



Issue Date: 10 December 2014

OALJ Case No.: 2014-CBV-00003

In the Matter of:

**APPLICABILITY OF WAGE RATES COLLECTIVELY
BARGAINED BY G4S GOVERNMENT SOLUTIONS, INC.
(FORMERLY WACKENHUT SERVICES, INC.) AND THE
INDEPENDENT EMPLOYEES SERVICE ASSOCIATION
AT DRYDEN FLIGHT RESEARCH CENTER, UNDER
CONTRACT NND12AC65C FOR PROTECTIVE SERVICES
AT DRYDEN FLIGHT RESEARCH CENTER, EDWARDS
AIR FORCE BASE, CALIFORNIA**

DECISION AND ORDER

This matter arises under the McNamara-O’Hara Service Contract Act of 1965 (“SCA”), 41 U.S.C. § 6701 *et seq.*, and the implementing regulations at 29 C.F.R. Parts 4 and 6. An Order of Reference was issued on March 21, 2014, pursuant to a September 3, 2013 letter on behalf of the Independent Employees Service Association (“IESA”) requesting a hearing under Section 4(c) of the SCA “to determine whether there is a substantial variance between the wage rates contained in IESA’s collective bargaining agreement with G4S Government Solutions, Inc. (formerly WSI) (‘G4S’) and those rates prevailing in the locality.”¹ The March 21, 2014 Order of Reference indicated that there was evidence warranting such a hearing.²

Pursuant to a Notice of Assignment and Supplemental Notice of Hearing I issued on September 19, 2014, I held a prehearing conference immediately followed by a formal hearing in this matter on November 4, 2014, in Los Angeles, California. All interested parties were represented and afforded the opportunity to examine and cross-examine witnesses and to present relevant and material evidence. Before the hearing, IESA and G4S submitted pre-hearing statements, as did the Administrator of the Wage and Hour Division. The Administrator, however, was not present at the hearing. The parties agreed that there was no need for post-hearing briefs in this case, Tr. at 6, and I did not request that any such briefs be submitted. I received the transcript of the hearing on November 25, 2014. Under the regulations, the decision must be issued within fifteen days after receipt of the transcript. 29 C.F.R. § 6.56.

¹ The September 3, 2013 letter is Attachment 1 to the Order of Reference.

² While the Order of Reference was signed by the Principal Deputy Administrator, Wage and Hour Division, on March 6, 2014, the document was served on the parties and sent to the Office of Administrative Law Judges on March 21, 2014.

At the hearing, I admitted IESA Exhibits (“IESAX”) 1-8 and G4S Exhibits (“G4SX”) 1-3 and 6-15, having sustained IESA’s objections to G4SX 4 and 5. Tr. at 12-16. The parties stated they had no other documentary evidence to submit. Tr. at 16. IESA presented the testimony of Mr. Christopher Gibson and Mr. Edgar Monzon, while G4S presented the testimony of Mr. Matthew Rieck, Mr. Michael Goodwin, and Mr. Ronald Dalton, Jr.

My jurisdiction in this proceeding is limited to determining whether the collectively-bargained wages at issues are “substantially at variance with those which prevail for services of a character similar in the locality.” 29 C.F.R. § 4.10(c).

For the reasons stated below, IESA’s petition for a collective bargaining variance is DENIED.

ISSUE

The parties agreed that the sole issue for determination at the hearing is the following:

With respect to protective services employees employed by G4S Government Solutions at the Dryden Aircraft Operations Facility (DAOF) in Palmdale, California, whether the collectively-bargained wage rates provided for in the Collective Bargaining Agreement between G4S Government Solutions and the Independent Employees Service Association effective August 1st, 2009, and expiring on July 31st, 2014, are substantially at variance with those that prevail for services of a character similar in the locality.

Tr. at 10.³

In its September 3, 2013 letter requesting a hearing, IESA stated the following:

IESA believes the wage rates in the CBA are substantially below those rates which prevail in the locality. *IESA limits its challenge to the wage rates for the following classification[s]: (1) visitor control, (2) control center, and (3) patrol.*

IESA September 3, 2013 letter (tab 1 to the Order of Reference), at 2 (emphasis added). At the hearing, however, IESA argued that despite this express limitation, I should consider the gate guard rate. Tr. at 106, 126-129. G4S argued that I have no authority to consider the gate guard rate as the issue of whether there was a substantial variance as to this rate was not before the Administrator of the Wage and Hour Division at the time the Order of Reference was issued. Tr. at 107. Counsel for G4S also stated that the day of the hearing “was the first day I have heard that the Gate Guard rates are at issue.” Tr. at 108. Counsel for IESA responded that while “[t]he issue is set by the Order of Reference, it doesn’t limit the [wage] comparison ... [I am] allowed to make in this case” and that G4S was on notice that the gate guard rate was at issue

³ I have made minor punctuation edits so this quote is not exactly the same as that contained in the transcript.

because IESA's prehearing statement referenced G4S employees' base rate of pay, which is the gate guard rate. Tr. at 127-128.

The regulations state that before a hearing may be held, a party must submit a request to the Administrator containing, in part, "[a] statement ... setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages...." 29 C.F.R. § 4.10(b)(1)(i)(C). I understand this regulation to mean that the person requesting a substantial variance hearing must provide information sufficient to identify the wage rates it believes substantially vary from wages for services of a character similar in the locality, as such identifying information is a necessary component of information "setting forth in detail why ... a substantial variance exists with respect" to those wages.

The regulations further state that "[n]o hearing will be provided ... unless the Administrator determines from information available or submitted with a request ... that there may be a substantial variance between some or all of the wage rates ... provided for in a collective bargaining agreement ... and those which prevail for services of a character similar in the locality." 29 C.F.R. § 4.10(b)(2). The Administrator must first determine that there may be a substantial variance before referring a matter to OALJ for a hearing. 29 C.F.R. § 4.10(c). I understand these regulations to mean that before a referral is made to OALJ, the Administrator must make a determination that there may be a substantial variance concerning "some or all" of the wage rates specified in a collective bargaining agreement.

The Order of Reference indicates that the Administrator determined that there may be a substantial variance as to the three wage rates identified by IESA in its request for a hearing:

IT FURTHER APPEARING from information submitted ... on behalf of the Independent Employees Service Association, that there is evidence warranting submission to an administrative law judge ... of the issue – whether such a substantial variance exists between such collectively bargained wage rates and those prevailing for services of a character similar in the locality[.]

Order of Reference, at 1-2. By explaining that the determination as to whether there may be a substantial variance was based on information submitted by IESA in its request for hearing, the Order of Reference necessarily indicates that the determination was limited to the three wage rates specifically outlined in that request for hearing – the rates for visitor control, control center, and patrol. Accordingly, I find that the Administrator's referral to OALJ is limited to these three wage rates and that I do not have jurisdiction to consider the gate guard rate.⁴

⁴ Having made this finding, I need not rule on G4S's due process argument that it did not receive notice that it would have to address the gate guard wage rate at the hearing. That said, G4S made clear in its prehearing statement (filed on May 6, 2014) its understanding that "IESA does not challenge the 'gate guard' wage rate." G4S Prehearing Statement, at 3 fn.10. Had IESA responded to this statement before the day of the hearing, G4S's due process concerns, as well as the jurisdictional issue resolved above, could have been addressed well in advance of the hearing.

FINDINGS OF FACT

A. Background on the Contracts, the Collective Bargaining Agreement, and the Wage Determinations

On August 22, 2012, the National Aeronautics and Space Administration (“NASA”) awarded contract NNC12AC65C (the “Prime Contract”) to Linxx Global Solutions, Inc. (“Linxx”) to provide protective services at the “NASA’s Dryden Flight Research Center, Edwards, CA [“Edwards”]; Dryden Aircraft Operations Facilities, Palmdale, CA [“DAOF” or “Site 9,” a term commonly used by those who work there]; or other locations as directed by the Government.” IESAX 3, at 9. DAOF is in Los Angeles County. Tr. at 25; Tr. at 71, G4SX 6. Edwards is in Kern County. Tr. at 71; G4SX 7.

On January 29 and 30, 2013, Linxx and G4S entered into a Subcontract Agreement – Subcontract Number 13-NASA-DRYDEN-01 (the “Subcontract”) – in which G4S agreed to provide protective services at DAOF. IESAX 5. While the Subcontract only identified protective services positions at DAOF in its listing of work that the G4S would perform, its place of performance clause is identical to that quoted above in the Prime Contract. IESAX 5, at A-1 and C-3.

In its solicitation for the Prime Contract, NASA stated, “[t]o ensure efficient use of resources the Contractor shall manage services as a single multi-faceted program that supports both the DFRC [Dryden Flight Research Center] main campus located on Edwards Air Force Base (EAFB) and the Dryden Aircraft Operations Facility (DAOF) located in Palmdale, California.” IESAX 2, tab O, at 3.

Before Linxx was awarded the Prime Contract to provide protective services at Edwards and at DAOF, G4S provided security services at those two locations. (Tr. at 25-26.) On July 16, 2009, G4S (then doing business as WSI) entered into a collective bargaining agreement (the “CBA”) with IESA covering employees working at the Dryden Flight Research Center, Edwards Air Force Base, California. IESAX 1, at 1 and 2. By its own terms, the CBA was effective from August 1, 2009, to July 31, 2014. IESAX 1. It is still in effect now, month to month, pending the outcome of this proceeding. Tr. at 29 (testimony of Mr. Gibson).⁵

In relevant part, Article 16 of the CBA established wage rates for three positions – Visitor Control, Control Center, and Patrol – without distinguishing whether the individual bargaining unit member worked at Edwards or at DAOF. These wage rates ranged from a low of \$17.62 for a patrol position with less than 5 years’ service as of August 1, 2009, to a high of \$22.66 for a control center position with over 20 years’ service as of August 1, 2013. IESAX 1, at 16-17. These wage rates were incorporated into NASA’s solicitation for the Prime Contract, and the CBA was incorporated into the Prime Contract. IESAX 2, at Tab V; IESAX 3, at 33. The Prime Contract and the Subcontract have option periods, and are currently in force. IESAX 3, 4, and 5.

⁵ Although the CBA refers to Edwards in its title and at page 2, the context of Mr. Gibson’s testimony, Tr. at 29-30, indicates that the CBA covered and covers employees at DAOF. This issue was not disputed at the hearing.

There is no dispute that G4S is a successor contractor under the Act. *See* IESA's Prehearing Statement, at 1 ("G4S ... is a successor contractor within the meaning of 41 U.S.C. § 6707(c)"); G4S Prehearing statement, at 2 n.6 ("G4S is both the 'predecessor' and one of the successor' contractors. 29 C.F.R. § 4.163(e)"). Moreover, there was no dispute at the hearing on the issue of whether G4S's earlier contract under which it provided protective services at Edwards and at DAOF should be considered the predecessor contract.⁶ I find that G4S is not only a successor contractor, but also that it is the predecessor contractor.

The Department's Wage Determination under the Service Contract Act for the area of Los Angeles and Orange Counties, California (the "Los Angeles County/Orange County Wage Determination"), provides a wage rate of \$23.77 for Guard II positions. IESAX 7, at 6 (Wage Determination No. 2005-2048, Revision No. 15, June 19, 2013). The Department's Wage Determination for Kern County provides a wage rate of \$12.30 for Guard II positions. IESAX 2, Tab U, at 7 (Wage Determination No. 2005-2044, Revision No. 14, June 13, 2011).⁷

Mr. Michael Goodwin, labor relations manager for G4s, testified that in negotiating collective bargaining agreements, G4S "look[s] at the total compensation that our employees receive, both in direct and indirect compensation," Tr. at 78, and that as a result, if wage rates increase, then necessarily fringe benefits decrease. Tr. at 81-82.

B. Testimony Concerning the Applicable Locality

Mr. Christopher Gibson, IESA's Union Steward for the last three years, testified that he worked as a security dispatcher at Site 9 for the last seven years, that Site 9 and DAOF are the same facility, and that Site 9 is located in Palmdale, California, which is in Los Angeles County. Tr. at 24-25. He testified that G4S previously provided services at Edwards until 2013 in addition to providing services at Site 9, and that before 2013, when G4S had the contract covering both facilities, G4S employees would be "cross-utilized," meaning that about once a week they would work at both facilities. *Id.* at 26-27. Mr. Gibson testified this practice of "cross-utilization" ended once Linxx won the contract and started providing services at Edwards. *Id.* at 27. Mr. Gibson stated, however, that for the first time, in October 2014 due to "an emergency shortage of personnel" at Edwards, a G4S employee from Site 9 went to work at Edwards "for about two weeks." *Id.*

Mr. Gibson also testified that he went to Edwards "a couple of times a year" for training involving the use of force and the Security Officer Certification Course. *Id.* at 28. He testified that Site 9 is not generally open to the public, but that group tours may enter the facility with special permission from management. *Id.* at 33.

⁶ I recognize that this earlier G4S contract was not introduced into the record. Nevertheless, on this record there is no doubt that it existed, and also no doubt that the parties did not dispute that it should be considered the predecessor contract. IESA previously stated that "G4S held the prior protective services contract for all NASA Dryden Flight Research Center facilities and entered into the CBA with IESA as a result of that prior contract." IESA September 3, 2013 letter (tab 1 to the Order of Reference), at 2 n.2.

⁷ There is no dispute that the Guard II rates are applicable to the positions at issue. Specifically, IESA stated that the Guard II classification applied. IESA Prehearing Statement, at 1. G4S did not dispute this, stating that "it would be ... appropriate ... to adopt a blended hourly rate that combines the Kern and Los Angeles/Orange County 'Guard II' rates." G4S Prehearing Statement, at 7.

On cross-examination, Mr. Gibson testified that he lives in Palmdale and that it took him almost four hours to get to the location of the hearing in the city of Los Angeles due to traffic. Tr. at 41. Mr. Gibson also testified that the only employer in the area that paid more than G4S was the Jet Propulsion Laboratory (“JPL”), and when the area was clarified to mean Palmdale, that he was not aware of employers in Palmdale area that pay more than G4S. Tr. at 39.

Mr. Edgar Monzon, an IESA shop steward for nearly a year and a G4S employee at Site 9 since 2011, testified that Site 9 is in Palmdale and that G4S also provides security at JPL, which is in Pasadena, California. Tr. at 44-45 (Pasadena is in Los Angeles County, G4SX 3). Mr. Monzon testified that he lives in Glendale, California, and that it takes him an hour to get from Glendale to Palmdale. Tr. at 56.

Mr. Matthew Rieck, the G4S program manager at Site 9, testified that he is familiar with employers in the Palmdale area. Tr. at 62. He testified that through his work as hiring manager, he knows the rates paid by all the other defense contractors in the Palmdale area because they “all hire from the same pool, because anybody that works at our facility has to have a secret clearance.” Tr. at 63. Mr. Rieck testified that G4S is “far and away the highest paying employer in the area,” and that its “lead competition is next door, it’s the Air Force Plant 42, and they’re at \$13.00 an hour for armed work.” Tr. at 63-64. Mr. Rieck testified that G4S’s pay, compared to those of other employers in the Palmdale area, “is ... why ... [G4S has] had virtually no attrition in the last several years, ... because people don’t leave unless they can make more money....” Tr. at 64.

Referring to G4SX 6, Mr. Rieck testified that the green areas of the map are mountains. Tr. at 71. He then testified that for a vacancy he recently posted, out of 68 applicants, only four or five were from south of the mountains, six or seven were from out of state, and the rest (*i.e.*, between 56 and 58 applicants) were from the Palmdale/Lancaster area, which he also described as the Antelope Valley. Tr. at 73.⁸

C. Testimony Concerning What Services Are Performed

Mr. Gibson testified that all security officers at Site 9 must carry handcuffs, pepper spray, a baton, ammunition, and a 9 mm weapon for their entire shift, and that they must have a state security guard license and a state weapons permit license. *Id.* at 35. Mr. Gibson testified that required training includes an annual eight hour class on the use of force and training on powers of arrest, as well as firing at the range twice a year to re-qualify. *Id.* at 35.

Mr. Gibson testified that patrol officers at Site 9 patrol a large hangar, four stories high with containing offices on both sides, and in which several NASA aircraft are stored, a small chemical warehouse near the hangar, a fuel depot hundreds of yards away, and the surrounding area. *Id.* at 32-33. Additionally, patrol officers also respond to various calls such as handling medical emergencies, requests for opening doors, and guiding people to locations on the facility. *Id.* at 33. Mr. Gibson testified that the first responding officer initially decides how to respond to a given situation and the response may include detaining a person until a supervisor arrives; he

⁸ In my questioning on this topic, I mistakenly referred to G4SX 7, when by context I meant G4SX 6. Tr. at 72.

testified that Los Angeles County [presumably the Sheriffs] would actually make the arrest. *Id.* at 37. Mr. Gibson said that it could take up to seven to ten minutes for the Sheriffs to arrive in an emergency. *Id.* at 37. On cross-examination, Mr. Gibson testified that only the program manager, Mr. Rieck, has arrest authority for G4S at Site 9. *Id.* at 40.

Mr. Gibson also testified that visitor control officers issue visitors badges to access the facility and also re-issue badges to employees who may have lost them. Additionally, he testified that visitor control officers perform minor tasks involving fingerprinting and background checks. *Id.* at 33.

Mr. Gibson testified that control center officers observe approximately 35 cameras throughout the entire facility, take phone calls from inside the facility, and dispatch patrol officers to handle the issues raised by those calls. *Id.* at 34.

Mr. Monzon testified that he worked at JPL⁹ for two days in May 2011 during an open house, performing “crowd control, gate access, and basically screening,” and that G4S did not provide him any specific training before he assumed these duties. Tr. at 47. Mr. Monzon testified that the duties at JPL were “pretty much the same” as those at Site 9, and other than the fact that G4S employees at JPL “have advance[d] training for federal arrest authority,” the skills used for duties at JPL are “the same” as the skills used for duties at Site 9. Tr. at 48. On cross-examination, Mr. Monzon testified that the security level at JPL during the open house he participated in was higher than the normal security level at JPL. Tr. at 52. Mr. Monzon also testified that the JPL facility has “a lot of buildings” in contrast to Site 9, which has a huge hangar and two or three small buildings. Tr. at 55.

Mr. Rieck testified that training for federal arrest authority involves “four weeks of additional training” and that guards with arrest authority “have to update it every two years and go through a series of courses, in order to keep their arrest authority current.” Tr. at 64-65.

Mr. Ronald Dalton, Jr., G4S project manager at JPL, testified that it is a facility with approximately 200 buildings covering 177 acres. Tr. at 83-84. He testified that there are Department of Defense classified areas known as Special Compartmentalized Information Facilities on the JPL facility that G4S must respond to with “very strict response times,” as well as Department of Energy radiation sources that G4S is responsible for. Tr. at 85. He also testified that all security officers at JPL must complete “a four-week federal arrest authority training school, appoint 162, 160 hours.” Tr. at 85. Additionally, he testified that one of the JPL security officers’ duties involve “flight hardware escort,” which involves escorting items that will go up into space either around the JPL facility or off the facility to another location, such as Vandenberg Air Force base, Cape Kennedy, or Arizona. Tr. at 86-87. Mr. Rieck also testified that security officers at JPL must qualify four times a year on a Glock 40 (a handgun) and on a 12 gauge shotgun. Tr. at 87.

Mr. Rieck testified that a G4S employee who only participated in operations at JPL during an open house would not have an adequate view of what security officers at JPL perform

⁹ As explained below, G4S provides protective services at JPL.

on a daily basis because “what JPL looks like during open house and what JPL looks like at this particular moment in time [*i.e.*, during normal operations] ... are totally different.” Tr. at 90.

ANALYSIS

A. *Controlling Legal Principles*

The Act applies to certain contracts where the United States is a party and where the main purpose of the contract is to provide services through the use of employees in the United States. *In the Matter of BAE Systems, Inc.*, No. 12-056, ALJ No. 2012-CBV-00001, slip op. at 5 (ARB May 19, 2014). The Administrative Review Board has summarized the statutory and regulatory framework as follows:

Section 4(c) [of the Act], as amended, “imposes on successor contracts an obligatory floor for wages and fringe benefits in the event that the predecessor contract has specified collectively-bargained rates.” *In re United HealthServ Inc.*, 1989-CBV-001, ... slip op. at 6 (Sec’y Feb. 4, 1991). *See also* 41 U.S.C.A. § 6707(c). However, Section 4(c) “contemplates circumstances in which the obligation may be suspended.” *In re United Healthserv*, No. 1989-CBV-001, slip op. at 4. Section 4(c) reads:

(c) Preservation of wages and benefits due under predecessor contracts. –

(1) In general. – Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm’s length negotiations.

(2) Exception. – This subsection does not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character.

41 U.S.C. § 6707(c); [*see also*] 29 C.F.R. § 4.10(a). The moving party carries the burden of demonstrating that a substantial variance exists with a “clear showing” of evidence. *In re Big Boy Facilities*, No. 1988-CBV-007 (Sec’y Jan. 3, 1989), 1989 WL 549943, *2. That clear showing requires “persuasion by a substantial margin.” *Id.*; *see also In re Ryan-Walsh*, 1993-CBV-1 and 1995-CBV-1 (ALJ

Aug. 13, 1996). Substantial variance decisions are “highly factual, [and] turn on an evaluation of all evidence presented.” *In re United HealthServ*, No. 1989-CBV-001, slip op. at 6.

BAE Systems, No. 12-056, slip op. at 5-6 (footnote omitted, brackets in original). In the footnote omitted from the preceding block quote, the Board provided additional guidance:

Ordinarily where service employees are covered by a collective bargaining agreement, a successor contractor furnishing substantially the same services at the same location will be obligated to pay such service employees no less than wages and fringe benefits required by such agreement. The intent of [section 4(c)] is to prevent the loss of wages and benefits fairly bargained for by the Union. The finding of a substantial variance should thus be an exceptional situation.

Id., slip op. at 5 n. 3 (citations and internal quotations omitted, brackets in original). This is consistent with the Deputy Secretary’s statement that “[a] fundamental Section 4(c) consideration is whether the bargained terms are so atypical that their continuation under a successor contract would be unreasonable.” *In re United HealthServ*, No. 1989-CBV-001, slip op. at 21-22.

While the Act has not defined a “substantial variance,” the Department has stated that “the plain meaning of the term requires that a considerable disparity in rates must exist before the successorship obligation may be avoided,” and has “emphatically rejected the argument that area wage determinations shall serve as the only benchmark for section 4(c) findings.” All Agency Memorandum 166, at 2 (Acting Administrator, Wage and Hour Division, Oct. 8, 1992), *available at* <http://www.wdol.gov/aam/AAM166.pdf>. AAM 166 indicates that four types of data are relevant in determining whether a substantial variance exists: (1) “Corresponding Federal wage board rates and surveys;” (2) “Relevant BLS survey data and the comparable SCA area wage determination;” (3) “Other relevant wage data” such as rates paid by other employers for similar jobs; and (4) “Other collectively-bargained wages and benefits.” *Id.* at 2-3.

29 C.F.R. § 4.54(c) states:

Where the wage rates and fringe benefits contained in a collective bargaining agreement applicable to the predecessor contract are set forth in a determination, locality in such a determination is typically described as the geographic area in which the predecessor contract was performed. The determination applies to any successor contractor which performs the contract in the same locality. However, see § 4.163(i).¹⁰

As IESA requested this proceeding, the burden is on IESA to make a clear showing that a substantial variance exists between the CBA wage rates and those that prevail for services of a character similar in the applicable locality.

¹⁰ 29 C.F.R. § 4.163(i) is not applicable here as, with respect to the services provided at DAOF, the place of contract performance has not changed.

B. The Positions of the Parties

IESA argues that because G4S performs the work under the Subcontract entirely in Palmdale, California, the appropriate locality for determining whether there is a substantial variance is the county in which Palmdale is located – Los Angeles County. Tr. at 103. It thus argues there is a substantial variance between the wage rates under the CBA and the prevailing rate for services of a character similar in the locality, citing both to the Los Angeles County/Orange County Wage Determination and to witness testimony concerning the work G4S employees perform at the Jet Propulsion Laboratory in Pasadena, California (which is also in Los Angeles County, *see* G4SX 3).

G4S argues that under 29 C.F.R. § 4.54(c), the appropriate locality is the geographic area where work under the predecessor contract was performed, not the Los Angeles County/Orange County area as a whole. Tr. at 108-12. In response to my question as to specifically where that location would be, counsel for G4S stated, “[t]he appropriate locality would be that area of Los Angeles County that is north of ... the San Gabriel Mountains.” Tr. at 125.¹¹ G4S also argued that in determining whether a substantial variance exists, I should consider not only the wage rates, but also the wage and fringe benefits rates together. Tr. at 112-15. G4S also argued for consideration of a blended wage rate between the rates for Kern County and Los Angeles County. Tr. at 122.

The Administrator “does not support any particular party or outcome in this case.” Administrator’s Prehearing Statement, at 2. The Administrator cited two portions of 29 C.F.R. § 4.54(a) concerning locality: “Although the term locality has reference to a geographic area, it has an elastic and variable meaning” and “locality is ordinarily limited geographically to a county or cluster of counties comprising a metropolitan area.” The Administrator then stated, “[b]ecause the work in this case occurs at the National Aeronautics and Space Administration’s Dryden Aircraft Operations Facility in Palmdale, California, the ALJ should consider data only from the Palmdale area” because “[d]ata reflecting wage rates in San Francisco, Northern California, or the nation as a whole generally would not provide relevant comparisons.” Administrator’s Prehearing Statement, at 9 (citation to *BAE Systems* omitted).

C. The Applicable Locality Is That Part of Los Angeles County North of the Angeles National Forest, Which Is Where the Predecessor Contract Was Performed

As outlined above, the regulations state that where, as here, the wage rates are set by a CBA, “locality is typically described as the geographic area in which the predecessor contract was performed.” 29 C.F.R. § 4.54(c). For purposes of the work done under the Subcontract, that geographic area is that part of Los Angeles County north of the Angeles National Forest. G4SX 3 depicts two separate areas labeled, “Angeles National Forest” that are contained within Los Angeles County – the applicable locality is that part of Los Angeles County north of the western portion of Angeles National Forest, that part of Los Angeles County north of the eastern portion of Angeles National Forest, and, to cover the gap between the two portions of Angeles

¹¹ I clarified that the mountains counsel referred to were those in the Angeles National Forest on G4SX 6. Tr. at 125. Also, I note that before the hearing, G4S argued that the “‘geographic area’ for the predecessor contract was southern Kern County ... and northern Los Angeles County.” G4S Prehearing Statement, at 10.

National Forest depicted on G4SX 3, that part of Los Angeles County north of a line drawn between Sleepy Valley, California and Vincent, California, continuing to the eastern portion of Angeles National Forest. This geographic area includes the Palmdale/Lancaster area and the Antelope Valley. *See* G4SX 3 and 6.

In making this determination, I find that IESA did not make the “clear showing” necessary to overcome the result dictated by 29 C.F.R. § 4.54(c). I recognize that the Predecessor Contract included two places of performance, and that the Subcontract includes one place of performance. With respect to the protective services at Site 9 performed under the Subcontract, however, the conclusion is inescapable that the same work is being now performed under the Subcontract in the same geographic area as it was performed under the Predecessor Contract.

I find IESA’s argument that because the work under the Subcontract is entirely performed in Los Angeles County, the Los Angeles County/Orange County Wage Determination should apply unpersuasive because it does not sufficiently explain why 29 C.F.R. § 4.54(c) should not apply. Indeed, during argument counsel for IESA took the position that even if the northern border of Site 9 were the Kern County line, the Los Angeles County/Orange County wage determination would still apply, citing to *In re Federal Savings and Loan Ins. Co.*, No. 87-SCA-WD-4, 1990 WL 656136 (Dep. Sec’y Sep. 28, 1990) (“*FSLIC*”). Tr. at 101-103.

FSLIC did not involve a case where wages were set by a CBA in a predecessor contract. As the Deputy Secretary did not have before him a case where 29 C.F.R. § 4.54(c) applied, *FSLIC* is distinguishable. Moreover, even if *FSLIC* were to apply, its reasoning would not support IESA because in *FSLIC*, where a variance was denied, the party seeking a variance provided no information concerning the residential, employment, or commuting patterns of comparable workers employed in the geographic area at issue. *FSLIC*, 1990 WL 656136 at 4. Here, IESA provided only minimal information concerning the commuting patterns of persons employed at Site 9 through Mr. Monzon’s testimony, and that information was rebutted by Mr. Rieck’s testimony, which indicated that the overwhelming majority of applicants for positions at Site 9 are from the Palmdale/Lancaster area. Accordingly, following the rationale of *FSLIC* would lead to a conclusion that IESA did not provide sufficient information concerning the appropriate locality to support a variance finding.

I am also mindful that Section 4(c) of the Act “is [intended] to prevent the loss of wages and benefits fairly bargained for by the Union” and that “[t]he finding of a substantial variance should thus be an exceptional situation.” *BAE Systems*, No. 12-056, slip op. at 5 n.3 (citations and internal quotations omitted). My finding that the applicable locality in this case is the geographic area where the predecessor contract was performed, pursuant to 29 C.F.R. § 4.54(c), is consistent with the intent behind Section 4(c) of the Act as stated by the Board.

D. IESA Did Not Clearly Show a Substantial Variance in the Applicable Locality

IESA’s evidence was entirely predicated on the assumption that the applicable locality would be the Los Angeles County/Orange County metropolitan area. For example, its evidence concerning wage rates at JPL in Pasadena, IESAX 8, and the Wage Determination for Los

Angeles and Orange Counties, IESAX 7, applies only to wages in the broader Los Angeles County area. This record is bereft of any information from IESA indicating “the wages and fringe benefits prevailing in the same locality [*i.e.*, the applicable locality I have described above] for services of a similar character.” 41 U.S.C. § 6707(c). I thus must conclude that IESA failed to meet its burden to make a “clear showing” that a substantial variance exists in this matter.¹²

E. Other Issues

Given my determination as to the applicable locality in this matter, I need not discuss other issues raised by the parties.

That said, assuming *arguendo* that the Los Angeles County/Orange County metropolitan area were the applicable locality, I would consider IESA’s probative evidence concerning comparable wages limited to the Los Angeles County/Orange County Wage Determination, IESAX 7, because the jobs at JPL in Pasadena are not comparable for the following reasons. First, Mr. Monzon’s brief two-day assignment at JPL for an open house is not a sufficient basis to opine as to the regular duties of security officers at JPL and to compare those duties to those of protective service personnel at Site 9. Second, the additional training for federal arrest authority required for JPL personnel – a four week course, with refreshers every two years – means that the qualifications for the positions are significantly different. Third, the additional firearms qualification requirements for JPL – qualifying twice as often on the range, and with a shotgun in addition to a handgun – means that the qualifications for the positions are significantly different. Fourth, the nature of JPL’s large, multi-building facility and additional duties such as escorting items bound for space both on the facility and across the country means that the duties of the positions are significantly different.

Once IESA’s evidence concerning wages at JPL is set aside because the jobs at JPL are dissimilar from the jobs at Site 9, IESA’s probative evidence on the issue of comparable wages evidence would be reduced to only one of the four types of data that AAM 166 indicates are relevant in making a substantial variance determination: the Los Angeles County/Orange County Wage Determination, IESAX 7. As noted in AAM 166, the Department “has emphatically rejected the argument that area wage determinations shall serve as the only benchmark for Section 4(c) findings.” AAM 166, at 2. Accordingly, even assuming *arguendo* that the Los Angeles County/Orange County metropolitan area were the applicable locality, I would find that IESA failed to make the requisite “clear showing” on the basis of this record.¹³

¹² Indeed, Mr. Rieck’s testimony indicates that the CBA wages significantly exceed wages in the applicable locality.

¹³ Comparing the CBA wage rates alone (*i.e.*, not including fringe benefits) to the Los Angeles County/Orange County Wage Determination: (1) there is at most a 9.19 percent difference between the CBA wage rates and the wage determination wage rates; (2) there is at most a 15.44 percent difference regarding the visitor control positions; and (3) there is at most a 19.87 percent difference regarding the patrol positions. G4SX 9 (analyzing CBA wage rates effective August 1, 2013; counsel for IESA cited these percentages, which are expressed as the percentage that would need to be added to the lower rate to reach the higher rate, in his closing argument, Tr. at 105-06). Assuming the Los Angeles County/Orange County metropolitan area were the applicable locality, I would not find a substantial variance concerning the control center and visitor control position rates. *See In re BAE Systems*, 2012-CBV-00001, slip op. at 16 (ALJ Feb. 14, 2012), *aff’d*, No. 12-056 (ARB May 19, 2014) (15.40% difference “as a whole between the CBA wage rates and the minimum rates set by SCA WD ... is not substantial”). The percentages

CONCLUSION

As explained above, IESA failed to meet its burden to make a “clear showing” that the collectively bargained wage rates substantially vary from those for jobs of a character similar in the locality because it did not show that the appropriate locality is the Los Angeles County/Orange County area as a whole, and not “the geographic area in which the predecessor contract was performed” as typically is the case when the wage rates are set in a collective bargaining agreement. 29 C.F.R. § 4.54(c). As I have found “the geographic area in which the predecessor contract was performed” includes that part of Los Angeles County north of the Angeles National Forest and which encompasses the Palmdale/Lancaster area, IESA’s evidence concerning wages in the Los Angeles County/Orange County area as a whole does not establish that there is a substantial variance between the collectively bargained wage rates and those for jobs of a similar character in the applicable locality. Accordingly, the “clear showing” required for a substantial variance finding has not been made in this case.

ORDER

For the foregoing reasons, IESA’s petition for a collective bargaining variance is DENIED.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Within 10 days after the date of the decision of the administrative law judge, any interested party who participated in the proceedings before the administrative law judge and desires review of the decision shall file a petition for review by the Administrative Review Board pursuant to 29 C.F.R. Part 8. The petition shall refer to the specific findings of fact, conclusions of law, or order excepted to and the specific pages of the transcript relevant to the petition for review. 29 C.F.R. § 6.57. The Administrative Review Board may be served at the following address: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Ave., NW, Washington, D.C. 20210.

I have cited in this footnote appear to have been calculated using the same approach as used in *BAE Systems*, as in that case the expressed percentages were a percentage of the lower number that would need to be added to reach the higher number. *See id.*, slip op. at 5, table figures. Moreover, considering the three CBA wage rates together, the average difference between the CBA wage rates and the Los Angeles County/Orange County wage determination would be 14.83 percent (the result of adding 9.19 percent, 15.44 percent, and 19.87 percent, and then dividing that sum by three). I would not find a 14.83 percent differential to constitute a substantial variance.