IN THE MATTER OF THE ARBITRATION

Cause No. R-S/13-13

TEXAS DEPARTMENT OF ASSISTIVE

AND REHABILITATIVE SERVICES

Petitioner

UNITED STATES DEPARTMENT OF

THE ARMY, FORT BLISS

Respondent

Appearances:

For the Petitioner: Peter A. Nolan, Esq., Winstead, P.C.

For the Respondent: Mark J. Oppel, Major United States Army Senior Litigator

DECISION AND AWARD

Christopher A. Antcliff was selected by the parties as the Neutral Chair of a three member Arbitration Panel. This matter comes before the Panel pursuant to 20 U.S.C. § 107, et seq. and C.F.R. 395.37. A hearing was held on July 19, 2016 at Ft. Bliss, Texas. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file post-arbitration briefs in lieu of oral arguments. The Panel has considered the testimony, exhibits, briefs and arguments in reaching its decision.

ISSUE

Did the Department of the Army violate the Randolph-Sheppard Act (RSA) and its applicable regulations when it issued a solicitation for Dining Facility Attendant

(DFA) services without applying the provisions of the RSA to the Army's source selection process?

FINDINGS OF FACT

The Parties did not stipulate to a set of undisputed facts and the panel has set forth the following "Findings of Fact":

Congress passed the Randolph-Sheppard Act in 1936 to provide blind persons with increased employment opportunities through the operation of vending facilities on federal property. Military dining facilities are considered vending facilities under the RSA. The RSA was substantially amended in 1974 and implementing regulations were enacted in 1977 at 34 C.F.R. 395.1 *et seq.* The United States Department of Education (DOE) administers the RSA, and the Secretary of Education designates "State Licensing Agencies" (SLAs) to license blind persons to operate vending facilities.

The SLAs negotiate with the federal government for a permit to operate vending facilities on federal property. Vending facilities are stand-alone operations where no appropriated funds are awarded to the SLA to operate these facilities. Appropriated funds are awarded to the SLA for services to operate a dining hall facility. The award of a contract for dining hall services is governed by federal procurement laws and regulations as well as specific statutory authorizations provided by the RSA.

A contracting officer conducts the award of a service contract for dining hall services authorized by the RSA and other federal authorization statutes. The federal government authorizes these contracting officers to appropriate funds for specific purposes consistent with authorization statutes passed by Congress. These awards are also governed not only by the RSA but also by a broad array of federal procurement statutes and regulations. These federal procurement regulations are generally referred to as the Federal Acquisition Regulations (FAR) and do not include the RSA regulations implemented by the DOE.

The RSA requires blind vendors to obtain a license from an SLA, which in turn selects the location for such facility and the type of facility to be provided, and then

assigns blind vendors to operate the facility. Cafeterias on military bases, such as the Fort Bliss dining facilities, are considered vending facilities. In contrast to stand-alone vending facilities owned by the SLA and/or its licensee, the federal government determines the location of cafeterias and dining hall facilities. The services to be provided are defined by the federal government in a Performance Work Statement (PWS). The PWS is included in the contract awarded to provide these services.

Petitioner Texas Department of Assistive and Rehabilitative Services (DARS) is the SLA for the State of Texas.

Fort Bliss, Texas is one of the military's largest and most active military installations in the United States. Among other things, Fort Bliss' mission is to provide support for the 1stArmored Division, 32°d Army Air and Missile Defense Command, the Brigade Modernization Command, the Joint Task Force North, the William Beaumont Army Medical Center (WBAMC), and the German Air Forces Command. Fort Bliss has infantry, stryker, and heavy brigade combat teams with support from aviation, air defense, sustainment, signal, and military policy units culminating in over 26,000 active-duty military and 34,000 dependents. Fort Bliss employs over 4,800 civilians and provides various services to more than 32,000 military retirees. Additionally, Fort Bliss must provide efficient and effective installation services, quality infrastructure, and support to the greater Fort Bliss community. From 2003 until the present, Fort Bliss has deployed Soldiers in support of combat operations in Iraq and Afghanistan.

As a result of the drawdown of forces in both Iraq and Afghanistan, Soldiers and their units have returned to Fort Bliss increasing the need to feed and house these additional personnel. In support of this mission, the Fort Bliss Directorate of Logistics (DOL) Installation Supply Division is required to provide meals to Soldiers through the Army Food Program. The Army Food Program is a comprehensive program developed to ensure Soldiers are provided with safe and secure food service and drinking water.

While the RSA does not distinguish between contracts for the operation of a cafeteria and contracts pertaining to the operation of a cafeteria, Army Regulations refer to two types of military dining facility contracts relative to the Army Food Program: Full Food Services (FFS) and Dining Facility Attendant (DFA) services.

FFS includes those activities that comprise the full operation of an Army dining facility, including but not limited to the requisitioning, receiving, storing, preparing, and serving of food. Also included is the performance of related administrative, custodial, and sanitation functions. An FFS contract requires the contractor to operate the entire military dining facility including performing food preparation as well as janitorial and sanitation functions. FFS encompasses all aspects of feeding the Soldiers at Fort Bliss including food preparation and day-to-day operation of dining facilities.

DFA services are similar, but do not include food preparation because food preparation services are performed by Soldiers. DFA services are defined as activities required to perform janitorial and custodial duties within dining facilities, including sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning, and other sanitation-related functions. DFA services must be contracted out because Soldiers are prohibited from performing DFA services without prior approval from Headquarters, Department of the Army.

Between April 2003 and September 2014, pursuant to contract No. W911S0-04-D-0003 issued to DARS, Mr. Harvey Johnson, DARS's licensed blind vendor, provided cafeteria services at six dining halls on Ft. Bliss. Mr. Johnson is the only blind employee of his company. Pursuant to the contract issued to DARS, two of the dining halls at Fort Bliss were designated as FFS, and the remaining four were designated as DFA.

On June 16, 2014 the Army issued Solicitation No. W911SG-14-R-0003 for FFS at Fort Bliss as a small business set-aside that properly included giving DARS an RSA priority. On July 2, 2014 the Army issued Solicitation No. W911SG- 14- R-

0005 separating the DFA dining halls into a separate contract as exclusively small business set-aside procurement. DARS was not qualified to bid for the contract because DARS does not qualify as a small business. On July 15, 2014 DARS requested that the Solicitation be amended to comply with the RSA. The Army denied DARS's request on July 15, 2014.

Philip Johnson, contract specialist, testified that the decision to split the single contract for the dining facilities at Fort Bliss, which encompassed the operation of both the FFS and DFA facilities, into two separate contracts was based upon Military Installation Contracting Command (MICC) guidance. Mr. Johnson also testified that nothing prohibited continuing the provision of FFS and DFA services under one contract as has been done under the prior contract with DARS. He further testified that the division of the single contract into two separate contracts accomplished a goal of providing other disadvantaged groups the opportunity to bid on the newly created DFA contract.

The MICC memo introduced as Respondent's Exhibit 3, provides that the separation of contracts would help ensure flexible dining support while controlling costs. The MICC memo provides that the separation of the single contract into FFS and DFA services into two contracts was not required by law, but was a business decision to determine whether such separation was in the "best interests of the Government."

The MICC memo also provides that the decision as to whether to split the contract into two contracts will be consistent with cost savings. If the business case analysis concluded that the best course of action would be to retain a single FFS contract, the contracting officer would conduct the procurement in accordance with the RSA. On the other hand, if the business case analysis concluded that the best course of action would be to split the single contract into two separate contracts (one for FFS and the other for DFA services), the contracting officer would conduct the FFS procurement in accordance with the RSA but the DFA services contract would not be subject to the RSA.

Mr. Johnson testified that the business case analysis used by Fort Bliss determined that the single contract for cafeteria services should be separated into two separate contracts. Mr. Johnson testified that he prepared an Acquisition Strategy for the DFA services which reported that over 22,000 service members mobilized and demobilized from Fort Bliss annually. The Acquisition Strategy states that the expected cost of administering multiple contracts outweighs the expected benefits of multiple awards. Mr. Johnson explained that the cost of administering multiple contracts would far outweigh any benefits, although he agreed that there is a cost savings associated with one provider managing, staffing, scheduling and executing the entire program. TR 34, 1.6-10, TR 36, 1. 19-25.

Russell D. Campbell, Army Sustainment Command Food Program Manager, testified that services in a DFA contract cover a portion of the operation of a cafeteria and that DFA services are an inherent part of the operation of a cafeteria. TR 85-25, TR 86, 1. 1-15.

Mr. Johnson testified that, in his opinion and to his knowledge, there is no law (only policy) that DARS and its blind manager could not perform a contract with FFS and DFA services. TR 29, 1. 21-25, TR 30, 1. 1. Mr. Johnson stated that to his knowledge there was nothing in the Federal Acquisition Regulation that would prohibit Respondent from continuing under one contract. TR 14, 1. 16-24.

Dan Brigle is the project manager employed by the blind manager assigned to Fort Bliss. TR 89, 1. 8-25, TR 90, 1.1-8. Mr. Brigle testified that, in his opinion, given his experience, it would be feasible for the Army to continue to provide DFA and FFS services under one contract. TR 97, 1.26, TR 98, 1.1-2.

Michael Hooks is Director of the blind vending program for the Texas SLA. TR 104. 1, 1. He has been in that position for 20 years. TR 106, 1. 3-

Mr. Hooks testified that it is feasible for DARS to provide DFA services; in

fact DARS had been providing DFA services for over a decade. TR 109, 1. 25, TR 110, 1. 1-3.

The determination on whether the RSA applies to an Army DFA contract is a question of law and is the ultimate issue that must be determined by this Panel. When the Army has a requirement for the operation of cafeteria services, then the RSA applies and the Army must follow the statutory and regulatory guidance of the RSA. Under the RSA, blind persons selected by the SLA will be awarded a contract as long as their proposal is within the competitive range; thus, by having a proposal within the competitive range, the blind vendor will receive priority ahead of all other commercial vendors in the competitive range that are fully qualified to perform the services.

The RSA covers the operation of vending facilities on federal property and then defines the term "vending facilities." Cafeterias like those operating at Fort Bliss are included within the definition. The DOE is responsible for writing the regulations for the RSA.

The RSA provides: "Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitations justified." 20 USC § 107(b). The Department of the Defense has never made a request to the Secretary of Education for an exception to the provisions of the RSA under this Section.

The Performance Work Statement (PWS) for the DFA services at Fort Bliss includes all functions, tasks and responsibilities normally performed by a Food Service Operation. Mr. Johnson testified that "Food Service Operation" meant a cafeteria. The PWS developed for the DFA services solicitation and contract at issue here contains a requirement that the contractor hire management and supervisory personnel, including a contract project manager and dining facility attendant supervisors. It also requires the contractor perform a variety of tasks in areas including pot and pan cleaning and other sanitation related functions in the dining facilities. The PWS includes various managerial tasks related to the operation of a cafeteria. Finally, the PWS provides that the contractor will be

responsible for categories of tasks relating to the operation of the cafeterias at Fort Bliss, including washing dishes, scrubbing pots and pans, and cleaning and sanitizing tables, floors, and equipment. The DFA PWS does not include any aspect of food preparation. There are currently two contracts at Fort Bliss: one for FFS dining facilities and one for DFA facilities. DARS is operating both contracts pending the actions of this arbitration pursuant to a settlement agreement with the Army.

Currently, at the four (4) Fort Bliss DFA services dining halls (one of which was visited by the Panel), Army personnel are currently operating and retain responsibility for performing management operations, headcount and cashier services, cooking, and menu planning and serving food, while the civilian contractor provides ancillary cleaning services under the DFA contract.

As noted above, the RSA provides a statutory process where blind persons can obtain increased employment opportunities through the operation of vending facilities on federal property. In order to resolve potential disputes, the RSA establishes an arbitration process. When an SLA believes a federal agency has failed to comply with the RSA, the SLA may file a complaint for arbitration with the Secretary of Education. Section 107d-2(a) of the RSA provides that the arbitration panel "shall ... give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action." If the arbitration panel determines that there was a violation of the RSA, "the head of any ... agency ... 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:'

In its Post-Arbitration brief, the Anny conceded that it did not provide written notice via registered or certified mail to DARS of its solicitation for FFS or DFA services at Fort Bliss. However, the Anny did provide worldwide notice of the solicitation/procurement of such services at Fort Bliss by posting them on the online marketplace that the government routinely uses to make such solicitations/procurements know to the industry. During the arbitration hearing, both

DARS and the vendor testified that they were aware that the Army was soliciting FFS and DFA services in the summer of 2014. This is particularly true in light of the fact that both the vendor and OARS sought injunctive relief in the El Paso Division of the United States District Court for the Western District of Texas to stop the solicitations.

CONCLUSIONS OF LAW

The panel has been chartered to address whether or not DFA services are covered by the RSA. The Army has made a policy/legal determination that DFA services are NOT covered by the RSA and the panel will address whether the legal determination of the Anny to not apply the RSA to this source selection process for DFA services should be honored by the DOE. The Panel concludes that the Army's decision to not apply the RSA to DFA services is entitled to deference and is not a violation the RSA.

DISCUSSION AND ANALYSIS

There is no legal dispute regarding the authority of the Department of the Army to use its own military personnel to operate and retain responsibility for performing management operations, headcount and cashier services, cooking, and menu planning and serving food at all of the Fort Bliss dining halls, which it is currently doing in the four (4) DFA dining halls. Such a decision is reserved to the Department of Defense and is entitled to deference.

There is no dispute as to the facts since the Army's policy is a matter of record and the parties agree that this solicitation is for DFA services only and does not include food preparation. The contractor under the DFA contract is to provide services that include washing dishes, scrubbing pots and pans, and cleaning and sanitizing tables, floors, and equipment. The contractor is not required to provide other support services such as facilities, equipment, maintenance of equipment and facilities, grounds maintenance, utilities, transportation, etc. These services also pertain to the successful operation of a dining hall facility but are provided by either

the Army or other contractors. The division of services and the limitation of services is important to understanding the scope of the RSA to dining hall services.

There is no dispute that FFS contracts involve services that are more than support services and generally relate to the exercise of management responsibility and day-to-day decision-making authority by the SLA and include the responsibility for subcontractors providing DFA services. When the SLA is providing FFS services, the government's role is limited to contract administration oversight of the SLA and its blind vendor. This case involves statutory interpretation which is a matter of law. Issues involving only matters of law do not require the solicitation of testimony. Rather than the Department of Defense, it is the DOE that is charged with the responsibility of interpreting the RSA. The DOE's authority in this case has been passed down to this Arbitration Panel. The enabling statute authorizes the DOE to convene an arbitration panel and for the panel to decide the issue or issues presented to it. Determining whether the DFA services described in the PWS in this case falls within the ambit of the RSA is the issue and thus, the Panel's responsibility to decide.[1] The panel shall make a determination *de novo* as to whether the contracting officer's conclusion that the RSA did not apply to a DFA services contract is entitled to deference by this panel.

This is not the first time this issue has been arbitrated. There was an arbitration hearing held in May of 2002 involving the Commonwealth of Kentucky's SLA and the Department of the Army that resulted in the issuance of an Award on July 26, 2002.[2] In that case, a contractor had been performing "Full Food Service and Dining Facility Attendant" services since 1996. The latest contract was set to

[1] In *Mississippi Dep't of Rehabilitation* v. *United States,* 61 Fed. Cl. 20, 26 (2004), the Court held: the "interpretation of statutes is a legal matter for courts to decide and contracting officers can claim no special expertise in statutory construction." That is especially so with regard to this Statute given the role of the Department of Education over the interpretation of the Statute.

[2] The Award was challenged by the Department of Defense.

expire on September 30, 2001. Prior to its expiration, the Army decided to discontinue ordering the performance of FFS. A contractor would only perform DFA services. The SLA sought to negotiate an extension of the contract, which the Army refused. The Army in June of 2001 sought a solicitation for the DFA services limited to Small Business Administration certified personnel. The Department of Defense issued a memo concluding that the RSA does not apply to a "contract for discrete services." The Arbitration Panel Majority in that case noted that the RSA had been amended in 1974 adding the "requirement that to the maximum extent feasible blind vending facilities should be placed" where federal employees work and that preference be given to vendors covered by the RSA. The majority then concluded that DFA (which, *inter alia,* included food preparation) services in that case were services subject to the RSA.

The same issue arose between the same parties in another Arbitration conducted on November 12 and 13, 2013 at Fort Campbell, Kentucky. Again, the Panel majority in that case concluded that DFA services were subject to the provisions of the RSA.

Interpretation of the RSA has evolved over the years and the Panel feels a review of that history is germane to its decision here.

The original version of the RSA was passed in 1936. As noted above, the RSA was intended to increase opportunities for blind vendors to earn income from vending machines on United States Government Property. The RSA was amended and expanded in 1974. The Amendments gave a clear priority to blind vendors seeking to operate vending facilities on government property. Vending facilities included automated vending machines, cafeterias, snack bars, cart service, shelters and counters and auxiliary equipment operated by blind vendors for the sale of various products including food.

Regulations were then drafted.

(c) 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 C.F.R. 395.33(c).

Following the passage of the amendments and regulations, questions began arising in the courts, the DOE and the various agencies that dispensed food over what services the law did and did not cover.

In June 1993, the Comptroller General was asked to review a decision by the Department of the Air Force that the RSA applied to FFS at Keesler Air Force Base. The Comptroller General agreed with the Department of the Air Force that it did. In so finding, it noted:

While there are many tasks and responsibilities under the contract that are not mentioned in the regulatory definition of cafeteria, it is apparent that, for the most part, they are directly related to providing cafeteria services. For example, while housekeeping and grounds maintenance (around the dining facilities) services are not food-dispensing tasks per se, 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. We see no reason why a contract containing services related to cafeteria operation would be excluded from the Act. Certainly, the mere fact that the regulatory definition is silent as to these related services would not by itself warrant adopting the protesters' strained view, since there are numerous specific tasks related to food dispensing that also are omitted but which logically would have to be covered (e.g., food preparation). The definition focuses on the cafeteria as a type of vending facility, and sets forth a few salient characteristics of such a facility, such as the presence of a serving line. A contract for operating such a facility, on the other hand, necessarily focuses on services-such as preparing food-not on the features of the facility itself. Such services, therefore, would not be expected to be mentioned in the definition.

The General Counsel for the Department of Defense subsequently concurred with the

opinion of the Comptroller General that "the provisions of the RSA pertaining to cafeterias are applicable to the Keesler AFB." She also noted:

It has been recognized that the Act may not be applicable in those instances where the contracts are for discrete services rather than the overall 'operation of the dining facilities.

Frederick Schroeder, the then Commissioner of the Rehabilitation Services Administration, took issue with a report from the "Committee of Purchase" dated July 2, 1997. The Committee took the position that the RSA only covered cafeterias that dispensed food and not to military dining halls. The Commissioner found no support for that position and noted that even the DOD in the past had agreed that mess halls were covered by the Act. He noted:

Any attempt to draw a distinction between appropriated funded cafeterias and concession cafeterias is merely a fiction to justify placing full food service activities on the Committee's Procurement List. There is no basis either in the Act or in the legislative history for the Committee's position.

The question of whether Military mess halls were covered by the RSA did not end with the opinion of the Commissioner of Rehabilitation Services. A nonprofit contractor who was not yet on the procurement list established under the Javits-Wagner-0 'Day Act sought to bid on a contact to operate a mess hall on a Virginia Army base. The Virginia SLA also sought the work. In *NISH v. Secretary of Defense and Secretary of the Army*

247 F.3rd 197 (4th Cir. 2001) the Court reached the same conclusion as the Commissioner. In so doing, it indicated it must give deference to that opinion as it is from the Agency responsible for enforcing the Act. The Court also held that the RSA was the controlling Statute. It observed: "it is a basic tenet of statutory construction that when two statutes ostensibly apply, the more specific of the two control(s)."

The RSA it found was the more specific.[3]

The General Accounting Office reviewed a protest from a small business that was excluded from bidding on a contract for full food service at Fort Rucker in Alabama. The GAO report reached the same conclusion as was reached in the NISH cases. It concluded while the preference under the RSA is the greater preference that did not mean a preference under a different Statute could not also be applied. If the bid from the contractor under the SLA is competitive, that contractor should be awarded the work. If not, the other preference comes into play.[4] The GAO did note in a footnote: "Where an acquiring activity has a requirement for cafeteria services, (including full food services such as those required here) the agency is required to invite the SLA to compete for the requirement."

The conclusion that military dining halls were covered by the RSA left a question as to the extent of services to which the RSA was applicable. An Arbitration Panel in June of 1999 had to determine whether a contract for DFA services fell within the Act. The Panel by majority decision concluded the contract was not for the operation of the dining hall and was thus not covered by the RSA.[5]

Another Arbitration Panel in 2001 was again asked to decide whether "discrete" services at Fort Richardson in Anchorage, Alaska were covered by the RSA. No vending and no concessions were part of the contract. The Panel ruled these services were not covered by the Act, because the services to be provided did not

[3] A similar holding was reached by the 10th Circuit at 348 F.3rd 1263 (2003)

[4] The GAO cited *Automated Communication Systems, Inc v. United States,* 49 Fed. Ct. 570, 578 (2001) in support of that proposition.

[5] The Panel decision was upheld by the United States District Court on March 30, 2000. The Court did indicate that statutory questions are reviewed *de novo.* It then held: "Accordingly, because there is sufficient evidence to support the panels' factual determination that the Air Force was responsible for (1) food preparation, (2) food quality, and (3) day-to-day supervision of the cafeteria, the Panel's factual that the Air Force operated the cafeteria is affirmed.

involve the operation of a dining hall. This was followed in 2002 with the Arbitration involving Fort Campbell discussed above where the opposite conclusion was reached. The panels decided almost the same issue totally differently.

Two Federal Court of Claims cases were also instructive on this issue. The Federal Court of Claims in *Mississippi Department of Rehabilitation Services* addressed the question of the scope of the RSA. The Department of the Navy argued that the contract in issue was for food services in a galley rather than a cafeteria and that the RSA did not apply. The Court rejected that argument. The Navy next argued that the scope of work involved did not fall within the definition of the term "operate." The Court cited the decisions already discussed here and observed: 'we may conclude that courts have not applied the RSA in cases where the contract is merely for busboy and other cleanup services." The Court then noted that none of the cases "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 ascribe to the 'operation' of a cafeteria." The Court subsequently concluded more was involved in the contract before it than simply "busboy" work, "food preparation and cooking," was also required and, therefore, the work was covered by the RSA. The DFA PWS in this case clearly does not involve food preparation and cooking because Soldiers are performing that work. Further, the Army at the four (4) Fort Bliss DFA dining halls retains responsibility for performing management operations, headcount and cashier services, cooking, and menu planning and serving food.

In *Washington State Department of Services for the Blind* v. *United States* the Army made a determination that OFA services did not fall under the RSA. The solicitation said the services included were:

activities which comprise janitorial and custodial functions within a dining facility including, but not limited to, sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning and related quality control.

The Court determined the services described did not entail "the operation of a vending facility and was not, therefore, covered by the RSA.

There have also been disputes over whether the RSA or the Javits-Wagner-O'Day Act should be applied to different work in the cafeteria and mess halls. While the courts have addressed the priority to which the RSA is entitled, there still has been tension between the two competing interests over work each interest claimed. Those interest groups prevailed to some degree on Congress to help draw the line as to what work each statute was intended to cover.

President George W. Bush signed the National Defense Authorization Act for Fiscal Year 2004. Section 852 of that Act read:

INAPPLICABILITY OF RANDOLPH-SHEPPARD ACT- The Randolph-Sheppard Act does not apply to any contract described in sub- section (b) for so long as the contract is in effect, including for any period for which the contract is extended pursuant to an option provided in the contract.

JAVITS-WAGNER-O'DAY CONTRACTS- Subsection (a) applies to any contract for the operation of a military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces that:

Was entered into before the date of the enactment of this Act with a non-profit agency for the blind or agency for other severely handicapped in compliance with section 3 of the Javits-Wagner-O'Day act and is in effect on such date.

This Statute took a first attempt at trying to define the work covered by each Act. However, it did not resolve all of the controversy. Consequently the National Defense Authorization Act of 2007 was passed. That Act is more commonly referred to as the John Warner Act. It states:

Section 856 CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES

Inapplicability of certain laws-

INAPPLICABILITY OF THE RANDOLPH-SHEPPARD ACT TO CONTRACTS AND SUBCONTRACTS FOR MILITARY DINING FACILITY SUPPORT SERVICES CVOERED BY JAVITS- WAGNER-O'DAY ACT- The Randolph-Sheppard Act does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility, as of the date of enactment of this Act, were services on the procurement list established under Section 2 of the Javits-Wagner-O'Day Act.

INAPPLICABILITY OF THE JAVITS-WAGNER-O'DA Y ACT TO CONTRACT FOR THE OPERATION OF A MILITARY DINING FACILITY- (A) The Javits-Wagner-O'Day Act does not apply at the prime contract level to any contract entered into by the Department of Defense as of the date of the enactment of this Act with a State Licensing Agency under the Randolph-Sheppard Act for the operation of a military dining facility.

(B) The Javits-Wagner-O'Day Act shall apply to any subcontract entered into by a Department of Defense contractor for full food services, mess attendant services and other services supporting the operation of a military dining facility.

Section b(1) then called upon the Comptroller General to evaluate the contracts for services listed above. Section b(2) then defined the terms used:

For purposes of the review under paragraph (1), 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;

that was awarded under either the Randolph-Sheppard Act or the Javits-Wagner-O'Day Act; and

that is in effect on the date of the enactment of this Act.

This law was passed based on a recommendation made by both the Departments of Education and Defense. The National Defense Authorization Act of 2006 requested these Agencies file a report with recommendations. They issued their report on March 16, 2007. The John Warner Act changes were part of those recommendations. The two Agencies then issued a second report where they attempted to explain what was intended by the various provisions it had recommended.[6] The report noted that one of its recommendations "may have been overtaken in part by Statutory Change." It referenced the changes already made in the John Warner Act. The Report set forth its rationale for the change that had already been made. The report noted:

Public comment taken during the development of the policy report supported the "no poaching" provision (i.e. maintenance of market share), and these sentiments were express by both R-SA and JWOD sources.

The report then discussed contracts "not covered by the 'no poaching"' provision:

The contracts will be competed under the RSA when the DOD solicits a contractor to exercise management responsibility and day-to-day decision-making for the overall functioning of a military dining facility, including the responsibility for its staff and subcontractors where the DOD role in the contract is generally limited to contract administration ...

In all other cases, the contracts will be set aside for JWOD performance

... where the DOD needs dining support services (e.g., food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendants, or other services that support the operation of a dining facility) where food service specialists exercise management responsibility ...

[6] Section 3 of the recommendations said "The parties recommend that legislation should be submitted that creates a "no poaching" provision maintaining the current distribution of contract opportunities as outlined in this paragraph.

Regulations were to be drafted following the issuance of the Report that incorporated many of the suggestions. That never occurred. Consequently, one court concluded:

[b]ecause no regulations have been implemented to give effect to the policies set forth in the Joint Report, and because DOD has clarified that the Joint Report would not be effective until implemented through regulations, the Joint Report was not binding on the Army in awarding the contract.[7]

The Department of the Army concurred with this Decision. It issued a memo on March 16, 2007 stating "The joint policy should not be cited in individual solicitations until it is implemented in complementary regulations by ED and DOD." The only exception was the provisions incorporated into law in the John Warner Act.

The plain and unambiguous language of Section (b)(2) of the John Warner Act limits the application of that section of the statute to the GAO study and does not expand the coverage of the RSA to include mess attendant services, or services supporting the operation of all or any part of a military dining facility. The John Warner Act clearly attempts to protect the RSA preference for FFS services with DFA services to be provided by JWOD contractors. This language does not expand coverage of the RSA to include DFA services when the contractor is not also providing FFS services because such a decision would effectively bar JWOD contractors and contractors operating under other socio-economic programs from participating in DFA type service contracts.

The DOD best expresses the impact of expanding contracts covered by the RSA in the Report stating:

The Secretaries of the Military Departments should have discretion to define requirements and make procurement decisions concerning contracting for military dining support and the operation of a military dining facility. The Secretaries should have the discretion to make decisions about the best use for buildings under their

[7] *Moore's Cafeteria Services v. U.S.,* 77 Fed. Cl. 180 (2007).

control and to ensure decisions support the readiness of the armed forces, and the best use of taxpayer dollars to accomplish national defense. The Secretaries should also be able to make decisions about whether and how to provide activities on-base for the morale, welfare, and recreation of military members and their families, especially when the families are left behind during deployment. Decisions integral to the armed forces and the military families should be made by DOD, not DOE nor the SLAs.

For the reasons stated herein, the Panel Majority finds the Department of the Army did not violate the RSA when it issued solicitation W91 I SG-14- R-0005 for DFA services without applying the provisions of the RSA to the Army's source selection process, particularly in light of the fact that military personnel retain responsibility for performing management operations, headcount and cashier services, cooking, and menu planning and serving food at those facilities. Further, the Panel concludes that any issue relative to notice was resolved when OARS and the vendor sought injunctive relief in federal court to stop the solicitations for FFS and DFA services at Fort Bliss.

The Panel strongly urges the Department of Education to promulgate regulations that would definitively answer this question and avoid the multiple arbitrations and Court cases that have arisen as others have attempted to answer it. The cost for the issuance of such regulations would most certainly be less than the cost of the repeated litigation that has ensued since the passage of the RSA and its various amendments.

Dated: November 2, 2016

Christopher A. Antcliff, Panel Chair

Steven Fuscher, Panel Member, Fuscher Group, LLC

Susan Rockwood Gashel, Panel Member (dissenting)

Dissent

Case No. R-S/13-13,

Rehabilitation Services Administration United States Department of Education

Texas Department of Assistive and Rehabilitative Services v. United States Department of the Army, Fort Bliss November 2, 2016

The Majority holds, in contravention of four recent legal decisions, two of R-S Act[8] arbitration panels,[9] and two of the federal courts,[10] that the R-S Act does not apply to contracts for dining facility attendants (DFA) at military cafeterias.
The Majority's decision is largely based on its feeling that JWOD[11] and other socio- economic programs should be able to participate in DFA contracts, displacing blind vendors' prior right under the law.

As set out more fully below, the Majority's decision is contrary to Congressional policy, the R-S Act itself, and current arbitration and court decisions. The Majority ignores the fact that the most recent information available is that JWOD military cafeteria contracts outnumber R-S Act contracts. See Section II below. Congress has definitively stated that the R-S Act applies to DFA contracts, yet the Majority

[8] The Randolph-Sheppard Act, 20 U.S.C. § 107 through 107f, (R-S Act) establishes a priority for blind persons to operate vending facilities on all Federal property. The states administer the program and obtain contracts for cafeteria operations, and contracts related to cafeteria operations. Only blind persons trained and licensed by the states can manage these contracts.

[9] Commonwealth of Kentucky Education and Workforce Development Cabinet Office of the Blind Business Enterprise Program v. United States Department of the Army Acting Through the Contracting Officer Mission & Installation Contracting Command, MCC Center, Fort Campbell, Kentucky, Case No. R- S.11-06, Feb. 4, 2014, and Georgia Vocational Rehabilitation Agency v. United States Dep't of Defense, Dep't of the Army, Fort Stewart, Georgia, Case No. R/S 13-09 , January 11, 2016.

[10] Kansas v. United States, 171 F. Supp. 3d 1145 (D. Kan. 2016) and Johnson v. United States, WL 12540469 (E.D. Tex., 2016).

[11] The Javits-Wagner-O'Day Act (JWOD) establishes the Committee for Purchase (CFP), which places services and products to be provided to the Federal government on a Procurement List. 41 U.S.C. § 8502. Formerly known as NISH, JWOD was renamed the "Ability One Program" in the November 27, 2006 Federal Register. See also 41 U.S.C. § 8501, et seq. Purchase by a federal agency from the Procurement List is mandatory.

has ignored Congress' clear statement.

I. Section 856(a)(1) of the John Warner Act Permitted JWOD to Permanently Keep DoD Contracts that should have been Awarded to R-S Act Blind Managers

The John Warner Act,[12] at Section 856(a)(1), states that the R-S Act does not apply to "full food services, mess attendant services, or services supporting the operation of a military dining facility" on the Procurement List as of October 17, 2006.[13] This allowed contracts awarded under JWOD to remain JWOD, in spite of the fact that those contracts were required by the R-S Act's superior priority to be awarded under the R-S Act, and not under JWOD.

Before enactment of the John Warner Act, two separate Circuit Courts ruled that the R-S Act priority is superior to the JWOD preference. The Fourth Circuit held that the R-S Act deals explicitly with the operation of cafeterias, whereas JWOD is a general procurement statute; accordingly, the R-S Act must control.[14] Two years later, in the Tenth Circuit, the Court found that, to the extent a conflict exists between JWOD and the R-S Act, the R-S Act must control.[15]

Both NISH v. Rumsfeld and NISH v. Cohen make it abundantly clear that blind vendors have a prior right to operate cafeterias on federal property, superior to the right of JWOD to operate such cafeterias. In addition, the R-S Act's implementing regulations make it clear that the R-S Act priority applies to all contracts that pertain to the operation of cafeterias on Federal property. 34 C.F.R. § 395.33(c).

II. The GAO Review Ordered by the John Warner Act Revealed that JWOD had Poached 53 Contracts that Should Have Been Awarded

[12] https://www.govtrack.us/congress/bills/109/hr5122/text

[13] October 17, 2006 is the date of the enactment of the John Warner Act.

[14] NISH v. Cohen, 247 F.3d 197, 205 (4th Cir. 2001).

[15] NISH v. Rumsfeld, 348 F.3d 1263, 1272 (10th Cir. 2003).

Under the R-S Act

The John Warner Act, at Section 856(b) required GAO to conduct a review of R-S Act and JWOD contracts. The GAO review[16] reveals that, as of October 17, 2006, there were 39 R-S Act contracts and 53 JWOD contracts. This means that JWOD had successfully "poached" and convinced Congress that it should continue to "poach" these contracts, in spite of courts in two different circuits having reached the conclusion that the R-S Act controls over JWOD.[17]

The GAO review also concludes the following:

1. R-S Act blind vendors average $276,500 per vendor annually, representing a percentage of contract revenues. R-S Act blind vendors are managers. Their responsibilities include managing personnel, coordinating with military officials, budgeting and accounting, and managing inventory. In many cases, blind vendors and a food service company (called a teaming partner) form a joint venture to operate the contract, with the blind vendor as the head of the company. A teaming partner can provide technical expertise, ongoing training and often extends the vendor a line of credit and insurance for the operation of the facility. For six of the 39 R-S Act contracts, the blind vendor operates the dining facility without a teaming partner. On average, 18% of the work force employed by blind vendors are individuals with disabilities. Blind vendors seek to become entrepreneurs by gaining experience managing DoD dining facilities.

2. JWOD "beneficiaries" are paid an estimated $13.15 per hour including fringe benefits. The disabled individuals in JWOD programs are employee in less skilled jobs such as cleaning tables, washing pots and pans, or serving food. Most

[16] http://www.gao.gov/new. items/d083.pdf

[17] The term “poach" comes from a Joint Report required by Congress in the National Defense Authorization Act of 2006 directing the Departments of Education and Defense and the CFP to issue a joint policy statement. The only recommendation of the Joint Report that was enacted by Congress is the “no poaching provision," enacted as section 856 of the John Warner Act.

supervisors are persons without disabilities.

The Department of Education's (DOE) comments to the GAO Report state that it was concerned about comparing the earnings of R-S Act vendors to JWOD food service workers. DOE suggested GAO compare the earnings of the blind vendors with the earnings of employees of the JWOD agencies performing similar management functions.

According to the legislative history of the John Warner Act, the Senate proposed that the status quo for continuation and completion of existing contracts awarded under JWOD and the R-S Act be extended for one year.[18] The House receded with a permanent policy "regarding the award of contracts and subcontracts for food services, mess attendant services, and other services supporting the operation of a military dining facility under" JWOD and R-S Act.

While Congress made a determination that it would allow JWOD to keep the contracts it had poached, it recognized that mess attendant services or services supporting the operation of a military dining facility, were contracts included in those contracts that should have been R-S Act contracts, but were poached by NISH.

This is an implicit acknowledgement by Congress that the R-S Act applies to not only full food services, but also mess attendant services and other services supporting the operation of a military dining facility. Of course, after October 17, 2006, the R-S Act did not apply to the 53 "poached" contracts.

The contract at issue is a contract that is required to remain R-S Act, according to section 856b)(2)(A), as it was operated by a blind licensee pursuant to the R-S Act since 2003.[19] From 2003 through 2014, the blind licensee operated the entire

[18] https://www.congress.gov/congressional-report/109th-congress/house-reporU702/1

[19] Transcript of Proceedings, R-S/13-13, July 19, 2016, Texas Department of Assistive and Rehabilitative Services v. United States Department of the Army, Fort Bliss, page 97, lines 17-25, page 98, lines 103.

cafeteria contract, including the DFA portion of the contract. kt. By splitting the contract into a Full Food Service (FFS) and DFA contract, the Army placed a limitation on the operation of the Ft Bliss contract. This is expressly prohibited unless the Army first seeks, and obtains, the approval of the Secretary of DOE to place such a limitation on the operation of the Ft. Bliss contract.[20] The Army did not seek such a determination. This is an issue that the Panel was charged to address; the Majority's opinion ignores this issue.

III. The Majority's Decision ignores the Fact that the R-S Act Continues to Apply to All Contracts for the Operation of a Dining Facility, Including All Contracts that Pertain to the Operation of a Dining Facility

The John Warner Act, at Section 856(a)(2), explicitly states that JWOD does not apply to any contract for the operation of a military dining facility as of October 17, 2006 when that facility is operated pursuant to a contract with a state under the R-S Act. Therefore, JWOD is not authorized by Congress to "poach" current R-S Act contracts. In other words, except for the contracts awarded to JWOD as of October 17, 2006, the R-S Act's superior priority continues to be the law.

IV. The Majority's Analysis Does Not Accord with Established Principles of Statutory Construction.

Inexplicably, at page 21 of its opinion, the Majority analyzes the issue of whether a DFA contract is subject to the R-S Act by analyzing the section of the statute calling for a report by GAO.[21]

[20] 20 U.S.C. § 107(b) provides:

> Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

[21] Section 856(b) of the John Warner Act calls for a report by GAO of R-S Act and JWOD contracts.

A. The Phrase "Mess Attendant Services or Services Supporting the Operation of Military Dining Facility" Means the Same Thing in 856(a)(1) and 856(b) and Indicates those Services are Subject to the R-S Act

It is a standard principle of statutory interpretation that identical phrases appearing in the same statute ... ordinarily bear a consistent meaning.[22] Section 856(a)(1) and 856(b) both contain the same phrase. Clearly, the phrase in 856(a)(1) means that, except for those "poached" contracts, the R-S Act applies to "mess attendant services or services supporting the operation of a military dining facility." The definition of those contracts that were to be subject to the GAO study cannot logically exclude the very same contracts "poached" from blind vendors by Ability One (formerly NISH). To do so would fly "in the face of the well-established principle that every word, phrase, sentence, and part of a statutory enactment must be accorded significance and harmonized with every other part.[23] Clearly, if the contracts covered by the GAO study include mess attendant services, and services supporting the operation of a dining facility, *including those awarded under either the R-S Act or JWOD,*[24] then Congress recognized that DFA contracts are authorized to be awarded under the R-S Act. If Congress intended to remove those contracts from the R-S Act, it would have explicitly done so. It did not.[25]

B. The John Warner Act Only Removed those Contracts Previously Awarded to JWOD from the R-S Act

When interpreting statutes, "courts presume that by passing a new statute Congress ordinarily does not intend to displace laws already in effect." Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936). This principle is identified as the

[22] Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2545 (2013).

[23] McGraw v. City of Huntington Beach, 882 F.2d 384, 391 (9th Cir. 1989}.

[24] John Warner Act, Section 856(b)(2}(8}.

[25] What Congress did do was to explicitly state that subcontracts entered into by a prime contractor are to be JWOD. John Warner Act, Section 856(a)(2}(B}. That provision covers all subcontracts (not just DFA} to be awarded to JWOD. That can only mean that where a blind vendor (or other prime contractor) seeks to employ a subcontractor, the opportunity must first be offered to JWOD.

"presumption against implied repeal."

"[There are] two well-settled categories of repeals by implication-(1) *where provisions in the two acts are in irreconcilable conflict,* the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."

Radzanower v. Touche Ross & Co.. 426 U.S. 148, 154 (1976) (quotations omitted, emphasis in original). The two statutes, the John Warner Act, and the R-S Act, are not in conflict. Nor does the John Warner Act cover the entire subject of the R-S Act. To the contrary, it preserves the priority to the extent not poached by NISH before October 17, 2006. If Congress intended to repeal the R-S Act's broad authority to provide services, it would have done so in section 856(a)(3). It did not.

V. The Majority Fails to Apply the Relevant Statutory Language and Legislative History

Unaccountably, at page 13 of the Majority Decision, the writer states that the 1936 R-S Act was intended to increase opportunities for blind vendors to earn *vending* machine income on Federal property (emphasis added). To the contrary, when the R-S Act was amended in 1974, it was with the express purpose of responding to the "rapid proliferation" of vending machines operated by Federal employees on Federal property in contravention of Congress' intent to preserve vending facilities on Federal property for blind persons. Sen. Rep. 93-937, pages 6, 10. Congress stated:

Blind vendors collectively have been confronted with obstacles at virtually every turn. Competition from automatic vending machines has increasingly threatened to suffocate the blind vendor program. Federal employee welfare and recreation groups refuse to part with any of the income from such machines, even though the use of such income by such groups is of questionable legality.

Sen. Rep. 93-937, p. 10. Congress sought to double the number of R-S Act vending facilities. Sen. Rep. 93-937, p. 13. Congress also clearly conveyed its concern with the DOD's failure to comply with the R-S Act and to ensure that business operated by blind vendors were established on property under its control:

Very few blind vendors are to be found at military installations. Witnesses before the Committee have stated that each military post or base commander is in charge of his particular installation, and that, for the most part, commanders are either hostile or indifferent to the Randolph-Sheppard program. This attitude has severely curtailed the growth of the program within the Defense Department.

Sen. Rep. 93-937, page 17.

The Majority, at page 13, incorrectly defines vending facilities. The correct definition is:

(x) "Vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State within such State.

34 C.F.R. § 395.1(x) (emphasis added).

The Majority, at page 13, neglects to set out the full text of the regulation pertaining to cafeterias:

Section 395.33 Operation of cafeterias by blind vendors.

(a) 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 appropriate property managing department,

agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.

(b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. Such solicitations for offers shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of Section 395.37.

(c) 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.

(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, Federal property managing departments, agencies, and instrumentalities may

afford priority in the operation of cafeterias by blind vendors on Federal property through direct negotiations with State licensing agencies whenever such department, agency, or instrumentality determines, on an individual basis, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees: PROVIDED, HOWEVER, That the provisions of paragraphs (a) and (b) of this section shall apply in the event that the negotiations authorized by this paragraph do not result in a contract

34 C.F.R. § 395.33 (emphasis added).

At page 16, the Majority cites two arbitration panel decisions finding that the R-S Act did not apply to DFA contracts, one from 1999 and the other from 2001. These decisions have been overruled by the John Warner Act, which explicitly recognized that the R-S Act formerly did apply to DFA contracts. The Majority then mentions to the Fort Campbell case in Kentucky, noting that the "panels decided almost the same issue totally differently." The Majority's logic is flawed on two bases. First, the majority fails to note that the Fort Stewart case in Georgia and the Fort Campbell case in Kentucky were both decided *after* the enactment of the John Warner Act, and relied on established principles of statutory construction to determine that DFA contracts do fall under the R-S Act priority. The majority also ignores two recent federal cases. In Kansas v. United States, 171 F. Supp. 3d 1145 (D. Kan. 2016), the Court ruled that under the current RSA and implementing regulations, the Army has violated the RSA." Accord, Johnson v. United States, 2014 WL 12540469, at *10 (W.D. Tex. Sept. 12, 2014)

Next, the Majority claims that "two Federal Court of Claims cases were also instructive on this issue," citing Washington State Dep't of Servs. for the Blind v. United States, 58 Fed.Cl. 781 (2003) and Mississippi Dep't of Rehab. Servs. v. United States, 61 Fed. Cl. 20 (2004). As stated by the United States District Court for the District of Kansas: "the two cases never conclude what 'operation' means and they never held that the RSA does not apply to DFA services contract." Kansas v. United States, 171 F. Supp. 3d 1145 (D. Kan. 2016).

Next, at page 19, the Majority relies on the Joint Report. In Moore's Cafeteria Servs. v. United States, 77 Fed. Cl. 180, 185-86 (2007) aff'd 314 F. App'x 277 (Fed. Cir. 2008), the Court of Claims agreed that the guidelines set forth in the Joint Report will not be binding until formal regulations have been issued by DOD and DOE, and that according to Yocum v. United States, 66 Fed. Cl. 579, 590 (2005), "[l]n general, proposed regulations have no legal force or effect until they become final".

Based on flimsy rationale, the Majority concludes that the "plain and unambiguous language of section (b)(2) limits the application of that section of the statute to the GAO study and does not expand the coverage of the RSA to include mess attendant services, or services supporting the operation of all or part of a military dining facility."

The Majority attempts to repeal the R-S Act's implementing regulation at 34 C.F.R. § 395.33(c). Its rationale? The Joint Report. This in spite of the fact that the DoD itself has asserted that the Joint Report "should not be cited in individual solicitations until it is implemented in complementary regulations by the [DOE] and DoD." See, Kansas v.

United States, 171 F. Supp. 3d 1145, 1161 (D. Kan. 2016).

In enacting Section 856 of the John Warner Act, Congress only disturbed the priority so as to permit dining contracts on the JWOD list to remain JWOD, and to require that subcontracts be JWOD. This does not mean that DFA prime contracts are not R-S Act, the law remains as set forth in the R-S Act and its implementing regulations, which make it clear that a DFA contract pertains to the operation of a dining facility and thus falls under the ambit of the R-S Act.

Finally, the majority in this case only addressed the first issue put to it for determination by the Commissioner of the Rehabilitation Services Administration of the Department of Education. The majority did not address the issue of whether the Army violated the R-S Act when it segregated aspects of a dining facilities

contract into small parts to avoid the R-S Act priority in violation of 34 C.F.R. § 395.33. See Section above. It is "well settled" that the "scope of an arbitrator's authority" is defined by the issue(s) submitted. Delta Lines. Inc. v. Brotherhood of Teamsters and Auto Truck Drivers. Local 85, 409 F.Supp.873, 875f (1976). Accordingly, this panel is required to decide both issues as set out in the Secretary's authority to convene the panel.

Dated November 2, 2016.

Susan Rockwood Gashel,
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