

**UNITED STATES DEPARTMENT OF EDUCATION  
REHABILITATION SERVICES ADMINISTRATION**

**GEORGIA VOCATIONAL  
REHABILITATION AGENCY,**

**PETITIONER,**

**v.**

**UNITED STATES DEPARTMENT OF  
DEFENSE, DEPARTMENT OF THE  
ARMY, FORT STEWART, GEORGIA**

**RESPONDENT**

**Case No. R/S 13-09**

**ARBITRATION DECISION AND AWARD**

This arbitration was convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§ 107(a) through 107(f) (the “R- S Act”), following a complaint letter dated May 20, 2014 filed with the U.S. Department of Education (“DOE”) (Rehabilitation Services Administration) (“RSA”), by the Georgia Vocational Rehabilitation Agency – Business Enterprise Program (the “Petitioner”).

The Petitioner asserts that the U.S. Department of Defense, Department of the Army (the “Respondent” or the “Army”) violated the R-S Act and its regulations by failing to apply the R-S Act priority to a contract covering Fort Stewart, Georgia, and Hunter Army Airfield, Georgia (Solicitation Number W9124M-14-R-0001, issued on April 1, 2014, and Contract No. W9124M-15-D-0002, awarded on March 16, 2015) (collectively referred to herein as the “Contract”).

A hearing was convened at Fort Stewart, Georgia on July 14, 2015, and completed on July 15, 2015. Both parties presented witnesses to testify on their behalf and tendered substantial documentary evidence, all of which has been considered.

### **ISSUES**

The panel members have agreed that the issues to be decided are:

1. Did the Army violate the [R-S Act] and its implementing regulations by failing or refusing to apply the R-S Act priority to the contract at issue in this arbitration?
2. If so, what is the appropriate remedy?

### **FINDINGS OF FACT**

The parties did not stipulate to a set of undisputed facts, and the panel has therefore set forth the following “Findings of Fact:”

1. The R-S Act grants a priority to blind entrepreneurs in the operation of vending facilities, including cafeterias, on federal properties.
2. Military dining facilities, including the dining facilities at Fort Stewart, Georgia are “cafeterias” to which the R-S Act’s priority applies.
3. The R-S Act was amended in 1974. The Secretary of Health, Education, and Welfare (now Education) was charged with prescribing regulations to implement the R-S Act as amended. Implementing regulations were adopted in

1977 at 34 Code of Federal Regulations (“CFR”) §§ 395.1 *et seq.* (the “Regulations”). The Regulations have not been amended since then.

4. DOE administers the R-S Act, and the Secretary of Education designates a state licensing agency (“SLA”) to, *inter alia*, train and license blind persons to operate vending facilities (including cafeterias), and to select the location and types of vending facilities, with the approval of the head of the federal agency involved. 20 U.S.C. §§ 2107a(b)(c), 107d-4.

5. In general, SLAs seek out contracts for food services with federal property managing agencies, and if successful, assign licensed blind persons to manage the contracts. The Petitioner is the SLA for the State of Georgia and the administrator of the blind vendor program, also known as the “Business Enterprise Program” (“BEP”), in Georgia.

6. In 1938, Congress enacted the “Javits -Wagner-O ‘Day Act” (“JWOD Act”) which was amended in 1971 (formerly 41 U.S.C. § 46 *et seq.*). The JWOD Act created the “Javits-Wagner-O’Day Program” (“JWOD Program”), which was renamed the “AbilityOne Program” in the November 27, 2006, Federal Register. 71 Fed. Reg. 68492; see also 41 U.S.C. § 8501 *et seq.*

7. The “Committee for Purchase from People Who Are Blind or Severely Disabled” (“CFP”) is the federal entity that administers the AbilityOne Program. *See* 41 U.S.C. §§ 8502, 8503. The CFP works with the National Institute for the Severely Handicapped (“NISH”) and the National Industries for the Blind to place non-profit organizations in government contracts. 41 C.F.R. § 51-3.1.

8. Under JWOD, the CFP publishes a list of services it considers suitable for purchase by the Federal Government from qualified non-profit organizations for the blind and disabled. Id. § 51-3.2. Services appearing on the procurement list constitute a mandatory supply source for all federal agencies. Id. § 51-5.2.

9. On January 6, 2006, Congress passed Section 848 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109-163 (the “NDAA FY 2006”). Section 848 required the Departments of Education and Defense and the CFP to issue a joint statement of policy concerning application of the JWOD Act and the R-S Act to contracts for operation and management of military dining facilities and contracts for food services, mess attendant and other services supporting the operation of military dining facilities.

10. On August 29, 2006, the Department s of Education and Defense and the CFP issued a joint report to Congress entitled “Application of the Javits-Wagner-O’Day Act and the Randolph -Sheppard Act to the Operation and Management of Military Dining Facility Contracts.” (“Joint Report”).

11. Although there were a number of recommendations made in the Joint Report, the only one enacted into law by Congress is found at Section 856 of the “John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364)” (“NDAA FY 2007”).

12. On March 16, 2007, the Office of the Under-Secretary of Defense instructed the directors of the defense agencies that the Joint Report should not be

cited in individual solicitations until it is implemented in complementary regulations by DOE and DOD. Petitioner's Exhibit S. That has not yet occurred.

13. The "Army Food Program" is a comprehensive program developed to ensure that soldiers are provided with safe and secure food service and drinking water. The Army Food Program consists of two main functional uses, Full Food Services ("FFS") and Dining Facility Attendant ("DFA") services. Army Regulation 30-22.

14. Fort Stewart, Georgia, currently has four (4) Dining Facilities ("DFACs") in operation and one (1) in operation at Hunter Army Airfield. The DFACs in operation provide food and drink to soldiers of the 3d Infantry Division, other tenant organizations, and associated units.

15. In December, 2012, and again in September, 2013, the Army published a "sources sought" notice for "dining facility attendant services" at Fort Stewart and Hunter Army Air Base.

16. On January 11, 2013, Rajaunnda D. Gandy, Director of the Georgia BEP, wrote to the Fort Stewart Directorate of Contracting to provide official notice of the Petitioner's interest in the solicitation that had been posted on December 14, 2012. Petitioner's Exhibit I.

17. On March 27, 2013, Ms. Gandy wrote a second letter notifying the Fort Stewart Directorate of Contracting of the Petitioner's interest and offering a briefing of the Petitioner's capabilities to perform the requirements of the DFA Contract. Petitioner's Exhibit J.

18. On March 19, 2014, the Army posted a pre-solicitation notice with a set aside for “Service-Disabled Veterans-Owned Small Businesses” (“SDVOSB”) and issued a “Request for Proposals” (“RFP” or the “Solicitation”) with the same set aside, on April 1, 2014. Petitioner’s Exhibit K.

19. The Solicitation sought DFA Services for ten (10) dining facilities at Fort Stewart and two (2) dining facilities at Hunter Army Airfield. The solicitation also included partial services at another location (not a DFAC) to provide DFA services for meals provided to deploying soldiers at Hunter Army Airfield.

20. The Solicitation was not issued pursuant to or in accordance with the R-S Act.

21. Ten (10) proposals were received in response to the Solicitation, and the DFA Contract at issue here was awarded on March 16, 2015 as a fixed price requirements contract to RC Tech, Inc. (the “Contractor”) with a six (6) month base period valued at \$1,561,751.00 and two (2) option years with a total estimated contract value of \$7,961,431.00.

22. The Solicitation required the contractor to provide DFA services, including janitorial and custodial services, at the dining facilities located in the twelve (12) DFACs and one (1) additional non-DFAC facility at Fort Stewart and Hunter Army Airfield, Georgia.

23. Under the Solicitation, military personnel were responsible for operating the twelve (12) dining facilities at Fort Stewart and Hunter Army

Airfield, Georgia, and charged with responsibility and accountability for the overall operation of the dining facilities.

24. As such, military personnel were required to perform multiple tasks in the dining facilities, including selecting the menus, preparing and cooking the food, ordering supplies, maintaining quality control of all food prepared and served, maintaining equipment, conducting headcounts of soldiers served, and accounting for cash received.

25. The Contractor, RC Tech, Inc, is required to provide custodial and janitorial services at all the DFACs under the DFA Contract, including but not limited to sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning, and related quality control. (See Petitioner's Exhibit F, Final Performance Work Statement, Section C.2.2).

26. On March 25, 2014, Ms. Gandy wrote to the Ft. Stewart Directorate of Contracting expressing disappointment that the Army intended to solicit bids under the "SDVOSB" preference, and not under the R-S Act. Petitioner's Exhibit L.

27. Ms. Gandy wrote that under the R-S Act, an agency can accommodate a lower-level priority along with the R-S Act priority through "cascading preferences", citing to *Matter of Intermark*, B-290925, 2002 WL 31399028 (Comp. Gen. 2002). Where the SLA responds, and its bid is within the competitive range, it is granted the bid. If the SLA's bid is not within the competitive range, the lower-level priority applies. Petitioner's Exhibit L.

28. On April 2, 2014, Contracting Officer James Frye, Fort Stewart Directorate of Contracting, advised Ms. Gandy that the Army had determined that the R-S Act priority did not apply to the Solicitation at issue.

29. On May 20, 2014, the Petitioner mailed a letter to DOE seeking arbitration.

30. On June 20, 2014, DOE, RSA issued a letter ordering that an arbitration panel be appointed and a hearing held.

31. On December 19, 2014, President Obama signed into law the “2015 National Defense Authorization Act” (“NDAA FY 2015”), Public Law 113-291. Section 632 of the NDAA FY 2015 amended 10 U.S.C. § 2492 to add food services to the authority of non-appropriated fund instrumentalities to enter into contracts with other federal agencies and instrumentalities to provide and obtain certain goods and services.

32. The NDAA FY 2015 contains a “Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2015” (hereinafter the “Explanatory Statement”) which directed the Secretary of Defense to prescribe implementing regulations for the application of the JWOD Act and the R-S Act to military dining facilities. As of this date no regulations have been adopted pursuant to the Explanatory Statement.

## **DISCUSSION AND ANALYSIS**

For years the Army has drawn a distinction between “full food service” contracts (“FFS Contracts”) and “dining facility attendant” contracts (“DFA

Contracts”), consistently maintaining (as it does in this case) that the R-S Act applies only to FFS Contracts while DFA Contracts (and subcontracts) are covered by the JWOD Act, with no R-S Act priority required. The problem with this distinction is that Congress has never seen fit to make it law and DOE has not put it in any R-S Act Regulations (which have not been amended since 1977).

The result has been a persistent lack of clarity through which lawyers, judges, arbitrators and contracting officials have searched for an answer that has proven to be elusive. To date there has been no definitive answer.<sup>1</sup> But this panel has accepted the assignment to resolve this dispute, so answer it we must. The first place to look for guidance is the R-S Act itself.

### **1. The Randolph Sheppard Act.**

Section 107(a) of the R-S Act provides that “blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any federal property.” 20 USC § 107(a). Section 107(b) provides that “[i]n authorizing the operation of vending facilities on federal property, priority shall be given to blind persons licensed by a State agency...”. 20 USC § 107(b). The R-S Act defines the term “vending facility” to include “cafeterias.” 20 USC § 107e(7).

Unfortunately, the terms “operate” and “operation” are not defined in the R-S Act or in the implementing Regulations. Nor are there any modifiers or qualifiers

---

<sup>1</sup> Judge Hewitt wrote, “[t]here is, given the state of DOE guidance and the fact that DOD is entitled to make determinations on a case-by-case basis, no legally required answer to the question of whether a DFA services contract, at least as to a contract like the one here, ... is covered by [R-S Act] or not.” *Washington State Dep’t of Services for the Blind et al. v. United States*, 58 Fed. Cl. 781, 796, Par. 101 (2003).

appended to those terms by the R-S Act. *See* R-S Act, § 107(a): “licensed blind persons are authorized to *operate* vending facilities”; R-S Act, § 107(b): “in authorizing *the operation* of vending facilities ... priority ... given to blind persons”; and R-S Act, § 107d-3(e): “[DOE]... to establish a priority for *the operation* of cafeterias on federal property.” (emphasis supplied in all quotations).

## **2. The DOE Regulations.**

In the absence of any definitive guidance from the R-S Act itself, the panel has turned to other sources. One such source is found in the DOE Regulations at 34 CFR §§ 395.1-395.38. Although somewhat helpful, the Regulations also fall short of answering the central question here.

34 CFR § 395.33(a) is straightforward and appears to generally follow the language in the R-S Act. It provides that:

“Priority in the operation of cafeterias by blind vendors on federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the [proper federal official] that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, ...”.

That is a very broad, almost unlimited mandate. If after consultation with the proper federal official, the Secretary determines that a cafeteria can be operated by a blind vendor “at a reasonable cost, with food of a high quality comparable to that [being] provided employees...,” then the R-S Act priority “shall be afforded.”

Once the Secretary makes the required determination, then the R-S Act priority must be applied. Section 395.33(b) provides complementary direction as to how the determination required by subsection (a) is to be made:

“In order to establish the ability of blind vendors to operate a cafeteria in such manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeterias, the appropriate [SLA] shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by a [proper federal official].”

Note that before anyone makes any determination about the ability of the blind vendor to operate the cafeteria, the relevant SLA must be invited to respond to solicitations whenever a cafeteria contract is even contemplated to be placed on federal property.

The Army is correct that sections 395.33(a) and (b) do not use the phrase “related to” the operation of a cafeteria; instead they use the undefined language found in the R-S Act: “the operation of cafeterias” in subsection (a); “such operation” (used twice) in subsection (a); and “to operate a cafeteria” in subsection (b). In addition, the Army correctly points out that subsections (a) and (b) both refer to “food”: “food of a high quality” and “provide food service.”

### 3. 34 CFR § 395.33(c).

But the answer to this interpretive dilemma is not found in subsections (a) or (b); the closest we come to an answer is found in subsection (c) of Section 395.33, and that subsection is the focus of both parties' arguments. Unfortunately, subsection (c) is not clear at all. The operative language was written in a single sentence, which has made subsection (c) a model of obscurity. Before delving into and parsing the wording in subsection (c), the sentence should be quoted in its entirety for ease of reference:

“All contracts or other existing arrangements pertaining to the operation of cafeterias on federal property not covered by contract with, or by permits issued to, state licensing agencies shall be renegotiated subsequent to the effective date of this part on or before the expiration of such contracts or other arrangements pursuant to the provisions of this section.”

34 CFR § 395.33(c).

What this appears to state is that, upon the effective date of the (1977) R-S Act Regulations, those contracts and arrangements “pertaining to the operation of cafeterias on federal property” not involving state licensing agencies<sup>2</sup> had to be renegotiated so as to bring them under the R-S Act where they should have been.

---

<sup>2</sup> The phrase “not covered by contract with, or permits issued to, state licensing agencies” simply describes those contracts and arrangements that were not entered into under the R-S Act, but should have been. The requirement to renegotiate them was a means of bringing them under the R-S Act where they belonged.

This was a recognition by DOE that “[a]ll contracts or other existing arrangements pertaining to the operation of cafeterias on federal property” either were or should have been covered under the R-S Act.

It is also helpful to break down the sentence that begins subsection (c). The “subject” of the sentence (a compound subject) is “[a]ll contracts or other existing arrangements.” That group is then narrowed down to a smaller subset: those “pertaining to the operation of cafeterias on Federal property.” And that group is defined further to a smaller subset: those “not covered by contract with, or by permits issued to, State licensing agencies.” The command for that subset is that they “shall be renegotiated.” The parameters within which the renegotiations must take place are “the provisions of this section,” i.e. Section 395.33.

And finally, the time period covered by the command to renegotiate begins “subsequent to the effective date of this Part” and ends “on or before the expiration of such contracts or other arrangements.” The Army vigorously asserts that subsection (c) is limited to a single defined period of time that began with the effective date of Section 395.33 and ended when the covered contracts or arrangements expired or were renegotiated.<sup>3</sup> The contracts and arrangements covered are those “existing” on the effective date of Section 395.33. The Army’s

---

<sup>3</sup> The Army asserts that “upon the expiration of existing contracts after [the] regulations have become effective ... negotiations will be under taken.” That is not accurate. Section 395.33(c) requires negotiations to begin “subsequent to the effective date of this part,” and completed “on or before the expiration” of the contracts, not afterward. Were it otherwise, there would be no deadline for renegotiating the contracts, and they could go on for months or even years.

interpretation is one possible reading of Section 395.33(c),but it is nowhere near as clear as the Army asserts.

Because, notwithstanding the limiting language, subsection (c) opens up the universe of contracts and arrangements covered by the R-S Act to those “pertaining to the operation of cafeterias on Federal property.” Subsection (c) does not limit contracts and arrangements to those calling for the overall “operation” of a cafeteria, it includes those that “pertain[ ] to the operation of cafeterias.” The latter grouping is obviously broader than the former.

And thus we arrive at the paramount question, central to the resolution of this arbitration. In fact, it is hard to overstate the significance of this question, which is: once Section 395.33 opened up the scope of subsection (c) (and therefore the R-S Act) to the broader set of contracts and arrangements, did the same regulations then shut down those opportunities once the expanded set of contracts and arrangements were renegotiated? The Army says yes. The Petitioner points out the illogical result of such a reading:

“Such application would have the illogical effect that in 1977, but only in 1977, blind vendors were entitled to a priority for all existing contracts ‘pertaining to the operation of cafeterias.’ If that were so, vendors receiving the renegotiated ‘pertaining to’ contracts that existed in 1977 would be thrown out of work once those contracts expired because they merely pertained to the operation of

cafeterias, but did not constitute ‘operation’ of a cafeteria under Section 395.33(a).”

Petitioner’s Post Hearing Brief, pp. 19-20.

The Petitioner is right, and the Panel cannot accept that DOE intended that result. Having opened up the scope of the R-S Act priority, which subsection (c) clearly did, was the intent really to make the opening a single temporary event and then shut that door as soon as the contracts and arrangements had been renegotiated once? Was the intent to thereafter limit the R-S Act priority to only those contracts calling for the entire overall operation of a cafeteria and exclude those that only pertained to such operations? If so, why? The scope of the R-S Act should be the same both before and after the renegotiations, should it not? Did DOE intend that the parties renegotiate a defined set of contracts and then once those expired, remove them from coverage under the R-S Act? That makes no sense.<sup>4</sup>

The panel is unable to accept that constrained reading of Section 395(c) and is persuaded by the Petitioner’s logic. We are thus drawn to the conclusion that DOE’s Regulations cover contracts and arrangements “pertaining to the operation of cafeterias on federal property.” The result, as argued by the SLA in *Washington*

---

<sup>4</sup> If Section 395.33(c) was only a single transactional requirement, why did the transition not go into effect until 1977, some 41 earlier after that adoption of the original R-S Act?

*State*<sup>5</sup> is that “[t]he scope of contracts required to be renegotiated under [the R-S Act] is identical to the scope of contracts to which [the R-S Act] applies.”

This conclusion is crucial to the resolution of this case, since a contract that “pertains to the operation of a cafeteria” is much broader in scope than a contract limited to “the operation of a cafeteria.” In this case, the DFA services described in the Contract are supportive of and clearly “pertain to” the operation of any cafeteria.

In the DFA Contract, the term “DFA Service” is defined as:

“[t]hose activities that comprise janitorial and custodial functions within a dining facility including but not limited to sweeping, moping (sic), scrubbing, trash removal, dish-washing, waxing, stripping, buffing, window washing, pot and pan cleaning and related quality control.”

Petitioner’s Exhibit F.<sup>6</sup>

Obviously, these tasks “pertain to” the operation of a cafeteria, and the specific tasks required of the Contractor in Section C.5 of the Final PWF demonstrate that he is expected to work side by side and in tandem with the ongoing operation of the cafeteria, even during those times when meals are being served.

---

<sup>5</sup> *Washington State Dep’t of Services for the Blind et al. v. United States*, 58 Fed. Cl. 781, 790, Par. 62 (2003).

<sup>6</sup> Citations to the exhibits to Petitioner’s Prehearing Brief are used herein and identified as “Petitioner’s Exhibit \_\_\_\_\_” because the Petitioner helpfully organized all of those exhibits, indexed them, tabbed them, and attached them all in one place to the brief, making them easy to locate and reference.

The Contractor must “provide dinnerware, utensils, and trays to diners,” i.e. he must ensure that “clean and sanitized dinnerware, utensils and trays are made available to diners without delay 100% of the schedule (sic) meal serving period.” Petitioner’s Exhibit F, Section C.5.5. This means that he is required to participate in the serving of food during meal time by providing clean dinnerware, utensils and food trays throughout the meal serving process.

And that is not all the Contractor must do while meals are being served. He must also “clean spills on all serving lines and self-service areas during meal periods”, the cleaning to be done “within 5 minutes of [the] occurrence.” Petitioner’s Exhibit F, Section C.5.2. And he must also ensure that “each diner is afforded a clean area to eat without delay” while meals are being served, and that “appropriate condiments are available without delay” during meal times. Exhibit F, Section C.5.6.

He must also bus tables when diners neglect to return their trays to be cleaned (“clean spills and remove soiled dinnerware occasionally left by diners” and make sure that “spills cleaned and soiled trays [are] bussed within 5 minutes of occurrence”). Exhibit F, Section 5.6.3. That includes the requirement to “buss (sic) and replace tray carts during meal serving periods” so that “no diner is delayed from exiting the facility due to non-availability of space on a cart for a soiled tray.” Exhibit F, Section C.5.6.7.

These requirements demonstrate that the Contractor is integrally involved in and an active participant in food service during all scheduled meal times. In fact, as set up by the DFA Contract, the service of food cannot be accomplished without the active participation of the Contractor. In emphasis, it is noted that Section C.5.5 is entitled “Food Serving” and Section C.5.6 is entitled “Dining Room Service.”

In addition, the Final PWF requires an on-site Contract manager to supervise and be responsible for carrying out the contracted work. The Contract manager is required to have five years of experience, “consisting of three years supervisory experience in managing cafeteria style or multi-entrée operations, providing meal service (breakfast, lunch and dinner).” Exhibit F, p. 2. The PWS also provides that “[m]ilitary food service experience in the pay grade of E-8 or above may be credited as management experience for [the] position” of Contract manager.

While these requirements are not dispositive, they tend to demonstrate how closely related the management of a contract for the operation of a cafeteria is to management of the DFA Contract here – so much so that experience managing “cafeteria style or multi-entrée operations providing breakfast, lunch and dinner” is singled out as qualifying experience for managing the DFA Contract in this case.

A similarly expansive reading has been applied to Section 395.33(b), which provides a non-exclusive list of criteria for judging responses from contract offerors, such as “sanitation practices, personnel, staffing, menu pricing and portion sizes,

menu variety, [and] budget and accounting practices.” 34 CFR § 395.33(b). The Federal Court of Claims has found that “[i]t is not clear from the text [of Section 395.33(b)] whether the regulation contemplates one contract that includes all of the listed tasks or whether it contemplates multiple contracts for the various tasks listed.” *Washington State Dep’t of Services for the Blind et al. v. United States*, 58 Fed. Cl. 781, 792, Par. 71 (2003). Since the Court found that the Regulations can be read to include multiple contracts, that lends support to Petitioner’s contention that there can be more than one prime contractor, and therefore more than one “operator” under the R-S Act.

The Army contends that Petitioner’s reading of Section 395.33(c) is so overbroad and expansive that it could “theoretically expand the [R-S Act] to include trucking contracts that deliver the food ...”, “painting contracts for the dining facility building”, contracts covering grounds maintenance, contracts for “the repair of the heating or cooling systems for the building”, and even “utility contracts” that provide for “electricity, water and sewer services for the building,” adding that “the list goes on.” Army Brief, pp. 7-8.

In response to this argument, it is noted that the contract examples cited by the Army might have some minimal connection to cafeterias in general, but the contracts covered by Section 395.33(c) are limited to those “pertaining to the *operation* of cafeterias,” i.e., integrally involved in the day to day operation of cafeterias, not every contract that in some slight way has some tenuous connection to cafeterias.

We agree with the majority opinion in the *Commonwealth of Kentucky* arbitration decision that delivery trucking, painting, grounds maintenance, and HVAC repairs “are sporadic and only incidental to operating a dining facility.” *Commonwealth of Kentucky v. United States Dep’t of the Army* (Petitioner’s Exhibit A), at pp. 24-25. In contrast, cleaning and washing dishes, pots, pans, utensils and tables (and actively participating in the service of food, see pages 16 through 18, *infra*), are integral to, and an inseparable part of, the operation of a cafeteria, in that without such tasks being performed on a regular basis, multiple times per day, the cafeteria could not function or operate.

This is consistent with a decision of the U.S. Comptroller General cited by Petitioner concluding that “sanitation, housekeeping, grounds maintenance around the dining halls, and food service equipment maintenance,” although “not food dispensing tasks per se” were nevertheless “directly related to providing cafeteria services” and were therefore covered by the R-S Act. *Dep’t of the Air Force – Reconsideration*, 72 Comp. Gen. 241, 246 (1993).

As stated by the Comptroller General, “to the extent that such services are necessary to assure a clean environment for preparing and serving food, they clearly are related to operating a cafeteria facility.” *Dep’t of the Air Force – Reconsideration*, 72 Comp. Gen. 241, 246 (1993). It is in that sense that Section 395.33(c) uses the phrase “pertaining to” – not every farfetched possibility of a connection to a cafeteria.

That is the same conclusion drawn here, and we agree with the Comptroller General that “[w]e see no reason why a contract containing services related to cafeteria operation would be excluded from the [Randolph-Sheppard] Act.” *Dep’t of the Air Force – Reconsideration*, 72 Comp. Gen. 241, 246 (1993).

#### **4. The Court of Claims Decisions.**

The Army cites two Court of Claims decisions, *Washington State Dept. of Services for the Blind v. United States*, 58 Fed. Cl. 781 (2003) and *Mississippi Dept. of Rehabilitative Services v. United States*, 61 Fed. Cl. 20 (2004). Since these cases were decided before Congress adopted the John Warner Act (discussed in Part 5 below), they have marginal persuasive force.

The Army asserts that those decisions “did an exhaustive analysis of the [R-S Act]” and held that the R-S Act “does not apply to [DFA] contracts because such contracts are for ancillary cleaning and janitorial services and do not require the contractor to operate the military dining facility.” Army Brief, pp. 2-3 (emphasis in original). Neither case made such a holding.

*Washington State* involved an appeal from a contracting officer’s decision (a “bid protest” case) and thus Petitioner correctly points out that the standard of review there was quite different from the instant case. In bid protest cases, the agency’s procurement decision is to be upheld unless shown to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Washington State* at p. 784, Par. 26.

Under that standard of review, “the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.” *Washington State*, Id.. The bid protestor “must show that an agency’s actions were without a reasonable basis or violated an applicable procurement statute or regulation.” *Washington State*, Id.. Under that standard, it is entirely possible that the contracting officer’s decision would have been upheld by the Court no matter which way it went.<sup>7</sup>

The Army places strong emphasis on the words “or otherwise not in accordance with law” – but neither court actually found the bid or contract at issue to be legal or illegal. In fact, the *Washington State* Court declined to answer that very question, stating that there was “no legally required answer” to it. *Washington State*, at p. 796, Par. 101.<sup>8</sup> Thus avoiding the legal issue, the Court decided that the contracting officer did not abuse his discretion. That is not a definitive holding one way or another on the issue faced by the panel in this arbitration.

Indeed, the *Washington State* Court noted that “even final agency decisions of DOE arbitration panels on the applicability of [R-S Act] to DFA contracts are in apparent conflict,” *Washington State* at p. 796, Par. 37, and construed the language

---

<sup>7</sup> This Panel does not have the luxury of avoiding the legal question confronted here by washing its hands of it and finding that the Contracting Officer “did not abuse his discretion.” See the discussion under heading number 6, “The Contracting Officer’s Discretion.”

<sup>8</sup> The *Washington State* Court said: “There is, given the state of DOE guidance and the fact that DOD is entitled to make decisions on a case-by-case basis, no legally required answer to the question of whether a DFA services contract, at least as to a contract like the one at issue here, ... is covered by [the R-S Act] or not.” *Washington State*, Par. 101.

in the R-S Act “to leave open the question of whether, to bring the operation of a cafeteria under [the R-S Act], an operator of a cafeteria must personally provide the food or whether it is sufficient that high quality food is provided on the premises, even if not by the operator directly.” *Washington State* at p. 791, Par. 67.

The *Washington State* Court was “not persuaded” that the language in the R-S Act and implementing Regulations”... compels either the restrictive interpretation urged by defendant – that blind vendors are afforded a priority for the operation of a cafeteria only if they can provide food at a reasonable cost and high quality,” ... “or the restrictive [expansive?] interpretation urged by plaintiffs – that no food need be provided by the R-S Act operator provided the contract pertains in some way to cafeteria operations.” *Washington State* at p. 791, Par. 69. That describes the very issue that this panel is called on to decide, so we cannot escape choosing between those two extremes.

Ultimately the *Washington State* Court decided that the statutory and regulatory language could be interpreted either way, finding that “the terms ‘to operate vending facilities’ and ‘operation of cafeterias’ in the R-S Act are capable of being understood by reasonably well informed persons in either of two or more senses,” and turned to other sources of guidance: the legislative history of the R-S Act, the policy pronouncements from DOE, and other adjudicatory decisions. *Washington State*, p. 791, Par. 72.

We agree with the *Washington State* Court and defer to the DOE policy that each case in this arena must be determined on a case by case basis, and that there

is “no legally required answer to the [general] question of whether a DFA services contract ... is covered by [the R-S Act] or not.” But that is a far cry from the Army’s statement that the *Washington State* Court “held that the [R-S Act] does not apply to DSA contracts.” Army Post Hearing Brief, p. 2 (emphasis in original). That is not what the Court held in *Washington State*.

A similarly overbroad interpretation underlies the Army’s assertion that the Court of Claims “did an exhaustive analysis of the [R-S Act] and held that the [R-S Act] does not apply to [DFA] contracts,” citing *Mississippi Dept. of Rehabilitative Services v. United States*, 61 Fed. Cl. 20 (2004). Army Post Hearing Brief, p. 2 (emphasis in original). Again, that is not what the Court “held.” The *Mississippi Dep’t* case confronted an argument from the Navy that the R-S Act did not apply to a solicitation calling for the contractor to perform quite a number of food service functions, because, the Navy urged, “DOD facilities and personnel continue to have the most important role in the overall day to day operation of this dining facility.” *Mississippi Dep’t*. at p. 24, Par. 28.

The Court declined to decide who “had the most important role in the operation of the dining facility,” and found that the contractor had been assigned so many responsibilities (including the “day to day management of the cafeteria”)<sup>9</sup> that it had to “be considered the facility’s ‘operator,’” and thus entitled to priority under the R-S Act. Therefore the Court found that “the request for proposals is for a

---

<sup>9</sup> In addition to day to day management, the contractor in *Mississippi Dep’t* was required to perform “food preparation, cooking, baking, and serving; cashier service; sanitation and housekeeping; and administrative work governing contracted functions.” *Mississippi Dep’t* at p. 28, Par. 69.

contract ‘to operate’ a food facility within the meaning of the [R-S Act],” and that the Navy “violated the [R-S Act] in failing to apply it to the NAS Meridian solicitation.”

The *Mississippi Dep’t* Court accurately described the holding in the *Washington State* case, that there the Court “upheld the determination that the contract for ‘dining facility attendants’ – essentially busboy clean-up work like the *Alaska* contract – was not for the ‘operation’ of the facility.” *Id.* at p. 28. The *Mississippi Dep’t*. Court also noted, as we have, that the *Washington State* Court “applied the ‘arbitrary and capricious’ standard’ rather than a *de novo* review.” *Id.* at p. 28. In contrast, this panel must conduct a *de novo* review of the legal issue presented.

The *Mississippi Dep’t* Court added a parenthetical statement that was not necessary for reaching its decision and was therefore *obiter dictum*: “[w]e may conclude that courts have not applied the [R-S Act] in cases where the contract is merely for busboy and other cleanup services.” *Mississippi Dep’t.*, *Id.* at p. 28, Par. 66. Yet the Court added that “these cases have not clearly addressed the issue of what constitutes the ‘operation’ of a cafeteria when the RFP at issue contracts out some, but not all, of those duties we would ordinarily ascribe to the ‘operation’ of a cafeteria.” *Mississippi Dep’t.*, at p. 28, Par. 66. That is true, and the *Mississippi Dep’t* case is helpful, but it does not “hold” that all DFA contracts fall outside the coverage of the R-S Act as a matter of law.

## 5. The John Warner Act.

On October 17, 2006, Congress adopted the John Warner National Defense Authorization Act for Fiscal Year 2007<sup>10</sup> (the “JWA”), which provided a partial parsing of military food service contracts in the form of a “no poaching” proviso to protect contracts in existence on that date pertaining to military dining facilities.

Section 856(a)(1) of the JWA removed a carefully described set of “services” from R-S Act coverage: those “full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under Section 2 of the [JWOD Act].” Petitioner is correct that this was (and is) an implicit acknowledgement by Congress that the R-S Act *does* apply to such services if they were *not* on the procurement list as of that date.

At the same time, Section 856(a)(2)(A) of the JWA provided that the JWOD Act “does not apply at the prime contract level to any contract entered into by the DOD as of the date of the enactment of this Act with [an] SLA under the [R-S Act] for the operation of a military dining facility.”

Here Congress explicitly recognized that there were existing prime contracts involving SLAs (and therefore necessarily entered into under the R-S Act) that would not be taken away from the SLA or poached by a JWOD contractor. This was a second implicit acknowledgement by Congress that those existing contracts had been covered under the R-S Act and so the SLAs were entitled to keep them. These

---

<sup>10</sup> Public Law 109-364, 109th Congress.

two provisos set up the so called “no poaching” proviso that lies at the heart of the JWA.

As a part of the no poaching solution, the JWA also specified coverage of the JWOD to services for military dining facilities on the subcontract level: Section 856(a)(2)(B) provides that the JWOD Act “shall apply to any subcontract entered into by a DOD contractor for full food services, mess attendant services, and other services supporting the operation of a military dining facility.” Notably this proviso is not limited by date.

Section 856(b)(1) of the JWA also required the Comptroller General to “conduct a review of a representative sample of food service contracts described in Section 856(b)(2).”

Section 856(b)(2) provides that “a food service contract described in this paragraph” is a contract “for full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility” adding “that was awarded under either the [R-S Act] or the JWOD Act and is in effect on” October 17, 2006.

The JWA thus acknowledged that “food service contracts” had been awarded under both the R-S Act and the JWOD Act and thus were necessarily covered by both. If both the R-S Act and the JWOD Act covered “food service contracts” for military dining facilities on the date of adoption of the JWA, and if the JWA only divided or restricted such contracts as of the date of its enactment, then it must follow that future competition for contracts not described in the JWA would remain

subject to both acts, since the JWA did not address future competition outside the no poaching provisos.

It follows that “food service contracts” (defined to include contracts “for full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility”) have been and are now covered by the R-S Act (and presumably by the JWOD as well). This means that future contracts covered by both acts will be subject to the “cascading preferences” described in *Matter of Intermark*, B-290925, 2002 WL 31399028 (Comp. Gen. 2002). But Congress left no doubt that the “food service contracts” defined above were covered by the R-S Act.

The JWA is silent as to whether military dining facility contracts could be added to future procurement lists, and presumably they can, but subject to the R-S Act preference. The JWA did not explicitly address whether future “food service contracts” (defined to include contracts “for full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility”) will in the future be subject to the R-S Act, but by the necessary implication noted above, Congress has decided that they will be.

We conclude that through the JWA, Congress acknowledged and reaffirmed that the R-S Act had covered and would continue to cover contracts “for full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility”. The result is that the Contract at issue in this arbitration is also subject to the R-S Act, and any other preferences used by the Army are subject to the R-8 Act priority..

## **6. The Contracting Officer's Discretion.**

The Army states that “Contracting Officers have wide discretion under federal procurement regulations to apply and interpret procurement regulations.” And “ultimately the decision regarding whether the [R-S Act] applies to a particular procurement is made by the contracting officer for the procuring activity, not the Secretary of Education.” Thus, the Army concludes, “the Contracting Officer had the authority and discretion to determine that the R-S Act did not apply to Solicitation Number W91248-12-R-0015.” Respondent’s Brief, pp. 15-16.

It is absolutely true that a Contracting Officer has broad discretion to interpret and apply procurement regulations; but it is also true that he is bound by the laws and regulations that govern his contracting authority, including the R-S Act. As the Army states on page 2 of its Brief,

“The Army asserts that the primary issue before this panel remains a question of law, that is, whether the Army violated the [R-8 Act] by issuing a solicitation and awarding the subsequent contract to a SDVOSBC vendor where the vendor does not provide any food services or operate the dining facility.”

The Army is correct, and we are faced with a question of law within the conventional expertise of the courts (and arbitration panels), not only contracting officials. The question presented here is not whether the Contracting Officer “abused his discretion” in choosing between two equally legal and allowable choices; the question we must decide was aptly phrased in the statement of the issues

presented to the Panel in this arbitration, which is “[d]id the Army violate the [R-S Act] and its implementing regulations by failing or refusing to apply the [R-S Act] priority to the contract at issue in this arbitration?”

The Army essentially concedes that this is a matter of law, not a discretionary choice to be made by a contracting official, in summing up its argument: “[c]learly, the Fort Stewart Contracting Officer had the authority to determine whether the [R-S Act] applied to DFA solicitation and contract in question,” and candidly stating that “[t]he issue for this panel to determine is whether the Contracting Officer’s determination that the [R-S Act] did not apply to the DFA solicitation and contract was in violation of the law.” Respondent’s Brief, p. 16. We agree, and acknowledge that federal contracting officers have very broad discretion – but they are bound by law.

### **7. R-S Act – General Requirements.**

In addition, the Army has bypassed and avoided more general requirements found in the R-S Act and its Regulations. First, R-S Act Section 107(b) directs DOE to “prescribe regulations designed to assure that” the R-S Act priority is given to blind persons licensed under the R-S Act; and that “wherever feasible, one or more vending facilities are established on all Federal property to the extent that [they] would not adversely affect the interests of the United States.” 20 USC § 107(b)(1) and (2).

There is no argument made here that the R-S Act priority would not be feasible, or that it would “adversely affect the interests of the United States.” The

R-S Act also provides that there shall be a “priority for the operation of cafeterias on federal property by blind licensees ...”. 20 USC § 107d-3(e). DOE Regulations require that Federal property managers shall “provide maximum employment opportunities to blind vendors to the greatest extent possible,” 34 CFR § 395.33(a), and to that end require that SLAs (such as the SLA in this case), must be “invited to respond to solicitations for offers when a cafeteria contract is contemplated.” 34 CFR § 395.33(b).

In this case, regarding these requirements, the Army has gone in the opposite direction. It has plainly tried to avoid application of the R-S Act to the Contract here. Of course if the Army had been successful in this attempt, there would be no problem, since the Army would have removed itself from the relevant provisions of the R-S Act and Regulations, and could not be deemed to have violated them if it wasn't covered by them. If the Contract here was successfully removed from R-S Act coverage, then we would be forced to find in favor of the Army, no matter how the Army accomplished that feat. In other words, if the Fort Stewart Contract were not covered by the R-S Act, then it would not matter what the general requirements of the R-S Act are. The problem for the Army is that in the preceding discussion, we have found that the R-S Act and its Regulations do apply.

## 8. The 2015 “Joint Explanatory Statement.”

The Army points to a document entitled “Joint Explanatory Statement” (“2015 JES”) that accompanied NDAA FY 2015 (Respondent’s Post Arbitration Brief, Exhibit 11), and says that this at last provides clarity that the R-S Act applies to contracts for the operation of military dining facilities, while the JWOD Act applies to contracts and subcontracts for dining support services, such as DFA contracts.

Petitioner counters this argument with the point that NDAA FY 2015 did not amend the R-S Act or the JWOD Act, only 10 USC § 2492, which addresses NFI contracts, and has nothing to do with either the R-S Act or the JWOD Act. Thus, Petitioner contends, to the extent that the Army relies on the 2015 JES to support its case, that document is *ultra vires* and of no effect. The Panel does not need to go so far as to declare that the 2015 JES is “*ultra vires* and void” (though it might be) because there are a number of other problems that crop up in relying on the so-called 2015 JES.

First of all, the 2015 JES is limited in the same way that the 2006 Joint Report to Congress was limited, as demonstrated in the Memorandum from DOD directing that it “should not be cited in individual solicitations until it is implemented in complementary regulations by the ED and the DOD.” Memorandum from Director, Defense Procurement and Acquisition Policy, Petitioner’s Prehearing Brief, Exhibit S; *and see Moore’s Cafeteria Services v. United States*, 77 Fed. Cl. 180, 186 (2007), *affirmed*, 314 F. App’x 277 (Fed. Cir.

2008). Similarly, the 2015 JES calls upon the Secretary of Defense to “prescribe implementing regulations for the application of the two acts [the R-S Act and the JWOD Act] to military dining facilities,” Respondent’s Exhibit 11, p. 00866, and no regulations have yet been adopted or published.

Furthermore, the published official enrolled House version of the “Carl Levin and Howard P. ‘Buck’ McKean [NDAA] for Fiscal Year 2015” includes a note from the Director of Legislative Operations explaining that “[t]his Act and the material found in this committee print are the product of an agreement between the Chairman and Ranking Member of the House Committee on Armed Services and the Chairman and Ranking Member of the Senate Committee on Armed Services.”

The Director’s memo explains that “[t]he Senate did not bring S. 2410 to the Senate Floor for further consideration and therefore was unable to initiate a formal conference with the House.” Thus the two individual representatives named above “agreed to reconcile the provisions of H.R. 4435 and S. 2410” themselves, and no “formal conference committee” was ever convened. As a result, the NDAA FY 2015 states that “there is no conference report and no formal ‘joint explanatory statement’ of the conference committee.” Yet those are the traditional and common means of publishing a joint explanatory statement to accompany legislation.

Instead, the respective chairmen of the House and Senate Committees, *by themselves*, without a vote of any conference committee and without a vote of either chamber of the Congress, published the document cited above as the “Joint Explanatory Statement to Accompany the [NDAA] for Fiscal Year 2015,” and the

two (really unreconciled by Congress) versions of the NDAA FY 2015. To patch up this potential flaw, the two Chairmen just added language that the “explanatory statement” would “have the same effect with respect to the implementation of this Act as if it were a joint explanatory statement of a committee of conference.”

But the fact remains that the document agreed to by the two committee chairmen was *not* a “joint explanatory statement of a committee on conference” at all, no matter what kind of label was affixed to it; which calls into question not only its effectiveness and persuasiveness, but even its legal status. Can a document that is quite clearly not a product of a committee on conference be converted into such a thing by simply naming it that? Such a conclusion would exalt labels over substance.

The upshot is that the legal effect and the persuasiveness of the so called “explanatory statement” is doubtful, and the panel is reluctant to conclude that a hotly disputed issue like the one before us, which has been allowed by Congress to fester unresolved for many years, can be resolved in such an unorthodox and nonpublic way, by two committee chairmen, without a vote of any committee or a vote by either chamber of Congress.

The Petitioner is correct that the so called “Joint Explanatory Statement” accompanying the NDAA FY 2015 “was never voted on by Congress or even by a conference committee,” stating that therefore it “not only lacks the force of law,” but “also falls short of providing legislative history that any adjudicator could rely on to

reinterpret the [R-S Act]” as the Army contends. Post-hearing Brief of Petitioner, p. 25.

Petitioner adds that the 2015 JES, such as it is, does not accompany any amendment to the R-S Act or the JWOD Act; instead it accompanied “a small amendment to section 2492 of title 10 of the U.S. Code” relating only to intergovernmental procurements. As explained by the Petitioner, even conventional joint explanatory statements (which does not include the 2015 document) “have no effect” and “are unpersuasive” when they go “well beyond” the statute they accompany to interpret a previous law. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 238 (D.C. Cir. 2003).

Thus while the document advanced by the Army as the 2015 JES does indeed finally make a clear statement as to how the R-S Act and the JWOD Act might be amended to implement the compromise idea that has been the Army’s fondest wish for decades, Congress has never voted on any language to make that idea law. Nor has DOE (or for that matter, DOD) enacted or amended any regulations to carry the idea into effect. The result is that the NDAA FY 2007 is the last legislative expression of how the two laws interact, and the NDAA FY 2015 is of little to no help in this case.

## **9. Remedy.**

The last issue concerns the remedy, or more accurately, whether this Panel has any authority to order a remedy. The 11th Circuit Court of Appeals, which has jurisdiction over the State of Georgia, has issued a decision that is binding and

controlling: *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482 (11th Cir. 1990).

There the Court confronted the issue of whether a licensed vendor had an implied cause of action for damages under the R-S Act against the Georgia SLA. In a very thorough decision, Judge Tjoflat analyzed the “formal set of remedial procedures” found in Section 107d-1 of the R-S Act, and concluded that Section 107d-1 grants the state licensing agencies (and not the blind licensee) a right to take action when dissatisfied with action taken by a federal agency under the R-S Act. *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1484 (11th Cir. 1990).

But the Court found that an arbitration panel like this one “has no remedial powers whatsoever,” concluding that “[i]t may deter mine that certain of the federal entity’s acts violate the [R-S Act], but the [R-S Act] leaves responsibility for remedying the violation to the federal entity itself.” *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1492 (11th Cir. 1990).

The *Georgia Dep't of Human Resources* case was cited with approval by Judge Russell in his December 29, 2014 decision in *Commonwealth of Kentucky v. United States*, 122914 KYWDC, 5:12-CV-00132-TBR, where he noted that “the Eleventh Circuit has concluded that an arbitration panel considering such a conflict [as this one] may determine whether or not the federal entity has complied with the [R-S Act], but may not order a specific remedy.” Judge Russell agreed that “although the arbitration panel’s decision constitutes the [DOE]’s final agency action, the

Secretary of Education has no authority to order another federal entity to act one way or another.” *Commonwealth of Kentucky v. United States*, 122914 KYWDC, 5:12-CV-00132-TBR.

Finally, in *Maryland State Dep’t of Education v. U.S. Dep’t of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996), the Fourth Circuit Court of Appeals agreed that a Section 107d-1(b) panel lacks authority to award a specific remedy for a violation of the R-S Act. That Court acknowledged that a federal entity could “simply refuse” to remedy the violations found by an arbitration panel, which comes close to a wrong without a remedy, something usually disdained by the courts.

But the 11th Circuit addressed this anomaly: “[t]he Secretary of Education has no authority to order another federal entity ... to take or terminate any action” and “thus if Section 107d-2 did not directly mandate that a federal entity take or terminate action according to the panel’s decision, then the [R-S Act] would provide for no substantive remedy in subsection (b) cases.” *Georgia Dep’t of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1492 (11th Cir. 1990).

The 11th Circuit is right, in that Section 107d-2(C) provides that if the arbitration panel “finds that the acts or practices of [the federal entity] are in violation of this chapter, or any regulation issued thereunder, the head of any such [federal entity] shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.” 20 USC§ 107(b)(2)(C).

Oddly, the Fourth Circuit found that a remedy existed since the SLA could “file another complaint with the Secretary of Education, initiating a second arbitration panel to determine whether the federal entity’s acts in response to the first decision bring it into compliance with the Act.” *Maryland State Dep’t of Education v. U.S. Dep’t of Veterans Affairs*, 98 F.3d 165, 171 (4th Cir. 1996).

This is somewhat confusing, since the Fourth Circuit had already found that an arbitration panel lacks authority to enforce its own decisions. Thus it seems that the Fourth Circuit has relegated the SLA into an endless loop of arbitrations, if the federal entity continues to “simply refuse” to comply with each arbitration panel’s decision – which would appear to lead nowhere.

It is concluded that although this Panel may identify acts of the Army that are in violation of the R-S Act, it has no authority to order remedies for such violations. That responsibility lies with the head of the federal agency involved. With these constraints in mind, the Panel finds:

- a. The Fort Stewart DFA Contract pertains to the operation of a cafeteria and is therefore subject to the requirements of the Randolph Sheppard Act and the DOE Regulations; and
- b. The Army violated the Randolph Sheppard Act and the DOE Regulations by failing to apply the R-S Act priority for blind vendors to the Solicitation and Contract at issue in this arbitration.
- c. The Army violated the Randolph Sheppard Act and the DOE Regulations by failing to maximize opportunities for blind vendors; and

- d. The Army shall cause the acts or practices found by this panel to be in violation of the R-S Act and DOE Regulations to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.
- e. To that end, the Panel finds as a matter of law that the Army is obligated under the R-S Act and DOE Regulations (but not ordered by this panel) to resolicit the Fort Stewart DSA Contract and grant the Petitioner and its blind vendor the priority afforded by the R-S Act in doing so.

This 11<sup>th</sup> Day of January 2016

/s  
Joe M. Harris, Jr. Chairman

/s  
Susan R. Gashel, Panel Member, who concurs in the result and has filed a concurring opinion, attached.

/s  
Steven Fuscher, Panel Member, who concurs in part and dissents in part and has filed a concurring and dissenting opinion, attached.

Susan Rockwood Gashel, concurring in the result.

I am fully in accord with the arbitration decision in this case. At the beginning of the Discussion and Analysis section of the Decision, at Pages 8 and 9, there is a discussion of the “persistent lack of clarity” because of the Army’s practice of drawing a non-existent distinction between “full food service” contracts and “dining facility attendant” contracts (FFS contracts and DFA contracts, respectively.) In my opinion, and as stated in section 5 of the Discussion and Analysis Section of the Decision, Congress made it definite, without question, and abundantly clear, when it enacted the John Warner Act, that the Randolph-Sheppard Act applies to DFA contracts.

Unfortunately, the United States Department of Defense (DoD) has engaged in a scorched earth campaign to prevent blind licensees from operating DFA contracts. It is time for that scorched earth campaign to end. See Minnesota Dep’t of Econ. Sec., State Servs. for the Blind & Visually Handicapped v. Riley, 107 F.3d 648, 650 (8th Cir. 1997). As indicated by Panel Member Fuscher’s statement, at page 7, DoD is intent on the adoption of recommendations made by the DoD’s inspector general in 2008. Congress has had ample opportunity to adopt those recommendations, and it has chosen not to, instead affirming the prior right of the blind to operate contracts pertaining to cafeterias in the John Warner Act. It is time for DoD to recognize, and implement, the R-S Act priority in all contracts pertaining to the operation of a cafeteria.

The R-S Act’s implementing regulations make it abundantly clear that each federal agency has an affirmative duty to “take all steps necessary to assure that, wherever feasible ... one or more vending facilities for operation by blind licensees shall be located on all Federal property provided that the location or operation of such facility or facilities would not adversely affect the interests of the United States.” 34 C.F.R. § 395.30(a). As is evident by the dissent of Mr. Fuscher, DoD is unrepentant and will continue to seek to flaunt its responsibilities to ensure that one or more vending facilities are established on all federal property.

With respect to the remedy, notwithstanding that the opinion in Georgia Dep’t of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990), binds this panel, without a remedy that rights the wrong, the Army will continue to refuse to implement the R-S Act’s priority, which is the law. A remedy other than to file another complaint for enforcement of the arbitration award is necessary. See the decision in Maryland State Dep’t of Education v. U.S. Dep’t of Veterans Affairs, 98 F.3d 165 (4th Cir 1996) that a state licensing agency can file another complaint to enforce an arbitration award. The result of the Maryland decision: the endless loop of arbitrations, as stated at page 38 of the Decision. This situation does not accord with Congressional intent.

When Congress enacted the arbitration provisions in 1977, it was “the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will

provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes.” Sen. Rep. 93-397 at 20.

The arbitration panel’s decision is “subject to appeal and review as a final agency action.” 20 U.S.C § 107d-2(a). The arbitration panel’s decision is also “final and binding on the parties except as otherwise provided in this chapter.” 20 U.S.C.A. § 107d-1. The only time a panel’s decision is not final and binding is when it is appealed. Obviously, unless DoD appeals a decision, it is final and binding. The statute provides that DoD “shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.” 20 U.S.C.§ 107d-2(b)(2). How can the panel’s decision be logically stated to be final and binding where an endless loop of arbitrations is the only way to enforce it? Obviously if DoD does not act promptly to carry out the decision of the panel, direct access to federal court is warranted.

Dated: January 11, 2016.

/s

Susan Rockwood Gashel

Statement of Panel Member Fuscher

Concurring in part and Dissenting in part

### **1. The Randolph Sheppard Act**

I concur with the majority that, to date, there is no “definitive answer” as to whether or not DFA service contracts are covered by the R-SA citing the *Washington State Dep’t of Services for the Blind et. All v. United States*, 58 Fed. Cl. 781, Para 101(2003). Id. at 8. While I concur with the majority that a contracting officer may develop a reasonable basis to determine that the R-SA applies to DFA services contracts, I do not concur that this is the only reasonable interpretation of the statute.<sup>1</sup> As the majority points out, “the result has been a persistent fog through which lawyers, judges, arbitrators and contracting officials search for an answer that has proven to be elusive.” Id. at 9.

### **2. The Findings of the Panel**

I do not concur with the panel’s findings that the Army violated the R-SA and the implementing regulations because the Army’s interpretation of the R-SA is reasonable and should be granted Chevron deference. The rationale for this opinion is located in the section that addresses the Chevron deference below. I concur with the panel’s conclusion that the panel has no authority to order remedies and that the agency has the responsibility for remedying a violation of the R-SA. Id. at 33. The procuring agency, not the

DoE, has the authority from Congress to obligate funds and the procurement agency has broad discretion in determining how those funds will be obligated. If the Secretary of the Department of Education objects to the action taken by the procuring agency, the Secretary can update its current regulations under the Administrative Procedures Act and/or request legislative to resolve the issue.

There is great merit to grant finality to the procuring agency's interpretation of the R-SA because that finality resolves the contracting officer's current dilemma regarding how to develop a procurement strategy that complies with the broad range of procurement statutes and procurement regulations that govern contracting officer award decisions. If the arbitration panel's order obligating the Army to resolicit can be enforced, there is no certainty regarding the award of any contract potentially subject to the R-SA. If the agency contracting officer makes an award decision based on a legal analysis that the R-SA does not apply to DFA services, the State has the right to demand an arbitration hearing. If the agency contracting officer makes an award decision based on a legal analysis that the R-SA does apply to DFA service contracts, potential offerors can protest the decision as evidenced by the *Washington State Dep't of Services for the Blind et. All v. United States* cited above.

The set aside of a procurement valued at several million dollars is closely watched by potential offerors, while the State initiated the protest in

the *Washington* case, there is nothing to prevent a potential contractor from filing a similar action. Allowing the procurement agency's determination to govern a specific procurement on a case-by-case basis ends the threat of endless rounds of arbitrations, protests and litigation.

### **3. Chevron Deference**

If a contracting officer uses the panel majority analysis to determine that the R-SA applies to DFA service contracts, it is my opinion that decision is within the broad discretion of the contracting officer and that decision would be supported by the courts. However, if a contracting officer's decision is that the R-SA does not apply to DFA service contracts, it is my opinion that decision falls with the broad powers of the contracting officer and the courts will not disturb that decision.

The contracting agency has reviewed the R-SA and determined that in this case it does not apply to DFA services to be contracted by the Army. In making that determination, the procurement was set aside for small business, including other disadvantaged small business contractors, who were given the opportunity to compete for award of these services. The contracting officer is charged by Army regulation to award contracts consistent with that interpretation. Therefore, the Army's interpretation of the statute is an agency decision that merits *Chevron* deference subject to the review standard set forth in the Administrative Procedure Act standard, 5 U.S.C. § 706, requiring an agency's findings to be upheld unless the

interpretation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A). *Mead*, 533 U.S. at 227, 121 S.Ct. 2164.

While the Department of Education does have the authority to issue regulations regarding the application of the R-SA to a specific set of contracts, the DoE has failed to update its regulations to remove the fog of confusion that surrounds the interpretation of the R-SA. In addition, the DoE has failed to incorporate those regulations into the Federal Acquisition Regulations and/or its supplements, which would provide authoritative guidance and direction to contracting officers making awards that are potentially subject to the R-SA. As a result, there is much confusion regarding the interpretation of the statute. This confusion is documented in great detail by the majority decision. However, the majority has given little deference to the Army interpretation of the statute as regards this particular procurement. In the *Washington* Case, Judge Hewitt acknowledges that the decision as to the application of the R-SA to a particular contract action is a case-by-case analysis and the court granted Chevron deference to the procuring agency’s interpretation of the statute. *Washington* at pg 10.

Consistent with the court’s rationale in the *Washington* case, absent clear regulatory guidance regarding the interpretation of the R-SA to DFA contracts, the Army’s interpretation of the application or non-application of R-SA to DFA contracts should be granted *Chevron* deference. This will avoid

the never ending loop of arbitrations described by the majority and allow contracting officers to make contract awards consistent with their agency guidelines and procurement regulations. The court in the *Washington Case* stated:

The Fort Campbell, Kentucky, and Fort Richardson, Alaska cases, both of which are final agency decisions, illustrate the difficulty of the DSB's argument. There is, given the state of DOE guidance and the fact that DOD is entitled to make determinations on a case-by-case basis, no legally-required answer to the question of whether a DFA services contract, at least as to a contract, like the one at issue here, which is similar to or narrower in scope than the Fort Richardson, Alaska contract, is covered by RSA or not.

Having considered the language of the statute and the regulations, the legislative history, the policy pronouncements by DOE and several decisions by arbitration panels convened in accordance with RSA, and in the absence of any other guidance by DOE, the court finds that the basis for defendant's interpretation of the term "operation of a cafeteria" is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Within the limited scope of this court's review, the court does not substitute its judgment for that of the agency, *see Bannum*, 56 Fed.Cl. at 457 ("A reviewing court cannot substitute its judgment for that of the agency ..."), and upholds the decision of an agency if there is a reasonable basis for the agency's action. *See MCS Mgmt., Inc. v. United States*, 48 Fed.Cl. 506, 510-11 (2001) ("[I]f the Court finds a reasonable basis for the agency's action, the Court should stay its hand ..."). *Washington* at 22.

As the above quote states, the United States Court of Federal Claims ruled that the agency's determination as to the application of the R-SA to a particular procurement is a case-by-case analysis and the agency decision is to be given *Chevron* deference. It is important to note that the court granted this deference to the procurement agency, DOD, rather than selecting a specific legal position. This decision supports the Army's position that the procuring agency has been given authority from Congress to obligate funds for specific purposes and is ultimately responsible for the use of those funds.

As the procurement agency, the Army has the authority to make a case-by-case analysis of a procurement to determine the application of the R-SA to a particular contract action within the review parameters of the Administrative Procedure Act. While the Army can consider the analysis and decision of the panel as to whether or not corrective action is appropriate, it is not bound to take action based on the decision of the panel.

Since the panel acknowledged that it has no authority to order remedies, the Army must make an internal assessment of the application of the R-SA and determine what remedial action, if any, is appropriate. The findings of the panel may be instructive, but are not binding on the agency. If the Army retains its current interpretation of the R-SA, the *Washington* case provides comfort for the agency that the court will not substitute its judgment for that of the agency.

#### **4. Authority of the Contracting Officer**

This arbitration action demonstrates the complexity of the government procurement process. The contracting officer is charged by Congress to balance the award of contracts across a broad range of socio-economic programs. If a contracting officer makes a procurement decision to apply the R-SA preference to a DFA services contract, the result is a sole source contract that prevents competition for these services by other socio-economic groups, such as women owned business, small businesses, veteran owned

business, minority owned businesses, etc. The result of that sole source award is a management opportunity for one blind vendor.

There is no obligation for the blind vendor to hire employees who are part of any socio-economic group. In fact, it is common practice for blind vendors to partner with a company that provides these dining hall services. The State Agency is awarded a prime contract. The State Agency then selects a blind vendor to manage the contract through a joint venture with a company that is responsive to the government's solicitation requirements.

While this award may satisfy one socio-economic policy, it excludes all other identified socio-economic groups from competing for these services. Thus, the decision of the panel that the R-SA preference applies to DFA services potentially has a significant negative impact on other socio-economic programs. By applying the R-SA preference to a particular procurement, that decision frustrates the competition for these services by other socio-economically deprived organizations. This is another justification to allow the contracting officer the authority and discretion to balance the numerous public policy directives passed by Congress while being a good steward of public funds.

The Inspector General of the Department of Defense studied the R-SA Program as it relates to government procurements and issued report #IE-2008-004 dated April 15, 2008. The report addresses the impact of the fog of interpretation currently impacting the R-SA program. The Report is titled:

*DoD Assessment of Contracting With DoD Assessment of Contracting With Blind Vendors and Employers of Persons Who Are Blind or Have Other Severe Disabilities.* The report's overall assessment was:

The Under Secretary of Defense for Acquisition, Technology, and Logistics [USD(AT&L)] should coordinate to establish a Defense Federal Acquisition Regulation Supplement rule to govern the R-SA contracting process and for the issue of appropriate procurement policy, regulations, and implementing procedures for R-SA contracting in military dining facilities. USD(AT&L) should coordinate to publish for public comment and interagency coordination appropriate policy and regulations to implement the joint policy agreed on and reported to Congress August 29, 2006, by the DoD, DoED, and Committee for Purchase. To resolve and clarify issues associated with contracting with employers of persons with disabilities, USD(AT&L) should forward a legislative change request to Congress. We made four recommendations for improvement in these areas. *Id* at pg 4.

The Inspector General's (IG) Report provided four specific recommendations that can be summarized as:

- 1- Promulgate DoD procurement policy, procedures and solicitation provisions
- 2- Require the collection of cost data to insure the cost of services is fair and reasonable
- 3- Coordinate and publish for comment procurement regulations that would govern these procurements; and
- 4- Clarify the statutory language through legislative action.<sup>ii</sup>

The endnote quotes the report's recommendations and the justification for those recommendations. While the IG's report identifies the need for a number of agency actions necessary to remove the fog from the interpretation of the R-SA, little has been done to address those concerns.

## Administrative Due Process

The majority is correct in attempting to bring clarity to the interpretation of the R-SA; however, the recognized method for bringing that clarity is through the process identified by the Inspector General's Report cited above. This issue has broad socio-economic policy implications and the public has a right to comment on the ultimate decision. Whether or not it is good public policy to set aside tens of millions of dollars of agency funds to provide a sole source opportunity for a select few is a public policy question that deserves public debate. In the meantime, the procurement agency's determination deserves to be given the deference granted by the *Washington* case. The confusion regarding the interpretation of the statute lies with DoE. Until DoE addresses the issue, the decision of the procuring contracting officer should stand.

Steven Fuscher, Panel Member

---

<sup>i</sup> The *Washington case* provides detailed analysis of the R-SA and the attempts by courts and arbitration panels to clarify its meaning. The application of the R-SA to DFA services contracts has been particularly difficult for all concerned. While the majority has determined that the R-SA does apply to the DFA service contracts, the dissent in the Fort Campbell arbitration case provides a competing rationale. See, In *Commonwealth of Kentucky Cabinet for Workforce Development Department for the Blind v. United States Department of Defense and Department of the Army*, Case No. R-S/11-06 (Feb 14, 2014).

<sup>ii</sup> The full text of the Inspector General's recommendations are: **Recommendation 1.** Promulgate DFARS policy, procedures, and guidance, as well as appropriate solicitation provisions, to govern DoD's contracting process for operation of a military dining facility under the R-SA. (Office of Primary Responsibility: OUSD[AT&L]).

**The Cost of Food Service and Military Dining Facilities.** During interviews for this report, the consensus among program managers and contracting officials was that application of the statutory JWOD mandate risks the possibility of monopolistic pricing. Program managers believe the law impedes competition of food service contracts. Analysis indicates costs vary from a low of \$2.14 per meal for a contract awarded to a small business

---

based on competition to a high of \$6.45 per meal for a JWOD contract. The JWOD Act stipulates that a JWOD vendor is a mandatory source for products and services on the Procurement List

The DoD total budget for food service contracting is \$3.245 billion dollars for FYs 2005-2009. R-SA prime contracts comprised 45 percent or \$1.4 billion of this total. JWOD prime contracts comprised 15 percent or \$493 million and Small Business comprised 12.9 percent or \$418 million. Large Business comprised 27.1 percent or \$882 million of the total. R-SA and JWOD food service contractors account for approximately 60 percent of the total value of all such contracts. Any inflation of costs for these types of contracts will cause a disproportionate increase in overall contract costs. Because there is currently no DFARS rule for R-SA, tracking the actual cost of R-SA contracts across DoD is problematic: There is no DFARS-required R-SA field in the Federal Procurement System Data System-Next Generation

**Recommendation 2.** Issue policy directing DoD contracting officers to obtain appropriate cost or pricing data and supporting information to determine whether any offer for a military dining facility solicitation presents a fair and reasonable price, as required by 10 U.S.C. 2306 and FAR Subpart 15.4. This policy should apply to contracts awarded through competitive procedures or without full and open competition. Coordinate to add an R-SA field to the Federal Procurement Data System-Next Generation to allow for reporting of R-SA contract actions. (Office of Primary Responsibility: OUSD[AT&L]).

**Requirements-Contracting for Best Value.** We identified three management concerns for complying with the requirement to operate military dining facilities in a cost-effective manner.

- Directed procurement requirements impede competition and the ability to implement cost avoidance solutions, such as Base Operation Support and Joint Basing initiatives.
- The introduction of an R-SA or JWOD offer into an otherwise competitive environment drives competitors from the field and effectively eliminates meaningful competition.
- R-SA contracts may cost more. The U.S. Army Audit Agency determined that at just four installations, the R-SA contracts cost about \$2,096,000 more than what non-R-SA contracts would cost. **R-SA Policies-Multiple Sources.** We identified three issues related to R-SA policies, guidance, and regulations.

The Randolph-Sheppard Act policies are vague and allow for interpretations that benefit the purposes of the interpreter. Clarification is required to strengthen current R-SA policies across the board.

Conflicting R-SA program guidance leads to inconsistent application of the law. Noncompetitive statutory preferences and competing priorities (JWOD and R-SA) inhibit creative solutions and flexibility in managing the cost of food service delivery. The Office of the Secretary of Defense has not sought legislative relief or clarification regarding JWOD and R-SA provisions as applied to military dining facilities.

The Department of Education's R-SA arbitration policy and processes are unclear to the Office of the Secretary of Defense, the Military Departments, and the State Licensing Agencies.

**Joint Policy Recommendations.** As required by Section 848 of the National Defense Authorization Act for FY 2006, a working group of representatives from DoD, DoED, and the Committee for Purchase (CFP) submitted their report describing the joint statement of policy to specified Congressional committees on September 1, 2006 (Appendix K). This report provided a joint policy statement for the application of JWOD and R-SA to contracts for the operation and management of military dining facilities. Congress has implemented one of the

---

recommendations made by the working group. Full implementation of the joint policy recommendations requires compliance with Administrative Procedures Act requirements and may require further legislative action by Congress, after appropriate coordination between DoD, DoED, CFP, and the Office of Management and Budget.

**Recommendation 3.** Coordinate to publish for public and interagency comment appropriate policy and regulations to implement the joint policy recommendations as reported to Congress on August 29, 2006, by DoD, DoED, and CFP. (Office of Primary Responsibility: OUSD[A T&L])

**Recommendation 4.** To resolve and clarify issues associated with contracting with employers or sponsors of persons who have disabilities or who are blind, consistent with military mission and quality of life programs, USD(AT&L) should forward a legislative change request through the Office of Management and Budget to Congress. This change request should enact the provisions of the DoD, DoED, and CFP joint policy recommendations. Appendix L provides proposed legislative language, originally developed by OUSD(AT&L), for this request. (Office of Primary Responsibility: OUSD[AT&L]; Office of Coordinating Responsibility: Office of the Under Secretary of Defense, Personnel and Readiness, DoD Legislative Affairs office, DoD Acquisition Resources and Analysis, DoD General Counsel).