



In the Matter of:

**RUSSIAN AND EAST EUROPEAN
PARTNERSHIPS, INC.**

ARB CASE NO. 99-025

***In re:* request for review and reconsideration
of wage determinations for six job classifications
employed on Contract No. DAKF 40-96-D-0009
at Fort Bragg, North Carolina**

DATE: October 15, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Gilbert J. Ginsburg, Esq., *Washington, D.C.*

Daniel B. Abrahams, Esq., *Epstein Becker & Green, P.C., Washington, D.C.*

For the Respondent:

Joan Brenner, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

For Intervenor Department of the Army:

Alfred E. Moreau, Esq., *Department of the Army, Rosslyn, Virginia*

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (Board) on the Petition for Review filed by Russian and East European Partnerships, Inc. (Partnerships), 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). *See* 29 C.F.R. §§8.1(b)(6), 8.7(b)(2000).

In 1996, the Army awarded service contracts to Partnerships to operate ten learning, training and testing centers at Ft. Bragg, North Carolina. The SCA wage determinations applicable to the contracts did not include wage rates for various job classifications needed to perform the learning center work; thus, it was necessary to add the missing classifications and wage rates *after* the contracts were awarded.

In a final ruling issued on October 20, 1998, the Wage and Hour Administrator's designee (Administrator) concluded that a specialized procedure known as "indexing" of wage rates (29 C.F.R. §4.6(b)(iv)(B) (2001)) was not available to Partnerships under the facts of this case. In addition, the Administrator issued conformed wage rates for the job classifications working on

Partnerships' contracts, but at levels higher than had been proposed by the Army and Partnerships. This appeal followed.

Two major questions are before the Board for decision in this case. The first is whether the indexing methodology can be used by Partnerships to determine the SCA wage rates to pay its employees on the Ft. Bragg contracts. Second, if indexing is unavailable, we must decide whether the Administrator properly set the wage rates for the employees under the general SCA "conformance" procedure used to establish classifications and wage rates for service employee classifications not listed in a wage determination. *See* 29 C.F.R. §4.6(b).

In this decision, we first present an overview of the methodology for determining SCA prevailing wage and fringe benefit rates, including the conformance and indexing procedures. Next, we review the relevant facts and procedural history of this dispute. We conclude with our analysis of the legal issues presented by the parties.

Having reviewed the arguments of the parties and the administrative record in this matter, we conclude that the Administrator's October 20, 1998 final ruling is correct. Partnerships' Petition for Review therefore is denied.

BACKGROUND

I. *Overview of the SCA wage determination, conformance and indexing procedures.*

The SCA requires that every service procurement contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States, contain a provision specifying the minimum hourly wage and fringe benefit rates payable to the various classifications of service employees working on the service contract. *See* 41 U.S.C. §351(a)(1), (a)(2). The Wage and Hour Division publishes "area wage determinations" setting these minimum wage and fringe benefit rates based on the rates prevailing in the locality where the service contract will be performed.^{1/}

Under the SCA regulations, Federal contracting agencies are required to notify the Wage and Hour Division of pending solicitations or option year renewals and advise the Division of the classifications of service employees that will be employed on the contract, ordinarily using a Standard Form (SF) -98 (Notice of Intention to Make a Service Contract). 29 C.F.R. §4.4. In response to the contracting agency's request, the Wage and Hour Division issues a wage determination to be used for the contract, specifying the minimum rates to be paid the various classifications of workers.

Sometimes a service contract is awarded that requires the employment of job classifications not listed in the applicable wage determination. In these situations, the SCA regulations provide for a "*conformance action*" to remedy the omission, directing that "the contracting officer shall require

^{1/} A second type of wage determination – not at issue in this case – is based on the wage rates in collective bargaining agreements that govern the pay for the service employees at the particular contract site of performance. *See* 41 U.S.C. §353(c).

that any class of service employee which is not listed . . . be classified by the contractor so as to provide a reasonable relationship (*i.e.*, appropriate level of skill comparison) between such unlisted classification and the classifications listed in the wage determination.” 29 C.F.R. §4.6(b)(2)(i). When seeking a conformed wage rate, the contractor is required to submit to the contracting officer a report of the proposed wage and fringe benefit rates for the job title, and indicate whether the affected employees agree or disagree with the proposed rates. The contracting officer reviews the contractor’s proposed classifications and wage rates, indicates the contracting agency’s recommendation and transmits it to the Wage and Hour Division for a final ruling on the conformance request. The Administrator then approves, modifies or disapproves the proposed classifications and wage rates and transmits the final conformance decision to the contracting agency. *Id.* See, e.g., *COBRO Corp.*, ARB No. 97-104, slip op. at 2 (July 30, 1999) (*errata issued* Sept. 13, 1999); *Kord’s Metro Servs., Inc.*, Board of Service Contract Appeals (BSCA)^{2/} No. 94-06 (Aug. 24, 1994).

Although the SCA regulations anticipate that a conformance request will be initiated by the service contractor when the contractor recognizes that a necessary job classification and wage rate is missing from the wage determination, the regulations explicitly allow the Administrator to establish conformed rates *sua sponte* if the contractor does not submit a conformance request. Any such conformed wage rates established by the Administrator apply retroactively to the beginning of the employees’ work on the contract. 29 C.F.R. §4.6(b)(2)(vi).

In strictly limited circumstances, the SCA regulations allow contractors and contracting agencies to establish wage and fringe benefit rates for missing job classifications through a shortened procedure known as “*indexing*,” found at 29 C.F.R. §4.6(b)(2)(iv)(B):

In the case of a contract modification, an exercise of an option or extension of an existing contract, or in any other case *where a contractor succeeds a contract under which the classification in question was previously conformed* pursuant to this section, a new conformed wage rate and fringe benefits may be assigned to such conformed classification by indexing (*i.e.*, adjusting) the previous conformed rate and fringe benefits by an amount equal to the average (mean) percentage increase (or decrease, where appropriate) between the wages and fringe benefits specified for all classifications to be used on the contract which are listed in the current wage determination, and those specified for the corresponding classifications in the previously applicable wage determination. Where conforming actions are accomplished in accordance with this paragraph prior to the performance of contract work by the unlisted class of employees, the contractor shall advise the contracting officer

^{2/} Prior to July 1992, final agency decisions under the SCA generally were issued by the Deputy Secretary of Labor, although some decisions were issued by the Secretary. See 29 C.F.R §8.0 (1991). From July 1992 until May 1996, final agency decisions under the SCA were issued by the Board of Service Contract Appeals. In May 1996, this function was delegated to this Board.

of the action taken but the other procedures in [the regular conformance process] . . . need not be followed.

Id. (emphasis added). By its terms, then, the indexing mechanism is available only if *all* of the following conditions apply:

1. The job classification(s) and rates that are to be indexed must have been previously conformed by the Administrator for use during a prior procurement period.
2. Some of the service work under the contract must be performed by job classifications actually employed on *both* the prior and current contracts, and whose wage rates are found in *both* the previous and current published wage determinations. (Without these classifications, it literally is impossible to compute “the average (mean) percentage increase . . . between the wages and fringe benefits specified for all classifications to be *used on the contract* which are listed in the *current* wage determination, and those specified for the corresponding classifications in the *previously applicable* wage determination,” as required by the indexing regulation.)
3. A service contractor that intends to use the indexing procedure to establish a wage rate for a previously-conformed job classification (and thereby avoid the full conformance process) must advise the contracting agency of its intention *before* the contractor begins to perform work during the new contract performance period.^{3/}

II. *Factual and procedural background.*

Although the labor standards problems on Partnerships’ Fort Bragg contracts began in 1996 when the Army awarded the first learning center operations contract to Partnerships, the genesis of this matter goes back several years to earlier procurement periods.

In late 1989 or early 1990, a predecessor contractor at the Ft. Bragg site, A/S/K Associates, requested a conformance action for five classifications of service employees because the job classifications listed in its contract with the Army were not listed in the then-applicable Wage

^{3/} In its briefs, Partnerships asserts that the Labor Department in the past has not required prior notice to the contracting agency before using the indexing methodology. This issue is discussed below at pp. 11-13.

Determination (WD) 86-895 (Rev. 3) (July 29, 1989). See Pet.^{4/} Exhibit (Exh.) 9. These five unlisted classifications needed to perform the 1989-1990 learning center contract were:

- Learning Center Operator
- Learning Center Monitor
- Test Monitor
- Test Examiner
- Language Lab Monitor.

In February 1990, the Wage and Hour Division granted A/S/K's request for conformed classifications. Pet., Exh 1. The wage rates that the Division established for the new classifications for the 1989-90 contract period were the same as the wage rates for the "File Clerk I" and "File Clerk II" classifications listed in the wage determination.

After the 1989-90 contract year and through 1995, the succeeding wage determinations published by the Division still did not list the job classifications needed to operate the learning centers at Ft. Bragg. However, the learning center contractors (initially A/S/K, and later a successor contractor, Operations Research Corporation (ORC)) continued to pay the workers on the learning center contract rates equivalent to the listed wage rates for File Clerk I and II without submitting conformance requests to the Wage and Hour Division.^{5/}

^{4/} In this Final Decision and Order, citation to additional documents in the record before the Board are abbreviated as follows:

Amended Statement in Support of Petition for Review	Pet.
Statement of the Deputy Administrator in Response to Petition for Review	Am. Stmt.
Petitioner's Response to the Statement of the Administrator in Response to Petition for Review	Pet'r Resp.
Administrative Record	AR

^{5/} There is no evidence suggesting that the Administrator was aware that the contractors at Ft. Bragg were engaged in this *ad hoc* "self-administered" conformance process, modeled on the slotting procedures sometimes used by the Administrator when developing wage determinations. See 29 C.F.R. §4.51(c). As the Administrator correctly notes (Am. Stmt. at 10-11), Partnerships, its predecessors and perhaps even the contracting agency repeatedly confuse "slotting" and "indexing," even though they are distinctly different methodologies. Although the Administrator often assigns conformed wage rates using a process analogous to slotting, the term "slotting" is never mentioned in the conformance regulation and therefore does not apply directly either to conformance actions or indexing. See 29 C.F.R. §4.6. (Curiously, even the Administrator is not immune from confusion on this issue, observing at one point that "Slotting is a procedure whereby wage rates may be established for use in issuing a wage determination *or responding to a conformance request*" Am. Stmt. at 10-11).

Although "indexing" can be implemented without the Wage and Hour Division's involvement under the very limited circumstances discussed above, nowhere do the SCA regulations allow contractors or
(continued...)

During the 1995 solicitation process that ultimately led to the award of the Fort Bragg contract to Partnerships, the Army requested the Wage and Hour Division to issue a wage determination for the learning center contract. Using the SF 98A, the Army informed the Division that six service employee classifications would be utilized to perform the contract. Although the Army did not indicate the Federal Grade Equivalency (FGE) that would have been applicable to these classifications if the employees would have been Federally employed – information required by the SCA regulations (*see* 29 C.F.R. §4.4(b)) and the SF 98A form – the Army did identify the hourly wage rates that it deemed would be applicable to the six service employee classifications:^{6/}

	Army's suggested wage rates
• Language Coordinator	\$11.06
• Language Librarian	12.29
• Test Administrator	9.92
• Learning Center Operator	11.06
• Learning Center Monitor	8.87
• Test Examiner/Administrator	8.87

AR Tab U at 146.

With regard to the 1995 solicitation which resulted in the contract award to Partnerships, several facts are significant in this case. First, only two of the job classifications used by the predecessor contractor were also employed under Partnerships' contract: Learning Center Monitor and Learning Center Operator. Even then, the Army changed the qualifications and skills required of the learning center employees and their required duties in the 1995 solicitation. Second, *none* of the job classifications actually employed on the learning center contract (either under the immediate predecessor contractor, ORC, or by Partnerships) was listed in the applicable wage determinations. Third, although the SCA classifications of File Clerk I and File Clerk II were listed in the wage determination at the time of the 1990 conformance ruling under the predecessor contract, by 1995 these two SCA classifications were no longer listed in the wage determinations applicable to Partnerships' contracts, having been replaced by the General Clerk I and II positions.^{7/}

During the bidding process for the first contract period, the Army was alerted by the bidders to the fact that the job classifications needed to perform the contract were not listed in the wage determination. In response, the Army advised the bidders (including Partnerships) of the SCA conformance procedures applicable when job classifications were omitted from a wage

^{5/}(...continued)

contracting agencies to invent their own conformed wage rates.

^{6/} Although the contract solicitation referenced a seventh service employee classification of Language Lab Technician (*see* AR Tab S at 123), the Army did not list this classification in the SF 98A.

^{7/} The wage determination applicable to Partnerships' second contract period (WD 94-2393 (Rev. 4)) similarly did not include the File Clerk I or II classifications. *See* AR Tab O at 111; AR Tab S at 122-123 and 132-140.

determination. In addition, at the request of the bidders the Army identified the wage rates that were being paid to the learning center workers by the predecessor contractor, noting that the predecessor contractor had been paying its employees wage rates that in 1990 had been conformed by the Wage and Hour Division to the then-extant SCA wage determination classifications of File Clerk I (for the Test Monitor, Learning Center Monitor, and Language Lab Monitor positions) or File Clerk II (for the Test Examiner and Learning Center Operator positions). The Army mischaracterized the practice as using “indexed wage increases” for subsequent contract periods. The Army also noted, however, that the employee duties and responsibilities in the new 1995 bid solicitation were significantly different from prior learning center contracts, and also pointed out that the File Clerk classifications no longer were included in the wage determination applicable to the 1995 solicitation. AR Tab O at 110-111.

The Army awarded the first of the Ft. Bragg learning center service contracts at issue in this proceeding to Partnerships on January 10, 1996. The first contract period performed by Partnerships commenced on February 1, 1996, and concluded on September 30, 1996, and was subject to WD 94-2393 (Rev. 3) (Aug. 16, 1995). A second, follow-on (or “option”) contract period of this contract covered the time between October 1, 1996, and September 30, 1997, and was subject to WD 94-2393 (Rev. 4) (Dec. 1, 1995). Partnerships did not initiate a conformance action under either contract.

After Partnerships’ first contract period was awarded, a Wage and Hour Division investigator examined the wage payment practices under the Ft. Bragg learning center contract. Partnerships informed the investigator that it was paying its employees the wage rates listed for the SCA classifications of “Clerk I & II.” AR Tab F at 47. Partnerships was informed that this practice was not permitted, and that a new conformance request needed to be submitted. Pet. at 3. However, Partnerships still did not initiate a request for conformed classifications. Accordingly, the Wage and Hour Division initiated the conformance process on its own and issued a conformance determination on September 29, 1997, directing substantial increases in the wage rates being paid to the service workers at Ft. Bragg. AR Tab E.

On November 12, 1997, Partnerships – dissatisfied with the September 29 ruling – requested that the Wage and Hour Division review and reconsider the conformed wage rates. AR Tab D. Partnerships presented an analysis for each of the job classifications employed on the Ft. Bragg contract, purporting to demonstrate that the Wage and Hour Division inappropriately had compared each of the learning center classifications to the wrong job classifications in the wage determination, with Partnerships arguing that the conformed classifications performed at lower skill and responsibility levels. The Wage and Hour Division revisited its conformance decision, examining (1) Partnerships’ job descriptions, (2) the Army’s statement of work in the contract documents and (3) the employee interview statements that had been compiled by the Wage and Hour Division’s investigator. AR Tab A at 1-2. These materials were forwarded to a classification specialist for analysis, and the Division issued a new ruling on December 17, 1997, lowering the conformed rates. AR Tab C.

Still dissatisfied, Partnerships requested a meeting with the Wage and Hour Division and an opportunity to submit yet another conformance request. The Division granted the request, and provided Partnerships a conformance guide to help in preparing the new submission. Partnerships submitted this new request, dated April 3, 1998, but did not use the tools recommended in the

Division's guidance document. The Wage and Hour Division reviewed the new data and issued the October 20, 1998 final ruling now at issue before the Board, reducing the wage rate for the Language Lab Technician but otherwise reaffirming the prior conformed rates.

Partnerships unilaterally rejected the Administrator's final ruling out of hand, informed the contracting agency that all of its conformance requests should be withdrawn, and further informed the Army that it would index the service employees' wage rates against the wage rates previously conformed in 1990. *See* Pet., Exh. 8. On December 16, 1998, Partnerships petitioned for the Board's review of the October 20, 1998 final determination.

STANDARD OF REVIEW

The Board's review of the Administrator's final rulings issued pursuant to the SCA is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). We review the Administrator's rulings to determine whether they are consistent with the Act and its implementing regulations, and are a reasonable exercise of the discretion delegated to the Administrator. *Department of the Army*, ARB Nos. 98-120/121/122, slip op. at 16 (Dec. 22, 1999) citing *ITT Federal Services Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992). *See also U.S. Postal Service ANET and WNET Contracts*, ARB No. 98-131, slip op. at 6 (Aug. 4, 2000).

PRELIMINARY MATTERS

Prior to reaching the merits of this Petition for Review, the Board is faced with a preliminary question raised by the Administrator, who objects to our consideration of certain exhibits which Partnerships submitted directly to the Board after the filing of the Petition for Review and which therefore are not part of the administrative record in this case. The principle that the Board cannot consider extra-record evidence *ab initio* – *i.e.*, without the Administrator first considering the material – has long been accepted. As the Secretary stated in *Harbert Int'l, Inc.*, No. 91-SCA-OM-5 (Sec'y May 5, 1992), the final decision-maker in SCA matters (*e.g.*, this Board) conducts

an appellate process in which cases are reviewed from a record upon which the decision appealed from was based, that is the Administrative Record. *See* 29 C.F.R. §8.1(d), 8.8(b). Where, as here, a submission goes beyond the record before the Administrator, [the reviewing authority] may not rely upon it on review.

Id., slip op. at 10-11, citing *BDM Management Servs. Co.*, No. 88-SCA-OM-1, slip op. at 2 n.2 (Dep. Sec'y Aug. 1, 1988). *See also Department of the Army, supra*, slip op. at 11 n.10; *COBRO Corp., supra*, slip op. at 10 n.10. However, the Board has the option to remand cases to the Administrator to consider new evidence. 29 C.F.R. §8.1(d). Thus, while the Administrator is correct that we cannot rely on extra-record material to reach our decision, we also must consider whether the newly-produced evidence warrants remanding the case to the Administrator for further consideration. Having reviewed Partnerships' materials, we conclude that remand is not warranted.

Partnerships submitted affidavits from two individuals^{8/} who had been involved with the learning center contracts over several contract periods during the 1990's – before, during and after the contract periods at issue in this case. Generally, the affidavits purport to demonstrate (a) that the duties performed by the employees on Partnerships' learning center contracts beginning in 1996 were unchanged from the time that A/S/K performed the contract in the early 1990s, and (b) that the Administrator incorrectly determined the levels of skills and duties required of the conformed classifications. In addition, (c) the affidavits (with supporting documentation) provide information about wage rates that apparently have been issued by the Administrator to be used on learning center contracts at Ft. Bragg during periods *subsequent* to the contracts at issue here, when some of the learning center employees were characterized by the Army as general clerks.

Presumably, this first “unchanged duties” argument is offered to support Partnerships' claim that it should be allowed to use the indexing methodology to establish the wage rates on the contracts following the examples of A/S/K and ORC; however, these prior efforts at indexing had been improper, and became even more clearly so under Partnerships' contracts when the Army explicitly changed the duties of the learning center employees and most of their job titles. Thus, this argument and the supporting material in the affidavits simply miss the mark, and the affidavits therefore would have little probative value if we were to remand the case to the Administrator.

With regard to the extra-record statements challenging the Administrator's assessment of the level of skill needed by the employee classifications, we simply note that Partnerships had ample opportunity during their several presentations to the Administrator to offer their evidence concerning the content of the various jobs, and Partnerships' timely submissions were considered by the Administrator and are included in the administrative record. Viewing the record as a whole, we see no need to remand the case to the Administrator to consider this question anew.

Finally, with regard to the information concerning wage rates applicable to periods of contract performance which occurred *subsequent* to Partnerships' two contract periods, these documents have no relevance to the conformance challenge before the Board in this case.

In sum, we conclude that the new, extra-record materials submitted by Partnerships do not warrant a remand of the case to the Administrator for additional review.

DISCUSSION

I. *The Administrator correctly concluded that the “indexing” procedure under the SCA's conformance regulations could not be used to set wage rates under Partnerships' two contract periods.*

As noted earlier (*supra* at 3-4), the conformance process typically is used when a job classification that is needed on an SCA procurement is missing from a wage determination. The

^{8/} The affiants included Cortez C. “Doc” Sembly, who worked as a project manager for A/S/K, ORC and Partnerships, and Kelly Kraft, who had supervised the work performed by A/S/K, ORC and Partnerships on the learning center contracts as the Army's contract administrator. These affidavits were submitted very late in the briefing process as attachments to Partnerships' rebuttal brief.

contractor submits a request to the contracting agency asking that a job classification be added to the wage determination, proposing a wage rate, and indicating whether the employees agree to the proposed rate. The proposal next is transmitted to the Administrator, with the contracting agency registering its agreement or disagreement with the proposed classification and rate. *See generally* 29 C.F.R. §4.6(b)(2). In limited circumstances where a conformed wage rate was issued for a contract during a *prior* procurement year, the contractor does not need to go through the full conformance process anew, but instead can set a new wage rate for the previously-conformed classification through the indexing procedure, 29 C.F.R. §4.6(b)(2)(iv)(B), without the involvement of the Wage and Hour Division. To make use of the indexing procedure: (1) some of the service work under the contract has to be performed by classifications actually contained in the previous and current wage determinations; (2) the classifications for which indexing is sought must have been conformed previously by the Administrator; and (3) the contracting agency must be informed that the service contractor intends to utilize the indexing exception prior to performance of any contract performance period.

The record in this matter shows that Partnerships has not demonstrated that it meets each of these requirements for using the indexing methodology for setting wage rates.

First, none of the service work performed under Partnerships' contract was performed by service employee classifications listed under either WD 94-2393 (Rev. 3), the previous wage determination or (Rev. 4), the following wage determination. According to the administrative record, only the following service employee classifications were to be utilized under the contract: Language Lab Technician, Language Librarian, Learning Center Monitor, Learning Center Operator, and Test Examiner. AR Tab C, pp. 10-36. None of these classifications were listed in WD 94-2393 (Rev. 3), dated August 16, 1995, applicable to Partnerships' contract period commencing February 1, 1996. AR Tab W. Nor were these classifications listed in the next version, (Rev. 4), dated December 1, 1995. AR Tab X. Because *none* of the job classifications listed in the wage determinations were employed on both the prior and successor procurements, there was no basis for computing the "average increase or decrease" (or "index") pursuant to the regulation, and indexing therefore cannot be used.^{2/}

Second, of the six employee classifications working on Partnerships' learning center contracts, only two – Learning Center Operator and Learning Center Monitor – had been part of the Administrator's 1990 conformance action for A/S/K. Under the regulations, therefore, it would be impossible under any circumstances to index any of the four new job titles employed on Partnerships' 1996 contracts. Moreover, inasmuch as the Army explicitly notified prospective bidders in the 1995 solicitation that the duties of all the employee classifications had changed from

^{2/} Apparently recognizing this fundamental problem, Partnerships argues that the Learning Center Operator classification actually was the General Clerk II, thereby claiming that one of the job classifications used on the Ft. Bragg contract actually *was* found in the wage determinations. *See* Pet'r Resp. at 11-12. This claim rests on a convoluted analysis of Partnerships' extra-record materials, working backward from Partnerships' 1999 procurement contract with the Army (*i.e.*, a period *after* the contract periods in dispute in the proceeding) to equate various job classifications named in the 1999 contract with job titles in earlier procurements. While Partnerships' argument is inventive, we decline to go outside the record in this case to reach this question.

prior years, we question whether indexing the Learning Center Operator and Learning Center Monitor positions would be appropriate *even if* the other conditions necessary for indexing were present. Indexing is predicated upon the notion that there is continuity in a job classification's duties and responsibilities from one contract period to the next, and that wage rates therefore can be established merely by applying an inflation (or deflation) formula pegged to other data in the wage determinations; where a contracting agency changes a job classification's duties (albeit without changing the job title), a new conformance action should be initiated so that the Division can assign a wage rate based upon the duties actually to be performed.

Finally, there is nothing in the record indicating that Partnerships notified the Army before it began work on the contracts that it intended to use the indexing method to establish SCA wage rates for the learning center workers, either in connection with the first or second procurement periods.^{10/}

In this regard, Partnerships asserts that under SCA case precedent it is not necessary for a contractor to provide advance notice to the contracting agency in order to set wage rates using the indexing method, citing *CACI, Inc.*, No. 86-SCA-OM-5 (Dep. Sec'y Mar. 27, 1990), and *Harbert Int'l*. Partnerships' reliance on these cases is misplaced. In *CACI*, the Administrator needed to conform retroactively a multi-year series of wage rates for litigation support staff who had been employed on a Federal contract with the Justice Department. To create the conformed wage rates, the Administrator established rates for the base procurement year, and then applied the indexing formula to subsequent years. Although this process resembles "indexing," in reality the Administrator was engaged in a multi-year conformance action, merely using an index-like inflation adjustment to create conformed wage rates during the out-years of the contract. The Deputy Secretary approved this methodology, just as this Board has approved a variety of other conformance approaches adopted by the Administrator to address the particular needs of a given service contract. *See, e.g., Biospherics, Inc.*, ARB Nos. 98-141/97-086, slip op. at 3 (May 28, 1999) (after selecting

^{10/} It appears that the question of indexing had at least been broached by the Army, which offered inconsistent and inaccurate information about wage rates to Partnerships and other offerors.

During the Ft. Bragg contract solicitation process (on October 19, 1995), the Army had informed Partnerships that "indexing" was being used by the then-current contractor at Ft. Bragg, based on the Wage and Hour Division's 1990 conformance action and relying on the SCA wage determination rates for the General Clerk I and General Clerk II classifications. AR Tab O at 111. The Army further informed Partnerships that the indexing of wage rates for the missing service employee classifications was being based on wage determination "increases given to File Clerk I and II." *Id.* By 1995, the File Clerk classifications were no longer listed in the Ft. Bragg wage determinations; moreover, as noted *supra*, the predecessor contractors never had used a correct indexing methodology, but apparently had invented their own *ad hoc* self-administered conformance procedure.

On the other hand, the Army did provide to bidders two other items of information suggesting that indexing might *not* be available. First, in the same October 19, 1995 notice, the Army referred prospective contractors to the conformance procedures for setting wage rates for job classifications that were missing from wage determinations. *Id.* Second, the Army's November 8, 1995 information to bidders noted that the File Clerk classifications were not listed in the wage determination (WD 94-2393 (Rev. 3)) applicable to the 1995 Ft. Bragg procurement, plainly putting the parties on notice that one of the threshold requirements for indexing was missing. AR Tab M at 105. On the whole, we view the Army's contradictory information to bidders during the solicitation process as unhelpful at best, and misleading at worst.

a “benchmark” classification and wage rate using procedure similar to “slotting,” wage rates for other conformed classifications created by applying differentials based on Federal general wage schedule); *Raytheon Systems Co.*, ARB No. 98-157 (Apr. 26, 2000) (after establishing FGEs for missing job classifications, conformed wage rates established by averaging pay rates for comparable employee classifications with the same FGEs listed in the wage determination); *D.B. Clark III*, ARB No. 98-106 (Sept. 8, 1998) (conformed wage rate established directly by adopting wage rate of comparable classification listed in wage determination, analogous to “slotting” procedure). With regard to the *Harbert* decision, an oblique reference to indexing is found in a footnote reporting that the Deputy Assistant Administrator had advised Harbert that, after a conformance was issued for the base year of its contract, conformed wage rates in future years would need to be established by making a new conformance request or by using the indexing procedure. This is merely a restatement of the conformance and indexing regulations, and does stand for the proposition that contractors are free to set wage rates through indexing without first notifying the contracting agency of their intent prior to beginning work on their contract.^{11/}

Therefore, the indexing procedure was not available to Partnerships under the requirements of the SCA regulations.

II. *The Administrator properly conformed the job classifications and wage rates for service workers employed on Partnerships’ Fort Bragg learning center contracts.*

This Board and its predecessors have recognized the inherent problems presented when the Administrator must establish prevailing wage rates after a contract has been awarded through the conformance process, and have observed that the Administrator therefore is accorded very broad discretion when determining conformed wage rates:

The conformance process is not a *de novo* proceeding to retroactively determine the prevailing wage for a particular classification – rather

^{11/} Partnerships also argues that it was not required to provide advance notice to the Army that it planned to use indexing because “indexing was not required for the initial contract period, since the same wage rates were in [Partnerships’] WD that had been in ORC’s WD. Thus, there were no wage rates to be ‘adjusted’ or ‘indexed’ for the initial contract period.” Pet’r Resp. at 6-7. No citation to the Act or its regulations is offered to support this proposition, and we can find none.

In addition, Partnerships argues that advance notice was not necessary because “the Army already knew that indexing would be used. Indeed, the Army itself advised offerors that indexing had been used consistently since the original conformance action had been approved by DOL.” *Id.* at 7. But as noted *supra* at n. 10, the Army’s advice to bidders was inconsistent on this issue, and it appears that the so-called “indexing” that had been used by predecessor contractors was wholly outside the letter of the indexing regulation. Moreover, a contracting agency’s or officer’s advice cannot in any event supplant the requirements of the Secretary’s regulations and interpretations, which are authoritative. *See* 29 C.F.R. §4.187(e)(5) (“Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor’s liability for back wages under the Act.”). *See also Le-Gals, Inc.*, No. 86-SCA-30 (Dep. Sec’y Aug. 7, 1987); *Dick Enterprises, Inc.*, Wage Appeals Board Case No. 95-046A (Dec. 4, 1996) (contracting agency advice not binding on Administrator in Davis-Bacon and Related Act matters).

it is a procedure by which the Administrator may establish a wage rate for a classification missing from the wage determination, but necessary to perform the contract. In establishing a conformed rate, the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are “unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations. . . .”

Environmental Chemical Corp., ARB No. 96-113, slip op. at 3 (Feb. 6, 1998), citing *Childress Painting & Associates, Inc.*, ARB No. 96-121 (Aug. 23, 1996), and quoting *Titan IV Mobile Service Tower*, Wage Appeals Board (WAB)^{12/} No. 89-14 (May 10, 1991). See also *COBRO Corp.*, *supra*, slip op. at 9.

In the final ruling letter of October 20, 1998, the Administrator conformed six service employee classifications and wage rates in response to Partnerships’ April 3, 1998 request. The conformed classifications for Partnerships’ first contract period (January 1, 1996 to September 30, 1996) were Learning Center Operator, Learning Center Monitor, Test Administrator, Language Librarian, Language Coordinator,^{13/} and Language Lab Technician. For the second contract period (October 1, 1996 to September 30, 1997), the Administrator did not issue a conformed rate for the Test Administrator classification because the applicable wage determination (WD 94-2393 (Rev. 4)) included two job classifications (Test Examiner and Test Proctor, each at a wage rate of \$10.90/hr.) that performed the same duties.

The conformed wage rates for all applicable classifications in both contract periods were based on the Administrator’s determination of their respective FGEs. The following is a tabulation of the conformed classifications; the FGEs and wage rates adopted by the Administrator; and the FGEs and wage rates proposed by Partnerships:

^{12/} The WAB issued final agency decisions of the Department of Labor under the Davis-Bacon Act, 40 U.S.C. §276a (1994), and the so-called Davis-Bacon Related Acts (*see* 29 C.F.R. §5.1(2000)) from 1964 until 1996. The Davis-Bacon and Related Acts mandate payment of prevailing wage and fringe benefit rates on Federal and Federally-assisted construction contracts and is considered a “sister statute” of the SCA.

^{13/} Partnerships did not submit a request for conformance of this classification.

Contract Period January 1, 1996 to September 30, 1996:

<u>Classification</u>	<u>W&H</u> <u>FGE</u>	<u>W&H</u> <u>Hourly Rate</u>	<u>Partnerships'</u> <u>4/3/98 FGE</u>	<u>Partnerships'</u> <u>4/3/98 Rate</u>
Learning Center Operator	GS-4	\$ 8.15	GS-3	\$ 7.12
Learning Center Monitor	GS-4	8.15	GS-2	6.09
Test Administrator ^{14/}	GS-5	9.70	GS-3	7.12
Language Librarian	GS-4	8.15	GS-2	6.09
Language Coordinator	GS-6	10.79	NA	NA
Language Lab Technician	GS-3	7.43	GS-2	6.09

Contract Period October 1, 1996 to September 30, 1997:

<u>Classification</u>	<u>FGE</u>	<u>Hourly Rate</u>
Learning Center Operator	GS-4	\$ 9.55
Learning Center Monitor	GS-4	9.55
Test Administrator	Not Applicable	
Language Librarian	GS-4	9.55
Language Coordinator	GS-6	12.65
Language Lab Technician	GS-3	8.77

In evaluating the reasonableness of the Administrator’s conformed wage rates in this case, the primary question before us is whether the FGEs chosen by the Wage and Hour Division were appropriate to the levels of skills and duties performed by the affected classifications. In addition, we must consider whether the wage rates ultimately established by the Administrator “provide a reasonable relationship . . . between such unlisted classifications and the classifications listed in the wage determination.” 29 C.F.R. §4.6(b)(2)(i).

The record on the skill level question is thorough and the Administrator’s analysis reasonable. The October 20, 1998 final ruling demonstrates that the Administrator carefully considered each classification and arrived at an appropriate and well-reasoned understanding of the duties performed and the skills possessed by each of the service employee classifications working on the Fort Bragg contract. *See* AR Tab A at 3-5. The Wage and Hour Division examined the job descriptions which Partnerships had submitted (*see* AR Tab B at 10-36) but granted no credence to the job descriptions (or to Partnerships’ recommended FGE levels), noting that:

All of the classifications that were submitted were determined by [Partnerships] to have lower FGE’s than were determined by the Department. . . . [A] *classification specialist reviewed the April 3 job*

^{14/} In its April 3 conformance request, Partnerships requested a wage rate for a “Test Examiner” – a job title that had been used under the earlier A/S/K procurement – rather than the “Test Administrator” job position identified by the Army in its 1995 solicitation.

descriptions on the conformance request and stated that it would be difficult to give true FGE's for the classifications based on the brief descriptions provided by [Partnerships]. The brief job descriptions or duty statements do not fully provide the nature of assignment or the level of responsibility. Further, because of the brevity of the job descriptions, background materials that were used in the December 17, 1997 conformance had to be used in this reevaluation because that was the only way in which assigning new FGE's for these classifications would be feasible.

AR Tab A at 3 (emphasis added). Instead of relying on Partnerships' cursory job descriptions, the Administrator looked to the description of the work to be performed found in the Army's contract documents. In addition, the Administrator relied on employee interview statements that had been collected by the Wage and Hour Division's investigator. The Administrator found that:

[T]he employees' job descriptions and the Army's statement of work for this contract, for each classification, are similar to each other; however, they are inconsistent with the job descriptions that were submitted by [Partnerships] in the April 3, 1998 conformance request. Moreover, the Language Coordinator occupational classification was omitted completely and should have been submitted for conformance in the April 3 request.

Id. These latter data sources – the Army's contract specification and the employee interviews – are more detailed than Partnerships' job descriptions, and have an underlying consistency. Comparing this data with Partnerships' presentation, the Administrator found that “[t]he wage rates that were proposed by [Partnerships] in the April 3 conformance request do not provide a reasonable relationship between the conformed classifications and those in the WD.” AR Tab A at 2. The Administrator's decision to rely on the contract documents and the employee interviews was a reasonable exercise of his discretion in administering the Act, and this data adequately supports the resulting FGE levels established by the Division's classification specialist.^{15/}

Partnerships also takes issue with regard to the *wage rates* that the Administrator assigned to the learning center job classifications after establishing the FGEs on the Ft. Bragg contract, asserting that the Administrator “ignored entirely the only job classification on the WD . . . in the relevant job family, i.e., education and training.” App. Resp. at 5; emphasis in original. This contention is based on the fact that WD 94-2393 (Rev. 3) listed a classification of Instructor (equivalent to a GS-9 position) with an hourly wage rate of \$8.10. Thus, Partnerships argues, the Administrator's conformance methodology was fatally flawed because the wage rates for the

^{15/} In support of their claim that the Administrator's FGE determination is excessive, Partnerships also relies on the affidavits of the Army's Fort Bragg contract administrator and Partnerships' project manager. However, as discussed *supra*, these documents were never presented to the Administrator for consideration during the administrative conformance process before the Wage and Hour Division and are not part of the administrative record in this case, and we therefore decline to rely on them at this stage of the proceeding.

learning center employees (with FGE ratings of GS-3 to GS-6) were conformed at higher hourly rates than the rate which had been predetermined for the GS-9 level Instructor classification.^{16/}

As noted *supra*, the business of establishing wage rates after contract award involves significant discretion on the part of the Administrator. The conformed wage rates established by the Administrator for the Ft. Bragg contract are similar to the rates found in the wage determination for job classifications comparable to the learning center workers. To the extent that the Administrator considered and rejected the unusually low \$8.10/hr. rate for the Instructor classification when setting the rates for the learning center workers in this case, the Administrator reasonably could have concluded – viewing the overall wage patterns in the wage determination – that the low Instructor wage rate was an anomaly and should not be relied upon. Indeed, lending support to the proposition that the Instructor wage rate in WD 94-2393 (Rev. 3) may have been incorrect is the fact that the wage rate for the same Instructor classification in (Rev. 4) jumped to \$16.56/hr., dramatically higher and more in line with other job classifications at the FGE 9 level. *See* AR Tab X at 168.

III. *Other issues.*

A. *Partnerships' attempt to withdraw its conformance request.*

In addition to its substantive argument that the Administrator's final conformance determination is incorrect, Partnerships argues that the conformance dispute is moot because Partnerships' April 3, 1998 conformance request "has been withdrawn . . ." Pet. at 6. Partnerships purported to withdraw the conformance request by a letter dated December 11, 1998; this "withdrawal" letter came only after the Administrator's final ruling of October 20, 1998, was issued.

Partnerships' attempt to withdraw its conformance request is without legal significance or effect. The SCA regulations are clear: if a job classification needed for contract performance is missing from a wage determination, a wage rate for the classification must be established. If the conformance process is not initiated by the service contractor and the contracting officer, then "the Wage and Hour Division shall 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)(2)(iv). Therefore it is entirely proper for the Administrator to establish conformed wage rates in this case, whether or not Partnerships has withdrawn its conformance request.

^{16/} Of course, Partnerships' argument with respect to the Instructor classification and its associated wage rate – claiming that the "education and training" job cluster in the wage determination is the occupational grouping most akin to the work performed by the learning center workers – is flatly inconsistent with Partnerships' broader argument that the learning center workers are the equivalent of file clerks.

B. *Whether the Administrator’s decision to establish new wage rates through the conformance process creates an administrative burden that is unnecessary in light of the availability of the indexing procedure.*

Partnerships argues that the Administrator’s conformance ruling should be reversed and that its use of indexing should be allowed by this Board because of the “burden” the conformance ruling places on the Wage and Hour Division, the Army, and the contractor. Pet’r. Resp. at 9-10. Partnerships notes that when the SCA wage rate indexing provision was promulgated, the Department observed that “the burdens on the Department [of Labor] and contracting agencies associated with DOL review of the conformance actions would be substantially lessened by allowing agencies and contractors to conform wage rates and fringe benefits which were the subject of a previous conformance action through indexing procedures.” 48 Fed. Reg. 49,736, 49,761 (Oct. 27, 1983)(Summary of Final Regulatory Impact and Flexibility Analysis, Section C, Changes in Conformance Procedures).

Although we agree that the goal of the indexing provision is to lessen the need for recurrent conformance actions, in this instance we are bound by the clear requirements of the indexing regulation itself. *See* Secretary’s Order 2-96, 61 Fed. Reg. 19,978 §4 (May 3, 1996) (“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated by the Department of Labor, *and shall observe the provisions thereof. . . in its decisions.*” Emphasis added.). As discussed above, the indexing methodology simply is not available to Partnerships during the disputed contract periods under the facts of this case.

C. *Whether Partnerships is entitled to set wage rates on the Ft. Bragg contracts because the Labor Department “allowed” this practice in the past.*

Partnerships also argues that it should be allowed to use indexing to establish wage rates because the Wage and Hour Division “allowed” the predecessor contractors on the Fort Bragg contract to utilize indexing and it would be unfair to change this practice with regard to Partnerships. Although not characterized as such, this essentially is an equitable estoppel argument.

Equitable estoppel claims against the government are strongly disfavored. In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Supreme Court held that estoppel will not lie against the Federal government in claims involving money damages against the government, but explicitly declined to adopt a flat rule that equitable estoppel could not apply against the government under any circumstances. *Id.* at 423 (“We leave for another day whether an estoppel claim could ever succeed against the Government.”). Because the action before this Board does not involve a money claim against the Federal government, it therefore is conceivable that estoppel might apply under appropriate circumstances.

The general considerations for and against of the availability of estoppel against the government were addressed in an earlier decision of the Court:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that is well settled that the Government may not be estopped on the same terms as any other litigant. [The Government] urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant . . . to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Heckler v. Community Health Servs. of Crawford, 467 U.S. 51, 60-61 (1984) (footnotes omitted). An estoppel argument was raised by a petitioner in another SCA conformance case, *Harbert Int'l*, in which the Secretary offered the following characterization of the circumstances where estoppel might be available:

Insofar as Wage and Hour could be subject to estoppel, Harbert would have to demonstrate that Wage and Hour made false representations to them with the intent that Harbert should rely on them, coupled with affirmative misconduct.

Harbert Int'l at 5, citing *Mukherjee v. INS*, 793 F.2d 1006, 1008-09 (9th Cir. 1986) and *Jaa v. INS*, 779 F.2d 569, 572 (9th Cir. 1986). Applying this *Harbert* standard to the present case before us, it cannot be seriously argued that the Wage and Hour Division “allowed” indexing by Partnerships’ predecessors on the Ft. Bragg learning centers contracts; indeed, there is no evidence at all that the Division was even aware of the practice. Moreover, there is no evidence that the Division affirmatively misled Partnerships in any way. To the contrary, as soon as the Division became aware that additional classifications were needed to perform the Ft. Bragg contracts, Partnerships was advised to initiate a conformance action. Accordingly, we reject Partnerships’ argument that it is entitled to use indexing to set wage rates because of the government’s conduct in this case.

Partnerships’ related argument – that it should be excused from the regulatory standards governing conformance of classifications because the Wage and Hour Division never notified the world of its interpretation of the regulatory requirements precedent to proper usage of indexing – is specious. The language of the indexing exception in the conformance regulation is clear, and sufficient to place a government SCA contractor on notice of its obligations and options in the event that a wage determination omits service employee classifications necessary for the performance of an SCA contract.

CONCLUSION

For the foregoing reasons, Partnerships' Petition for Review is **DENIED**, and the Administrator's final conformance ruling of October 20, 1998 is **AFFIRMED**.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

RICHARD A. BEVERLY

Alternate Member