29 C.F.R. §4.6(b)(2)(iv)(A):

The process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula. The approach used may vary from wage determination to wage determination depending on the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. *Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. . . .*

Emphasis added.

B. *The Board's conclusions as to the Division's conformance methodology, given its inherent difference from predetermination of prevailing wage rates*

With respect to the merits of the conformance action of February 14, 1997, we find that the Administrator's methodology in establishing the conformed wage rates in this case was a reasonable – albeit complex – exercise of the discretion inherent in the conformance procedures under the SCA regulations. Accordingly, the Administrator's February 14, 1997 determination of conformed wage rates (as subsequently modified in the Wage and Hour Division's August 4, 1997 and May 22, 1998 letters) is affirmed.

The Administrator's selection of the lowest-paid benchmark classification listed in WD Nos. 92-0418 (Rev. 1) and (Rev. 2) was reasonable and, if anything, use of Computer Operator I for establishing the conformed rates under Contract No. 2893 served to benefit Petitioner. This is not to imply that selection of a lowest-paid benchmark establishes the conformance action as reasonable, *per se*; rather the selected benchmark classifications are reasonable because they are comparable in skill level to the Information Specialist classifications.

The conformance ruling with respect to performance under Contract No. 2465 presents slightly different questions; however, the Administrator's action there is equally reasonable. There, the Administrator selected from WD No. 94-2249 (Rev. 2) the classification of Switchboard Operator-Receptionist (which had an FGE of GS-3) as the benchmark to use for conforming the rate for an IS-I employee. If anything, the Switchboard Operator-Receptionist is even more directly comparable than Computer Operator I to the position of an Information Specialist, given their respective job descriptions.^{21/}

Biospherics has presented no convincing argument or factual support which would demonstrate that the levels of skill, experience, education, and training required of the entry level IS positions are so dissimilar from those of Computer Operator I and Switchboard Operator-Receptionist that the Administrator's choice of benchmark classifications was unreasonable. Indeed, we conclude that the job descriptions demonstrate that the benchmark classifications and the IS positions were clearly comparable in skill level, and Biospherics' endorsement of the FGE structure ultimately used by the Administrator (*i.e.*, reliance on FGE GS-3, -4, -5, and -6 levels) indicates some measure of agreement by the company.

The Administrator's use of the benchmark classifications in conjunction with the federal General Service pay relationships produced conformance results which bore a reasonable relationship to the rates listed in the applicable wage determinations. This result is what the conformance regulations require. *See* 29 C.F.R. §§4.6(b)(2)(i); 4.6(b)(2)(iv)(A); 4.51(c).

^{21/} The Switchboard Operator-Receptionist position was not a listed classification in WD No. 92-0418 (Rev. 1) or (Rev. 2).

Although the methodology adopted by the Administrator may not be the simplest approach available, it nonetheless produced a result that falls squarely within the requirements of the conformance regulations: conformed wage rates reasonably related to the rates in the wage determinations, and appropriately ranked by skill level.

Once more, we must emphasize that the conformance process is not a *de novo* wage determination process. As the BSCA stated in an analogous conformance matter likewise involving similar, but not exactly congruent job classifications:

[t]he Petitioner had the opportunity and obligation to seek review of the wage determination prior to the award of the contract. . . . Having not availed itself of the opportunity to challenge the wage determination, Petitioner should not be heard to complain that the conformance process did not provide as precise a comparison between job classifications as it would desire.

Kord's Metro Services, Inc., BSCA Case No. 94-06, Aug. 24, 1994, slip op. at 5. With regard to the comparison of classifications in *Kord's*, the BSCA commented:

The Board finds there to be a reasonable relationship between skills and duties required of a stretcher van attendant and those of a "Housekeeping Aide II." *Given the duties of each, it is reasonable to conclude that the level of education, training, experience and skill required of these positions is very similar. The nature of the actual work is not so dissimilar as to foreclose comparison.*

Id.; emphasis added.

In another conformance proceeding, the BSCA opined that the operative goal where equation of two classifications may not be attainable is to find and utilize benchmarks where it is possible to view "the skills and duties of the two classifications as clearly being *comparable*." *Rural/Metro Corporation*, BSCA Case No. 92-27, Mar. 26, 1993, slip op. at 8-9; emphasis in original. Thus, the conformance process does not require the exactitude that might be achieved in a *de novo* determination of prevailing wage rates.

Use of FGEs by the Administrator was also reasonable under the facts and circumstances of this case. It must be remembered that Biospherics' employees are performing the delivery of information services concerning the operation of the federal government. Moreover, Biospherics itself suggested the FGE levels of GS-3, -4, -5 and -6 which the Administrator selected as the appropriate pay levels for the conformed classifications. AR I, Tab S. It was therefore not unreasonable to rely upon FGE pay levels when establishing the conformed wage rates. The fact that the Wage and Hour Division reconsidered the levels of FGEs to employ in the conformance procedure here – significantly reducing the level of the ultimate conformed rates – further demonstrates the reasonableness of this methodology, which inured to Petitioner's benefit.

C. *The geographic scope of the wage determinations*

In raising its challenge to the levels of wages conformed by the Administrator, Biospherics presents the Board with a related question: whether the wage determinations to which the wage rates for the IS classifications were conformed cover an improperly broad geographical area. In addition to the specific county of performance for the information services contracts – Allegany County, Maryland – the wage determinations in this case also were applicable to several other counties in the generalized area.^{22/} In short, Petitioner argues that the wage determinations encompass too broad a “locality” and therefore do not accurately reflect the actual prevailing wages and fringe benefits in the Cumberland, Allegany County area, the place of performance for the disputed contracts. We disagree.

First, we concur with the Administrator’s contention that Biospherics’ argument concerning the allegedly impermissible geographic scope of the wage determinations is, in effect, a challenge to the substantive correctness of the wage determinations themselves. As such, the challenge must fail as untimely. The SCA’s implementing regulations prohibit the Administrator from reviewing wage determinations upon presentation of an untimely challenge. The SCA regulations provide, in pertinent part, that:

In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or, later than 10 days before commencement of a contract in the case of a negotiated procurement, exercise of a contract option or extension. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

29 C.F.R. §4.55(a)(1); emphasis added. Thus, the prohibition against untimely review of wage determinations is a mandatory restriction under the regulation. As explained by the Deputy Secretary of Labor with regard to the regulatory text quoted above:

The underscored portion [of the regulation] precludes review of wage determinations after the opening of bids in the case of a competitively advertised procurement, or later than ten days before commencement of a contract in the case of a negotiated procurement. Here, neither [the contractor] nor any other party filed a request for review and reconsideration of the . . . wage determination at any time. Accordingly, [the contractor] cannot challenge in this post-bid proceeding the Administrator's conformance wage action . . . by attacking collaterally the . . . wage determination on which it was based. Rather, since the contract has been awarded and extended, the issues are whether the disputed classifications are conformable and properly conformed, not whether the preexisting prevailing wage determination was correct or

^{22/} The additional counties were Garrett and Washington Counties, Maryland; Franklin County, Pennsylvania; and Clarke, Culpepper, Frederick, Greene, Madison, Page, Rappahannock, Rockingham, Shenandoah, and Warren Counties, Virginia.

whether the conformed positions, standing alone, without reference to the wage determination from which they flow, should reflect the true prevailing wage for those new positions. Conformed wages are not new prevailing wage determinations; they must be derived from a preexisting wage determination, not a new and separate prevailing wage determination for the previously unlisted classifications.

CACI, Inc., supra, slip op. at 18-19. See also *United Food and Commercial Workers Local No. 1105*, BSCA Case No. 94-08, Oct. 28, 1994; *Rural/Metro Corporation, supra*. The wage determinations relied upon by the Administrator covered a multi-county locality; we are precluded from revisiting the appropriateness of this determination after the award of a contract.

Second, even if we were to accept Biospherics' challenge to the geographic scope of the wage determinations as timely, we would nevertheless conclude on the merits that the scope of the wage determinations' coverage is not impermissibly large. The regulations governing SCA prevailing wage determinations explicitly grant the Administrator wide latitude in establishing appropriate localities:

Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine the minimum monetary wages and fringe benefits prevailing for various classes of service employees "in the locality". Although the term locality has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. *Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act.* The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination. Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area. For example, a survey by the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the same geographic area included within the scope of the survey. *Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used. . . .*

29 C.F.R. §4.53(a) ("Locality basis of wage and fringe benefit determinations."); emphasis added. As the regulation makes clear, the term "locality" must perforce have an elastic meaning in order to provide the Administrator with the flexibility to determine prevailing rates under a

wide variety of circumstances. In affirming the Administrator's use of an expanded locality (rather than the Village of Lake Placid, New York) in another SCA case, the Deputy Secretary of Labor stated:

there is nothing in the regulations which precluded the Administrator from going beyond the small Village (population approximately 2,500) to encompass the more standard and routine New York Metropolitan Statistical Area of which the Village is a part. The regulations do not reference any area as limited in size as a village.

Federal Savings and Loan Insurance Corporation and Accounting Associates, Case No. 87-SCA-WD-4, Dep. Sec., Sep. 28, 1990, slip op. at 7; footnote omitted. Thus, even if Petitioner's challenge to the geographic scope of the wage determinations had been timely, the Board would not second-guess the Administrator's use of a geographic area which may exceed what may be considered a "traditional" locality of a single county^{23/} in the absence of a showing that serious error may have been committed.

D. *Applicability of conformance ruling to Contract No. 2893*

In Petitioner's Brief In Support Of [First] Petition for Review (Pet'r Brf. I), Biospherics contends that its first Petition for Review addresses only the Administrator's conformance determination with respect to its second contract with GSA, Contract No. 2465. Biospherics argues that the Administrator "unilaterally issued conformance rates with respect to Contract No. 2893." Pet'r Brf. I, at p. 2, n.2. Petitioner states that it "had sought review only with respect to Contract 2465, and included 2893 only to protect and preserve its rights and not because it conceded that Contract 2893 was at issue." *Id.* at n.3.

The Board rejects the argument that the Administrator's conformance ruling should not be applicable to Biospherics' first contract with GSA, Contract No. 2893. In the first place, the SCA regulations affirmatively require that a contracting officer "shall" require classifications of service employees not listed in a wage determination to be conformed to the listed classifications. 29 C.F.R. §4.6(b)(2)(i). The fact that GSA neither included a wage determination nor sought a conformance ruling for Contract No. 2893 does not detract from the mandatory requirements that covered SCA contracts contain wage determinations, and that unlisted classifications be conformed.

^{23/} Compare the Davis-Bacon Act, as amended, 40 U.S.C. §276a *et seq.* (1994), which requires the payment of prevailing wages and fringe benefits to the various classifications of laborers and mechanics employed in the construction of federal or federally-assisted construction projects. The Davis-Bacon Act specifies that construction wage determinations are to be based on the wages prevailing "in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there" 40 U.S.C. §276a. In contrast, the later-enacted SCA includes no limitations on the Administrator's discretion to determine the appropriate geographical area to use as the "locality" for service contract wage determinations.

In this case, we recognize that Biospherics' performance under the first procurement contract had concluded substantially before the Wage and Hour Division investigation of Biospherics had even commenced. However, this unfortunate fact does not preclude the Administrator's action in applying the conformance action to both of Biospherics' contracts. The SCA regulations specifically empower the Administrator "[u]pon discovery of failure to comply [with the conformance requirements]" to "make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work." 29 C.F.R. §4.6(b)(4)(vi). There is simply no regulatory restriction which forecloses the Administrator's final ruling with respect to conformed rates under Contract No. 2893 in this case, and we reject the contention that the Administrator's issuance of conformed wage rates for the first procurement contract is not properly before us.

E. Challenge to fringe benefit level under WD No. 94-2250 (Rev. 2)

For the option year commencing October 1, 1996, under Contract No. 2465, the Wage and Hour Division erroneously issued WD No. 94-2250 (Rev. 2) (dated April 18, 1996) for application to the contract in response to GSA's Notice of Intention To Make A Service Contract And Response To Notice. AR II, Tab H. Application of this wage determination was subsequently rescinded by the Wage and Hour Division (in June 1997), which then issued WD No. 94-2249 (Rev. 3) for the October 1, 1996 contract period. Counsel for the Administrator advises that WD No. 94-2250 (Rev. 2) was "the wrong wage determination" and – although GSA incorporated it into the contract for the option year commencing October 1, 1996 – the Wage and Hour Division "corrected the mistake on June 26, 1997, and a modification to the contract was issued on July 3, 1997, incorporating the correct wage determination 94-2249 (Rev. 3)." Adm. Stmt. II, at p. 10, n.4. The fringe benefits required under WD No. 94-2249 (Rev. 3) are substantially lower (\$.90 per hour) than those under WD No. 94-2250 (Rev. 2) (\$2.56 per hour). Compare AR Tab J and K.

In its April, 1997 Petition for Review, Biospherics challenged the correctness of the \$2.56 per hour fringe benefit payment required under WD No. 94-2250 (Rev. 2). Given that Wage and Hour later withdrew WD No. 94-2250 (Rev. 2), this portion of Biospherics' Petition for Review is apparently no longer at issue. In any event, this question never has been before the Administrator for final determination. The Administrator noted in his statement that "[the] conformance ruling does not address any fringe benefit rates under Wage Determination No. 94-2250. Hence, Wage and Hour has not issued any final determination with regard to this issue." Adm. Stmt. I, p. 17, n.9.

The Administrator is correct. The February 14, 1997 ruling establishing classifications and rates conformed to WD Nos. 92-0418 (Rev. 1) and (Rev. 2) and 94-2249 (Rev. 2) demonstrates that there has been no final determination concerning fringe benefits under WD 94-2250 (Rev. 2). Nor are any wage or fringe benefit rates reviewed in the Administrator's final ruling of June 22, 1998.

By regulation, the Board's jurisdiction under the Act extends only to review of "final decisions of the Administrator of the Wage and Hour Division or authorized representative, and from decisions of Administrative Law Judges[.]" 29 C.F.R. §8.1(b). It is only *after* the Administrator has reviewed materials submitted by interested parties and issued a final decision that a decision may be appealed to this Board. 29 C.F.R. §4.56(b). Where review of an issue has not been sought and obtained from the Administrator, the Board has no jurisdiction to consider the matter. Therefore, the Board is without jurisdiction to decide this question.^{24/}

II. *Second Petition for Review*

On June 22, 1998, the Administrator issued a second final determination setting forth with specificity the wage determinations which applied under the various periods of performance of Contract Nos. 2893 and 2465. AR II, Tab E. In addition to ruling on the question of which wage determination applied during certain periods of Biospherics' contracts, the Administrator further noted that under Section 10 of the SCA

all covered contracts with more than five service employees are required to contain an applicable wage determination. Section 4.5(c)(1) of [the] Regulations . . . specifies that "with respect to any contract for which section 10 of the Act requires an applicable wage determination, the Administrator may request retroactive application of such wage determination." Therefore, the wage rates conformed to WD 94-2249 (Rev. 2) would be applicable to the 7/1/94 contract commencement date since the relevant wage rates contained in WD 94-2249 and WD 94-2249 (Rev. 2) were the same. In addition, to the extent any of the . . . contracts were not modified to include the specified wage determinations, these wage determinations are retroactively applied pursuant to the authority cited above.

Id. at p. 2.

Performance under Contract No. 2465 was commenced by Biospherics on July 1, 1994; the original term of this performance period ran through September 30, 1994. For this initial period, WD 94-2249 was not received and incorporated by GSA until August 8, 1994. Biospherics argues that the wage determination only applied prospectively from August 8. Furthermore, Biospherics contends that applicable wage determinations were either not received or not received in a timely manner for the October 1, 1995 and October 1, 1996 contract years and that those contract years were therefore not subject to SCA wage determinations, but instead were subject only to the wage requirements of the Fair Labor Standards Act of 1938, as amended (29

^{24/} With further respect to WD No. 94-2250 (Rev. 2), the Administrator raises the argument that "any challenge to this particular wage determination is untimely." Adm. Stmt. I, p. 17, n.9. Given our conclusion that the Board is without jurisdiction to review this question since there is no reviewable ruling by the Administrator, we do not decide whether any challenge to the \$2.56 fringe benefit rate would be untimely.

U.S.C. §201 *et seq.*), providing for payment of the general federal minimum wage. We reject these contentions and conclude that the requirements of the SCA applied to every period of performance under Contract No. 2465 and the proper wage determinations for application were those enumerated in the Administrator's June 22, 1998 ruling.

As we noted previously, every federal service contract which requires more than five service employees *is required to have an applicable wage determination*. Moreover, the Department's regulations implementing the SCA provide the Administrator latitude to require retroactive application of a wage determination where one has been omitted. 29 C.F.R. §4.5(c)(1).

The only issue for resolution concerning the appropriate wage determinations under Contract No. 2465 is whether the Administrator properly required retroactive application of wage determinations for those periods when no wage determination had yet been received and incorporated into the contract periods. The Administrator's authority to require retroactive application of wage determinations in his or her discretion is clearly established in both section 10 of the SCA (41 U.S.C. §359) and the implementing regulations at 29 C.F.R. §§4.3 and 4.5(c)(1).

Moreover, precedent decided both by the Secretary of Labor and the BSCA has affirmed the Administrator's retroactive application of wage determinations. In *National Center for Toxicological Research, Food and Drug Administration, Department of Health and Human Services*, Case No. 90-SCA-WD-3, Sec. Dec., Oct. 30, 1991 (*NCTR*), the Secretary of Labor upheld the Administrator's retroactive application of SCA fringe benefits. The Secretary refused to allow the petitioner in that case to avoid retroactive application because:

[d]epriving the workers on this NCTR services contract of the prevailing fringe benefits for the additional months . . . would be contrary to the purposes of the [SCA] and in derogation of the specific mandate of Section 10 of the Act The record supports the Administrator's action in requiring that higher [health and welfare] payments be paid retroactively. . . .

NCTR, supra, slip op. at 6-7.

Pointing to the language in *NCTR* which implies that "the record" is an important consideration in whether the Administrator may retroactively apply wage determinations, Biospherics argues without elaboration that the record in this case does not support retroactive application. We do not agree that Biospherics' contention that retroactive application is a question of fact to be determined on the record; retroactivity of wage determination application is a question of law. The pertinent regulation, 29 C.F.R. §4.5(c)(2), merely provides that for any contract not containing a wage determination but otherwise required to have one pursuant to Section 10 of the Act, "the Administrator may require retroactive application of such wage determination" This issue is solely within the discretion of the Administrator, whose decision is not bound by any evidentiary requirement.

Even if there were a requirement that the administrative record must support retroactive application, we would conclude that the record here supports retroactive application of wage determinations for all of Biospherics' contracts, extensions and option years as determined by the Administrator. As noted by counsel for the Administrator, wage determinations "were continually provided" during Biospherics' performance under all periods of Contract No. 2893 and "the language in the modification dated August 8, 1994, make[s] it clear that the wage determination applies to all work performed under the contract." Adm. Stmt. II, pp. 17-18. Biospherics has indicated nothing in either its pleadings or the contracts referencing any understanding of the parties that wage determinations would be applied only prospectively. The record therefore supports retroactive application of WD 94-2249 to the period of Contract No. 2465 between July 1, 1994, and August 8, 1994, the date on which the wage determination was actually incorporated in the contract.

Further, even though we view the issue of retroactivity as a question of law, we note that the record in this case also lends support to the Administrator's retroactive application of applicable wage determinations to the contract extension periods commencing on October 1, 1995, and October 1, 1996, regardless of delay in their receipt or their actual incorporation into the contract. The contract modifications for these extension periods specifically state that wage determinations would be incorporated into the procurement contracts by GSA upon receipt. AR II, Tab B. Thus, Biospherics had actual notice that wage determinations would be applied retroactively. Therefore, there is no merit to Biospherics' contention that no wage determinations should be applied and that its employees are only due the federal minimum wage under the FLSA for these periods of contract performance.

The SCA was enacted to protect "rightful wages of the service workers." *James Bishop d/b/a Safeway Moving and Storage*, BSCA Case No. 92-12, Nov. 30, 1992, slip op. at 11. Given the discretionary authority of the Administrator to require retroactive application of wage determinations, such action is appropriate here where to do otherwise would be to undermine the protections of the SCA and the requirement of Section 10 of the Act that all covered contracts must contain an applicable wage determination.

III. *Miscellaneous issues*

Biospherics raises additional miscellaneous arguments against the Administrator's final rulings in this dispute. We address these issues below.

A. *The correct level of prevailing wages in Cumberland, Allegany County, Maryland*

Biospherics claims that the wage determinations utilized by the Administrator do not reflect the prevailing wages in Allegany County, Maryland (the site of contract performance). To the extent that Biospherics has presented certain "studies" purporting to show a lower "prevailing" wage in Allegany County, Maryland, than those referenced in the wage determinations, we conclude that claim is barred by untimeliness. The proper time to raise a challenge to the

substantive correctness of a wage determination is prior to the opening of bids (in the case of competitively advertised procurements) or 10 or more days prior to commencement of a contract in the case of a negotiated procurement, exercise of a contract option period, or extension. 29 C.F.R. §4.55(a); *Summitt Investigative Service, Inc.*, ARB Case No. 96-111, Nov. 15, 1996, slip op. at p. 9 (“The conformance procedure is not intended to be a substitute for timely challenging a wage determination.”); *Rural/Metro Corporation, supra*, slip op. at pp. 5-6. The fact that no particular wage determination had been received and actually incorporated by the contracting agency is, in our view, unavailing. The contract documents clearly specified that wage determinations would be incorporated and made applicable upon receipt. Biospherics chose to enter the contracts even though no particular wage determinations had been specified for some of the periods of performance. This was a risk that Biospherics accepted, and the company should have investigated the possible application of SCA wage determinations. Having failed to investigate the question of which wage determinations would be applicable to its contracts, Biospherics cannot now be heard belatedly to complain that the wages and fringe benefits are too high.

B. *Contract price adjustment*

We do not address Biospherics’ claim that the SCA “requires the Government to reimburse a contractor for increased wages based on increases in applicable rates. . . .” Pet. For Rev. II, at p.2. Petitioner has cited no provision of the SCA to support this contention and, indeed, the Act and the regulations are silent in this regard. Simply put, neither the Administrator nor this Board has any authority to address this argument raised by Petitioner. If Biospherics has a claim to reimbursement from GSA for increased labor costs, the SCA is not the vehicle, and this Board is not the forum for making such a claim. *E & M Sales, Inc.*, WAB Case No. 91-17, Apr. 28, 1992, slip op. at p. 3; *see also Harbert International, Inc.*, Case No. 91-SCA-OM-5, Sec’y, May 5, 1992, slip op. at 4.

C. *Associate Solicitor’s letter of October 15, 1997*

The Associate Solicitor of Labor issued a letter on October 15, 1997, replying to Biospheric’s counsel’s letter of September 29, 1997. AR I, Tabs A, B. The Associate Solicitor’s letter responds to an inquiry from Biospherics as to the applicability of wage determinations to the various periods of performance under Biospherics’ contracts.

In its second Petition, Biospherics asserts that the Associate Solicitor “indicated that, at the very least, the wages and benefits for performance periods before wage determinations were issued and received by petitioner should not be included as additional wages and fringe benefits due.” Pet. For Rev. II, p. 3. We reject Biospherics’ interpretation of the Associate Solicitor of Labor’s^{25/} letter of October 15, 1997. There is no support in that letter for Petitioner’s claim that

^{25/} The Associate Solicitor is counsel for the Administrator. Although that official represents the (continued...)

the Associate Solicitor indicated that “the wages and benefits for performance periods before wage determinations were issued and received by petitioner should not be included as additional wages and fringe benefits due. . . .” *Id.* at p. 3. The Associate Solicitor – who is counsel for the Administrator and not the official charged with issuing final determinations under the SCA – “actually stated that an appropriate wage determination *must be applied to all such contract periods and cover all contract work performed.*” AR I, Tab A, p. 1; emphasis added. We find no support in the Associate Solicitor’s letter for Biospherics’ exculpatory interpretation.

D. *Retroactive application of SCA wage rates to closed contracts*

Finally, we reject Biospherics’ contention that the Administrator is without authority to require retroactive application of wage determinations in situations in which SCA contracts may be closed. Petr.’s Reply to Adm. Stmt. II, p.5. There is no language in either Section 10 of the Act or the implementing regulations limiting the Administrator’s authority in this regard. Of course, it may be impossible to request withholding of contract funds where a contract is closed and no contract funds have been sequestered for payment of wages. *See* 29 C.F.R. §4.6(h)(i). However, this does not limit the Administrator’s authority to demand payment from a contractor whose payment practices have been in violation of the wage and fringe benefit payment provisions of the Act. Nor is the Administrator foreclosed from pursuing collection or other sanctions^{26/} in the appropriate forum.

^{25/}(...continued)

Wage and Hour Division in litigation, it is the Administrator, and not the Associate Solicitor who issues final determinations under the SCA.

^{26/} We note that Section 5 of the SCA provides that the sanction of debarment from federal contracting for a period of three years may be imposed for any violation of the Act including, of course, failure to pay required wages and fringe benefits.

CONCLUSION

For the foregoing reasons, the Petitions for Review consolidated in this matter are denied and the Administrator's ruling letters of February 14, 1997 (as modified by the Wage and Hour Division's letters of August 4, 1997, and May 22, 1998) and June 22, 1998, are affirmed.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member