

**BEFORE THE REHABILITATION SERVICES ADMINISTRATION  
DEPARTMENT OF EDUCATION**

SOUTH CAROLINA COMMISSION FOR THE BLIND

PETITIONER

V.

UNITED STATES DEPARTMENT OF THE ARMY

RESPONDENT

CASE NO. R-S/12-09  
R-S/15-07

Before:

Arbitrator Panel:

Merry C. Hudson, Chair  
Susan Gashel, Member  
Steven Fuscher, Member

Appearances:

For South Carolina Commission for the Blind  
Peter A. Nolan  
Assistant Attorney General

For the United States Department of the Army  
J. Mackey Ives  
Assistant Regional Counsel

Place of Arbitration: Fort Stewart, Georgia

Date of Arbitration: May 4-5, 2016

## I. INTRODUCTION

This matter is before the Arbitration Panel on a complaint filed with the Department of Education (DOE) by the South Carolina State Commission (SLA or Petitioner) against the United State Department of the Army (Army or Respondent) in which it contested the decision of the Army to award a contract for service without the priority required under the Randolph-Sheppard Act. The arbitration was conducted on May 4-5, 2016, at the military treatment facility(MTF) located in Fort Stewart, Georgia.

Peter Nolan, Esq. represented the South Carolina Commission for the Blind and James Ives, Esq. represented the Department of the Army.

The parties were given a full opportunity to present their cases through examination of witnesses, and the admission of documents. In addition, a tour of the facility in question was conducted. Post- arbitration briefs were submitted by the SLA and the Army on August 3, 2016 and August 8, 2016 respectively. Thereafter, the record was closed.

## II. STATEMENT OF THE CASE

On September 20, 2013, the South Carolina Commission for the Blind filed a complaint against the Army in which it requested that an arbitration panel be convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107d-1(b) and 107d-2, and the implementing regulations at 34 C.F.R. 395.37. The Commission

alleged that the Army violated the Act by failing to adhere to the Act's priority requirement in the procurement of hospital dining facilities under Solicitation No. W81K04-13-R-0010.

On or about December 24, 2013, Commissioner Janet LaBreck, of the Rehabilitative Services Administration, Department of Education, notified the SLA of her decision denying the SLA's request for arbitration. The Commissioner determined that the SLA had not alleged that it was prevented from submitting a bid for the contract. Concluding that there was no current violation of the Act, the Commissioner declined to grant the request.

The Commissioner further determined that one of two conditions had to be established before the matter could be ripe for arbitration: (1) The SLA could show that an action or inaction of the contracting officer prohibited it from submitting a proposal or (2) The SLA could demonstrate that the contracting officer failed to select the SLA after it submitted a bid that fell within the competitive range. The SLA was also advised that it could resubmit a request for arbitration if it believed that the contracting officer failed to comply with the Act by not awarding the SLA a priority.

By letter dated, January 13, 2015, the SLA again requested that DOE convene arbitration against the Department of the Army for its refusal to include the Act's priority requirement in the Solicitation. The instant panel was convened

by Commissioner LaBreck, to conduct the arbitration to render an opinion on the following issue:

“Whether the Army’s failure to apply the priority to the solicitation was in violation of the Randolph-Sheppard Act.”

### III. POSITION OF THE PARTIES<sup>1</sup>

#### A. South Carolina Commission for the Blind

South Carolina submitted a bid on Solicitation No. W81K04-13-R-0010 to provide dining facilities at the Army’s military treatment center located in Fort Stewart, Georgia. South Carolina contends that the Army violated the Randolph-Sheppard Act by failing to follow procurement requirements for the facility located at Fort Stewart.

If the Army stands by its determination that vending facilities are not cafeterias, then the Army was required to permit the facilities to South Carolina without any bidding. If the Panel finds that the vending facilities are cafeterias, then the Act requires the Army to determine if it was feasible for South Carolina to operate the facilities which could be accomplished in one of two ways. The Army should have either directly negotiated with South Carolina to determine feasibility or it should have invited South Carolina to respond to a solicitation for offers to establish its ability to operate the facilities at comparable costs and

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<sup>1</sup> Issues raised by the parties will only be addressed as they relate to the Panel’s charge.

quality available from other cafeteria providers. Instead of determining whether it was feasible for South Carolina to operate the contract with one of its blind vendors, the Army improperly conducted a procurement solely under the Competition in Contracting Act.

Further, South Carolina contends that its bid was judged based on inapplicable criteria. Regardless of the outcome of its evaluation, the Army was required to consult with the Secretary of Education for a final determination of whether the SLA proposal qualified for the Act's priority and award. The final decision to exclude the SLA from the competitive range rests with the Secretary.

#### B. The Department of the Army

The Army denies that it violated the Randolph Shepard Act. The Army contends that it conducted a fair evaluation of Petitioner's proposal and properly excluded it from the competitive range of proposals submitted. The Act did not apply to the Solicitation which was for Nutritional Care Services, which is distinguishable from a "cafeteria, as defined by DOE regulations and Department of Army regulations."

Under current policy, DOE has permitted SLAs to cross state lines to conduct business. Given this policy, it was prudent for the Army to extend an invitation to all SLAs nationwide via the federal website. Nothing in the statute or the DOE regulations requires any particular form or manner for issuance of

invitations to SLA's. SLA's were invited to submit proposals through the website. This is standard practice for all federal agencies. The SLA was not prejudiced since it learned of the contract through the website and submitted a proposal.

Although the federal agency is required to invited a SLA to submit a proposal when a cafeteria contract is contemplated, there is no such requirement for issuance of a permit. Further, it does not matter that the solicitation did not mention the term RSA priority because the priority never came into play in this procurement. The priority only applies if a State Licensing Agency submits a proposal and the proposal is determined to be in the competitive range.

Further, the Army contends that issues raised in the complaint are moot. The complaint should be dismissed for mootness and lack of specificity.

#### IV. FINDINGS OF FACT

1. On May 22, 2013, the Army issued Solicitation W81K04-13-R-0010, for nutritional food care service at eight different military treatment facilities located in eight different states, including Fort Stewart, Georgia.
2. The Solicitation was issued under the Competition in Contracting Act (CICA), general provisions relating to government contracting. The solicitation was announced on the government's website

3. The Performance Work Statement of the Solicitation states in pertinent part:

“1. GENERAL. This is a non-personal services contract to provide meals to meet the special nutrition needs of patients and service members within the hospitals and clinics of the military health care network ...

1.1. BACKGROUND. The U.S. Army Medical Command (MEDCOM) provides health care services worldwide to qualified military, family members, and retirees through a network of military treatment facility (MTF) and health clinics. A vital part of the health care network is the delivery of nutrition care food services in these facilities, to include educating patients on healthy food choices with the “Go Green” Food Identification Program...

1.2. SCOPE OF WORK. The contractor shall provide qualified Nutrition Care Management, supervisory, technical, administrative, and clerical services necessary to perform Nutrition Care Food service at locations identified at contract paragraph 1.10.

4. As stated in the Solicitation, specific work requirements include the following:

“1.21.4. PATIENT TRAY SERVICES (PTS) All CSPs involved in the assembly and delivery of patient meals shall have the following qualifications and experience.

1.21.4.1 Qualifications and Experience. PTS CSP’s shall: a) have and maintain ServSafe Food Handler certifications; b) have a minimum of one year experience in an health care food service environment; c) experience shall include preparation and inspection of therapeutic diet trays to ensure that all items match what is ordered on the tray ticket, make precise measurements and weights and follow recipes for preparation of special feedings and nourishments; d) have ability to provide excellent customer service; and e) have ability to read and write English.

2.2.21. Patient Tray Room Service. Patient meal service is a room service style meal delivery program for inpatients at the MTF. Patients may select menus that offer a variety of healthy, made-to-order food selections that are compliant with the patient’s diet prescription. Patients can order their food anytime during the specified hours of operation by the specific MTF.”

5. Section 5 of the Description of Work section of the Solicitation states:

“5.1. The contractor shall provide management, supervision, administration and labor to support the Nutrition Care services identified in this contract. The Nutrition Care food services include the following functions: Patient Tray Service; Non-Patient Food Services; Cash Collections; Cleanliness and Sanitation; Supply; Inspections, Reports and Meetings.”

5.3.4. “Provide on-premise food service support as required.”

5.3.4.2. “On-premise” food service includes preparation, set up, serving and clean up/teardown of service in accordance with USA MECOM Nutrition Food Service Standardization Program Policy #2 On-Premises Food Services.”

6. Approximately ninety-percent of the meals prepared under the Solicitation were typical cafeteria meals served in cafeteria settings at the various installations. At some installations, the average census for the in-patient meals was as few as three patients, while thousands of meals were served in the traditional cafeteria setting.

7. For inpatient tray service, meal requirements could be the same as in the cafeteria serving line.

8. The solicitation provided that the award would be made to an “offeror whose offer, conforming to the solicitation, would be the best value offered to the Government, price and other factors considered.” The following four factors were listed in the Solicitation: (1) Technical (2) Past/Present Performance (3) Price and (4) Subcontracting Plan.

9. Gary Hankins served as the Contracting Officer for the Solicitation. Hankins decided that the Act did not apply. He issued no invitations to SLA's to bid on contracts under the Solicitation.

10. On June 12, 2013, the Army held a Pre-proposal Conference in Fort Knox, Kentucky to answer questions from prospective contractors. Petitioner attended the conference. Potential offerors were advised to present initially their best proposals. They were also told that the Randolph- Sheppard Act did not apply to the Solicitation. Further, the Government advised that it reserved the right to conduct discussions, if deemed necessary.

11. On November 26, 2013, Morton Hopkins, Jr. Contracting Officer, forwarded to James Kirby, Commissioner of the South Carolina Commission for the Blind, a statement prepared by Hankins as to why the RSA did not apply to the Solicitation. Although Hankins acknowledged that the Act applied to cafeteria service, he stated that the Solicitation did not call for cafeterias but for multiple Nutrition Care Services as part of the medical series within a military treatment facility.

12. The deadline for submitting proposals was July 9, 2013. Five contractors including the SLA and Sodexo Management submitted proposals in response to the Solicitation.

13. The SLA submitted a proposal with its teaming partner, Nayarson, to provide food service at the military treatment center located in Fort Stewart, Georgia.

Dennis Donnelly, a writer/consultant with experience in food service marketing, prepared and submitted the proposal on behalf of the SLA.

14. Donnelly previously worked with the SLA and Nayarson in submitting bids for food service contracts. Donnelly testified that a food-dispensing facility is capable of providing a broad variety of prepaid foods and beverages, similar to a Luby's.

15. After the proposals were reviewed, Hankins determined that all were within the competitive range and had a reasonable chance of selection. Hankins testified that there was no standard for determining whether a proposal fell within the competitive range other than "seeking contracts that have a reasonable chance of selection for an award."

16. A Source Selection Evaluation Board (SSEB) of five professionals from various military bases across the United States was convened to evaluate the proposals. The team consisted of the panel chairperson, and four panel members with experience in contracting, nutrition, and clinical nutrition food service requirements. The proposals were separated into volumes for review covering Administrative, Technical, and Past Performance elements. Gary Hankins and S. Tolbert, Contract Specialist, participated in the reviews. The

identity of Board members cannot be disclosed due to confidentiality requirements.

17. Hankins determined that the proposals had “multiple issues.” At that point, he decided that no award could be made and that discussions were necessary. Discussion letters were sent to all offerors in which deficiencies and weaknesses were identified. The SLA proposal had 66 deficiencies/weaknesses

18. The purpose of the letters was to clear up any misunderstandings which an offeror might have had. Revised proposals were requested. Donnelly submitted a letter addressing all issues raised. He did not submit a “revised” proposal, believing that the Army would request any additional information which might have been needed. Hankins accepted his letter.

19. Revised proposals were reevaluated by the SSBB. It was determined that the revised technical proposal of the SLA contained enough major omissions/deficiencies that major rewrites were required. Hankins determined that the SLA proposal was still technically deficient and that it should be eliminated from the competitive range. No further discussions were held.

20. Donnelly testified as to each of the weakness and deficiencies which were identified by the Board. He explained that some were based on the Army’s lack of understanding of the relationship between Nayarson and South Carolina. Although deficiencies noted on the SLA proposal involved subcontractors, SLA ‘s

were not required to prepare subcontracting plans. Without such a requirement, fifteen of the SLA's forty-seven deficiencies would have been eliminated. This would leave only 32 noted deficiencies.

21. During the award process regarding a prior procurement, Nayarson served as the teaming partner for the SLA. Sixty-eight weaknesses/deficiencies were identified during that process. The SLA proposal was found to be in the competitive range.

22. On June 17, 2014, the SLA was notified of its elimination from the competitive range because its revised proposal was still technically deficient based on 16 technical weaknesses and 16 technical deficiencies.

23. Sodexo Management was awarded the contract at Fort Stewart.

24. A tour of the Fort Stewart facility was conducted on May 4, 2016. A member of the SSBB and the Army's counsel stated that the facility looked like a cafeteria. Hankins stated that without the tray service, the dining facility would be a simple cafeteria.

## V. DISCUSSION<sup>2</sup>

The issue presented is whether the Army's failure to apply the priority to the Solicitation was in violation of the Randolph-Sheppard Act. The burden is on

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<sup>2</sup> The Panel is required to conduct the arbitration in accordance with the federal Administrative Procedure Act. Under the Act, the burden of proof is by substantial evidence.

the SLA to show by substantial evidence that the Army violated the Act. See 5 U.S.C. 554-557. Also, see Dickinson v. Zurko, 527 U.S. 150,164 (1999).

Evidence is substantial in the APA sense if it is “enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact. Illinois Central R.R v. Norfolk & Western Ry. 385 U.S. 57, 66, 87 S.Ct. 255, 17 L. Ed. 162 (19). “This is something more than a mere scintilla but something less than the weight of the evidence.” Pennaco Energy. 377 F. 3d at 115 (Citations omitted)

Also see, People for the Ethical Treatment of Animals, Inc. v. United States Dep’t of Agric., No. 15-CV-00920-CMA, 201 WL 2772284, at \*7 (D. Colo. May 2016). The SLA met its burden.

In 1936, Congress enacted the Randolph-Sheppard Act to enhance economic opportunities for the blind, 20 U.S.C. Section 107(a). The Act provides that blind persons licensed by the state licensing agency will be given priority in the operation of vending facilities on federal property. 20 U.S.C. 107(a)& (b). The Act applies to cafeterias on federal land when a federal agency solicits such service. 20 U.S.C 107 (a) &(b); 34 C.F.R. 395,33(b). When the federal agency solicits such service, it is required to invite the SLA to bid on the contract. 34 C.F.R. Section 395.33(b). If the SLA’s proposal falls within the competitive range and has been ranked among those with a reasonable chance of being selected, the federal agency will give priority to the SLA’s proposal for the award. 34

C.F.R. 395.33 (a) and (b). In the alternative, the agency may negotiate directly with the SLA. Military dining facilities are “cafeterias” to which the Act’s priority applies. 20 USC Sections 107e(7), 107 d-3(e), 34 CR 395.

The Act defines a cafeteria as a “food dispensing facility capable of providing a broad variety of foods and beverages (including hot meals) primarily through the use of a line where the customer serves himself from displayed selections.” A cafeteria may be fully automatic or some limited waiter or waitress service may be available.

Thus, as the definition states, an entity must be capable of dispensing food primarily, although not exclusively, through use of a service line to be considered a cafeteria. Record evidence shows that operations called for under the Solicitation, in fact, fall within the meaning of a cafeteria. The Solicitation requires contractors to prepare and serve meals which must be provided to both patients and non-patients. Food may be served via Grab and Go Stations or from Kiosks. While a serving line is not mentioned in the Solicitation, the record shows that this method is actually used by the facilities in question, including the contractor at Fort Stewart. Indeed, evidence showed that approximately 90 percent of meals served by contractors are via serving lines. As few as 3 patients may be provided meals through tray service. Following a tour of the Fort Stewart facility, both the SSBB member and the Army’s counsel commented that it looked like a cafeteria.

The Department of Education and the Government Accounting Office have recognized that adding services to a cafeteria contract does not change the dining facility into an entity not subject to the Act. See This is especially true where the tray services were as limited as those involved here and were directly related to the facility's operations.

In view of total evidence of record, the Panel concludes that sufficient evidence exists to show that the Solicitation called for the operation of services by a cafeteria. Whether food is delivered by self-service, cart or tray, all fit within the definition of a cafeteria.

Having determined that the Solicitation called for operation of a cafeteria, the next inquiry is whether the Army violated the Act by failing to apply the priority requirement. The Army was required to apply the priority if the SLA's proposal fell within the competitive range and had a reasonable chance of selection. The Contractor Officer testified that the SLA's proposal met these requirements. Although the Officer later determined on further review, that the proposal was not in the competitive range, the change in position does not negate his initial determination. At the point where the officer found that the SLA proposal was within the competitive range, he was required to apply the Act's priority requirement. The officer's subsequent reversal of his decision cannot justify or excuse the Army's failure to apply the priority requirement.

The Agency further attempts to defend its action by stating that it was following CICA, as well as, DOD regulations and procedures. Procurements are to have full and open competition, except when other procedures expressly authorized by statute control. 10 U.S.C. section 2304. In enacting the Randolph-Sheppard Act, Congress provided for exceptions to the full and open competition provisions. 348 F.3d 1263, 1272 (10th Cir. 2003); Nish v. Cohen, 247 F.3d 197, 204 (4th Cir. 2001). Thus, CICA only applies where it does not conflict with the Act or its implementing regulations.

The Agency's contention that its action should be upheld under Chevron must also be rejected. The power of an administrative agency to administer congressional programs necessarily requires the formulation of policy and rule making to fill any gaps left by Congress. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782 (1984). Courts are not to substitute their judgment for that of the agency. CRS Marine Servs. Inc. v. United States, 41 Fed Cl. 66, 83 (1998). However, an Agency's decision can be vacated if arbitrary, capricious or without rational basis. The Agency's findings and conclusions are without rational basis if the Agency cannot articulate a rational connection between the facts found and the choice made. Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc. 419 U.S. 281 (1974). The Agency has failed to provide any reasonable explanation in support of its decision that the Act was inapplicable to the instant Solicitation. The Army not only failed to provide reasonable justification for its decision, but by issuing the

solicitation under CICA, effectively circumvented the Act's priority requirement. The Army's action runs counter to express purposes of the Act to enhance and promote opportunity for blind vendors.

In sum, the record shows that the Army's failure to apply the priority requirement to the instant solicitation violated the Randolph-Sheppard Act. The Panel has no authority to issue remedies, and was charged only with issuance of its opinion.

/s/ Merry C. Hudson,

Chair

/s/ Susan Gashel

Panel Member, Concurring

Concurring in Part, Dissenting in Part:

/s/ Steve Fuscher

Panel Member

Date: 9-2-2016

## Concurring Opinion of Panel Member Susan Rockwood Gashel

I concur wholeheartedly with the majority opinion. I write this concurring opinion as to the application of the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107f (R-S Act) to ensure that the record reflects the correct legal standards and to rebut the dissenting opinion of Army Panel Member Steven Fuscher. The following numbered paragraphs correspond to the numbered paragraphs in Mr. Fuscher's dissent.

### **Paragraph 3:**

In Mr. Fuscher's dissent he cites to Petitioner's brief at 18, stating that "[t]he State argues that CICA requires the contracting officer to negotiate a sole source contract with the SLA because the R-S Act specifically authorizes a priority to award a contract to the SLA." Page 18 of Petitioner's brief is attached. It merely states that if the vending facilities in question are not cafeterias, then they must be permitted without bidding. This statement was made to refute the Army's position that the solicitation was not for a cafeteria. See majority opinion herein, page 5, paragraph B.

Mr. Fuscher makes the assumption that the Competition in Contracting Act, 41 U.S.C. § 3101 (CICA) applies to this solicitation.<sup>1</sup> Section 3101(c) of the CICA provides it and the FAR do not apply "when this division is made inapplicable pursuant to law."

If a vending facility is a cafeteria, then the SLA submits its response to a solicitation, or a contract can be entered into through direct negotiations. 34 C.F.R. §§ 395.33(b) and (d). The testimony of Mr. Stevenson and of Mr. Donnelly cited by Mr. Fuscher reflected the fact that the Army had claimed that the solicitation was not a cafeteria. If a vending facility is not a cafeteria, a permit is authorized by the R-S Act. 20 U.S.C. § 34 C.F.R. §§ 395.16, 395.35.

### **Paragraph 4:**

Since the panel has concluded that the solicitation was for a cafeteria, there is no **required** sole source negotiations, instead the regulations at 34 C.F.R. § 395.33 come into play.

### **Paragraph 7:**

Mr. Fuscher states that a vending facility is established via a permit where there are no appropriated funds obligated. This position has long been repudiated. Whether appropriated funds are or are not obligated, the R-S Act applies.

In *NISH v. Cohen*, 247 F.3d 197, 203 (4th Cir. 2001) the Fourth Circuit refuted the contention that military mess halls are not cafeterias because meals are provided from appropriated funds. *Id.* at 203.

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<sup>1</sup> Mr. Fuscher cited to 10 U.S.C. § 2304, which is the Armed Forces general procurement law and which excludes "procurement procedures otherwise expressly authorized by statute." Application of both 10 U.S.C. § 2304 and 41 U.S.C. § 3101 can only result in a determination that neither apply to procurements pursuant to the R-S Act.

The Court, in NISH v. Rumsfeld, 188 F. Supp. 2d 1321, 1322 (D.N.M. 2002), *affd*, 348 F.3d 1263 (10th Cir. 2003), noted that the CICA allows for a noncompetitive process when authorized by statute. *Id.* at 1322. The opinion referred to the exclusion of the CICA as the “savings clause.” *Id.* Accordingly, the Court ruled that the R-S Act “is reasonably interpreted as a statute authorizing procurement and falls within the “savings clause” of the CICA. *Id.* at 1326. In other words, the CICA does not apply to procurements under the R-S Act.

### **Paragraphs 8 and 9:**

Mr. Fuscher continues to make a distinction between appropriated and non-appropriated funds, instead of recognizing that two federal courts as well as other authorities<sup>2</sup> have determined that whether or not services subject to the R-S Act’s priority are paid for with appropriated or non-appropriated funds, that those services are exempt from the CICA. Accordingly, his claim that the FAR controls the evaluation of the bids in this case has no legal basis whatsoever. The citation to a case not involving the R-S Act is irrelevant to this case, as it is based on the CICA, which is not applicable to a procurement where the R-S Act applies. The Army’s witness, Mr. Hankins, knows this. He testified that, unless there is a statutory exemption to competition act, the Army must compete all contracts full and open. Transcript (T), Page (P) 59, Lines (L) 2-4.

### **Paragraph 10:**

Mr. Fuscher has provided the standard of review for CICA procurement decisions, not the standard of review for R-S Act procurements. The Federal Court of Claims has conclusively stated that R-S Act cases cannot proceed to the Court of Federal Claims, but must be proceed to arbitration, rejecting the finding in Wash. State Dep’t of Services for the Blind v. U.S., 58 Fed. Cl. 781 (2003) that the Court of Federal Claims had jurisdiction over the matter. Kentucky v. United States, 62 Fed. Cl. 445, 447 (2004), *affd sub nom. Kentucky, Educ. Cabinet, Dep’t for the Blind v. United States*, 424 F.3d 1222 (Fed. Cir. 2005). The standard of review is as set forth in the majority opinion.

### **Paragraph 11:**

The Department of Education’s Rehabilitation Services Administration Commissioner LaBreck initially took the position that there was no violation of the R-S Act, in a letter dated December 24, 2013. However, she later authorized the convening of this panel to determine

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<sup>2</sup> Commissioner Frederick K. Schroeder of the Department of Education’s Rehabilitation Services Administration concluded: “[a]ny attempt to draw a distinction between appropriated funded cafeterias and concession cafeterias is merely a fiction ... [t]here is no basis either in the Act or in the legislative history for [such a] position.” NISH v. Cohen, 247 F.3d 197, 205 (4th Cir. 2001). The former General Counsel of DOD, Judith A. Miller, determined that “the assertion that the Act does not apply to military dining facilities cannot withstand analysis.” *Id.* In *Matter of: Dep’t of the Air Force-Reconsideration*, 72 Comp. Gen. 241 (1993) the Comptroller General denied a protest where the protesters argued that appropriated funds contracts were excluded from the R-S Act.

if there was such a violation, thereby overruling her prior position. There is no reason to cite the earlier letter; the statement in it was reversed by the Commissioner herself.

**Paragraph 12:**

As stated above, in 2005 the Federal Court of Claims reversed the finding in Wash. State Dep't of Services for the Blind v. U.S., 58 Fed. Cl. 781 (2003) that it has jurisdiction over the R-S Act. Kentucky v. United States, 62 Fed. Cl. 445, 447 (2004), aff'd sub nom. Kentucky, Educ. Cabinet, Dep't for the Blind v. United States, 424 F.3d 1222 (Fed. Cir. 005). The Court of Federal Claims again determined in lacked jurisdiction in Colo. Dep't of Human Serv. v. U.S., 74 Fed. Cl. 339 (2006).

**Paragraph 15:**

For the reasons stated above, the CICA and FAR are irrelevant to this case, as the Panel's decision must be based on the R-S Act and its implementing regulations.

**Paragraph 16:**

Mr. Fuscher states that bid must be "responsive, competitive, comparable, acceptable, or reasonable" for final award. Neither the R-S Act nor its implementing regulations so state. Accordingly, these terms are not appropriate to evaluate the SLA's response to the solicitation in this case.

**Paragraph 18:**

Any discussion of the competitive range is irrelevant in view of the fact that the regulation at 34 C.F.R. § 395.33(a) vests exclusive authority in the Secretary of Education to determine whether or not to apply the priority in the operation of cafeterias:

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.

**Paragraph 19 - 21:**

The statement that the SLA "submitted a letter with the apparent intent of conducting additional discussions as if this award process was a permitting process rather than a competitive award process" ignores the fact that 34 C.F.R. 395.33(b) requires that, once an SLA's bid is within a competitive range, the SLA is required to consult with the Secretary of

Education.<sup>3</sup> Moreover, 34 C.F.R. § 395.33(a) states that the prior right of blind vendors to operate cafeterias on Federal property “shall be afforded” when the Secretary of Education determines, in consultation with the federal property manager, that the operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided. The operation is “expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.”

**The statutory and regulatory scheme makes it clear that an SLA’s bid cannot be summarily dismissed without the federal property manager consulting with the Secretary of Education, who makes the final decision.** 34 C.F.R. § 395.33(a). See, also, Colo. Dep’t of Human Serv. v. U.S., R-S/10-6 (May 30, 2012) (“the fact that a blind vendor’s bid was not within a competitive range set by a contracting agency does not preclude the Secretary of Education from concluding that the blind vendor is entitled to the priority when the blind vendor can nonetheless provide services at a reasonable cost.”); Randolph-Sheppard Vendors of America, Inc. v. Harris, 628 F.2d 1364, 1367 (D.C. Cir. 1980) (“the bidding system allows the Secretary to determine whether the blind operator’s cost is ‘reasonable’; and the bidding regulation provides that if the blind vendor’s bid falls within a reasonable and competitive range, even if it is higher than some others, it will be given a priority.”)

## **Conclusion**

In sum, Mr. Fuscher’s conclusion that the removal of the SLA’s proposal from the competitive range mooted the R-S Act priority is without basis in law. Even if a bid is removed from the competitive range, the regulation at 34 C.F.R. § 395.33(a) leaves the final decision with the Secretary of Education, to ensure that the R-S Act is implemented to ensure “maximum employment opportunities to blind vendors to the greatest extent possible.”

August 29, 2016.

/s/ Susan Rockwood Gashel

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<sup>3</sup> Moreover, the citation to Rotech Healthcare, Inc. is inapplicable to this case because it does not deal with a statute outside the realm of the CICA and excluded by 10 U.S.C. § 2304 and 41 U.S.C. 3101.

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**PETITIONER'S POST HEARING BRIEF**

**related to cafeteria operation would be excluded from the Act.**<sup>71</sup>

This Comptroller General’s decision was cited by the arbitration panel which upheld the applicability of the Act to auxiliary services at Fort Stewart.<sup>72</sup> The panel issued an opinion stating “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.’”<sup>73</sup>

If these vending facilities are not labeled as cafeterias by this panel, then the Army was still required to permit these vending facilities to South Carolina without any bidding.<sup>74</sup> Only if South Carolina’s operation of the vending facilities would adversely affect the interests of the United States would a permit not be issued. Even in that instance, the Army would be required to justify its opinion in writing to the Secretary of Education, who has the final say on the matter.<sup>75</sup>

**B. The Army Violated the Act by Solely Following the Competition in Contracting Act Rather than Following the Act’s Requirements in the Procurement.**

1. *The Act Provides Certain Important Exceptions to the Competition and Contracting Act.*

Unaware that the Randolph-Sheppard Act applied to this solicitation, Mr. Hankins did not know that the Act provided certain important exceptions to the Competition and Contracting Act (“CICA”). CICA provides that except in the case of a procurement procedure expressly

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<sup>71</sup> *Id.* at 12-13.

<sup>72</sup> *Georgia Vocational Rehab. Agency v. United States Department of Defense, et al*, No. R/S 13-09 and 20-21, Jan. 11, 2016 (Tab 2).

<sup>73</sup> *Id.*

<sup>74</sup> 34 C.F.R. §§ 395.34-35.

<sup>75</sup> 20 U.S.C. § 107(b)(2).

Panel Member Fuscher, Concurring in Part and Dissenting in Part

1. I concur in the majority's analysis of the facts presented by the parties.

However, I do not concur with the finding that the Army violated the R-S Act when the Contracting Officer removed the State Licensing Agency's (SLA) proposal from the competitive range and determined that it was not eligible for award. In my opinion, the application of the R-S Act priority did not apply to this procurement action since the SLA's proposal was not ranked among those proposals which have a reasonable chance of being selected for final award as required by 34 CFR 395.33 (b)

#### **I. ARMY'S DECISION TO COMPETE THE AWARD**

2. The following discussion addresses the authority of the Army to compete the award of these services under the Federal Acquisition Regulations source selection process. This discussion is necessary to lay the foundation for the Competitive Range analysis that follows.

3. The Competition in Contracting Act (CICA), 10 U.S. Code § 2304, provides for an exception to full and open competition under certain circumstances. The State argues that CICA requires the contracting officer to negotiate a sole source contract with the SLA because the R-S Act specifically authorizes a priority to award a contract to the SLA. *Petitioner's* Brief at 18. While CICA does provide a priority to award an appropriated funds contract to the SLA when its proposal is ranked with those proposals that have a reasonable chance of being selected for award, the State failed to cite any

authority that “directs” the contracting officer to conduct negotiations for cafeteria services on a sole source basis with the SLA versus a competitive procurement under the Federal Acquisition Regulations.

4. If the contracting officer is required to conduct sole source negotiations with the SLA under the R-S Act, the R-S Act regulations would include that direction. However, 34 C.F.R. Section 395.33(b) states that the SLA will be “invited to respond to solicitations for offers” when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. If sole source negotiations were required there would be no need to be invited to submit a proposal in response to a solicitation. Therefore, it is reasonable to interpret the regulations to anticipate competitive source selections for the award of cafeteria contracts.

5. The R-S Act regulations do direct the contracting officer apply a priority for the award of a cafeteria contract when the SLA submits a proposal if the SLA satisfies two conditions:

a. The proposal received from the SLA is judged to be within a competitive range and has been ranked among those proposals that have a reasonable chance of being selected for final award<sup>1</sup> and;

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<sup>1</sup> 34 C.F.R. Section 395.33(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.

b. The Secretary of the Department of Education determines, on an individual basis, and after consultation with the agency 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<sup>2</sup>.

6. Except for these regulations, neither CICA nor the R-S Act and its regulations address the interaction of the Federal Acquisition Regulations and the R-S Act when a SLA is competing for award through a competitive acquisition process.

7. The R-S Act does authorize the negotiation of a permit to operate a vending facility where no appropriated funds are obligated to support the operation of the vending facility.<sup>3</sup> During the hearing, Mr. Otis Stevenson, a witness for the SLA, asserted that the Army could have issued the pending contract to the SLA by issuing a “permit”.

Transcript, Testimony of Mr. Otis Stevenson, Volume 2, pages 285-290. Mr. Dennis Donnelly, also a witness for the SLA, testified that the hospital food operations could

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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.

<sup>2</sup> 34 C.F.R. Section 395.33(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.

<sup>3</sup> 34 C.F.R. Section 395.16 Permit for the establishment of vending facilities.

Prior to the establishment of each vending facility, other than a cafeteria, the State licensing agency shall submit an application of a permit setting forth the location, the amount of space necessary for the operation of the vending facility; the type of facility and equipment, the number, location and type of vending machines and other terms and conditions desired to be included in the permit. Such application shall be submitted for the approval of the head of the Federal property managing department, agency, or instrumentality. When an application is not approved, the head of the Federal property managing department, agency or instrumentality shall advise the State licensing agency in writing and shall indicate the reasons for the disapproval.

have been handled by issuance of a ‘permit.’ Transcript, Testimony of Dennis Donnelly, Volume I, pages 215-217.

8. Because the solicitation contemplated the award of a contract that obligates appropriated funds, a federal agency is required to invite a SLA to submit a proposal when a cafeteria contract, not a permit<sup>4</sup>, 34 C.F.R. § 395.33(b). The regulations do not authorize the issuance of a “permit” to operate a cafeteria where the government pays for the services of the SLA with appropriated funds, it authorizes the “participation” of the SLA in a competitive source selection that is controlled by the Federal Acquisition Regulations.

9. The Federal Acquisition regulations and its supplements have a complex set of standards that are designed to inform offerors of the government’s stated requirements and the standards for review of those proposals. Contracting officers are granted broad discretion in evaluating proposals and determining which proposals will be considered for award. The General Accountability Office (GAO) summarizes this principle as follows:

The evaluation of an offeror’s proposal is a matter within the agency’s discretion. See IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶90 at 7, 13. In reviewing a protest against an agency’s evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency’s judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD, 169 at 3.

10. The United States Court of Federal Claims in *Washington State Department of Services for The Blind and Robert Ott, Plaintiffs, v.*

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<sup>4</sup> 34 C.F.R. Section 395.33 (b) Operation of cafeterias by blind vendors.

*The United States, Defendant.* No. 03 2017 C. Dec. 17, 2003 also addressed the standard for review of agency procurement decision as follows:

Under the standard of review applicable in bid protests, an agency's procurement decision will be upheld unless shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 28 U.S.C. § 1491(b)(4). The court recognizes that the agency possesses wide discretion in the application of procurement regulations. *See Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed.Cir.2001). *See also Honeywell, Inc. v. United States*, 870 F.2d 644,648 (Fed.Cir.1989) (stating that "[i]f the court finds a reasonable basis for the agency's action, 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") (citation omitted). In undertaking its analysis, the court is not to substitute its judgment for that of the agency, even if reasonable minds could reach differing conclusions. *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). A protester must show that an agency's actions were without a reasonable basis or violated an applicable procurement statute or regulation. *Info. Tech. & Applications Corp. v. United States*, 51 Fed.Cl. 340,346 (2001), *aff'd*, 316 F.3d 1312. Fed.Cir.2003). *Washington State Dep't of services for the Blind et. All v. United States*, 58 Fed. Cl. 781 at pg 22.

11. Commissioner Janet L. LaBreck also addressed these issues in her letter dated December 24, 2013 where she stated that "you [the State] have not established that there is anything in the request for proposals that would prohibit the SLA, solely because of its status under the Act, from submitting a bid at the present time....Thus, given that you have not alleged that there is anything in the contract solicitation preventing the SLA from submitting a bid, there is currently no violation of the Act." *Army Exhibit 6, pg 2.*

12. The finding that the Army did not violate the R-S Act by not determining the feasibility of the SLA performing the services contemplated by Solicitation Number W81K04-13-R-0010 prior to the issuing the solicitation for a competitive award is supported by the Commissioner's denial of the State's a request for arbitration early on in

the source selection process and by legal precedent. As stated in *Washington v. U.S.*, the government has broad discretion to establish its source selection strategy and the courts require that the Protestor (State) must show that an agency's actions were without a reasonable basis or violated an applicable procurement statute or regulation. *Id.*

## II. COMPETITIVE RANGE ANALYSIS

13. The following analysis addresses the Secretary's letter of December 24, 2013. This letter is followed by the Secretary's appointment letter of March 26, 2015 where the whether the Army's failure to apply the priority to the solicitation was violation of the R-S Act." *Respondent's Enclosures at pgs 13-14.*

14. In my opinion, the Army did not violate the R-S Act in its evaluation of Solicitation Number W81K04-13-R-0010 when the Army rejected the State Licensing Agency's (SLA) proposal as non-responsive to the terms of the solicitation.

15. Commissioner LaBreck was on notice that the Army was issuing a solicitation for dining hall services. Once the Army initiated that process, the Federal Acquisition Regulations controlled the process used to make an award. Some of the elements of that process include the notice to the public of a need for services, the statement of the Army's work requirements, the content of proposals, the evaluation of proposals and the standards to be used for making an award.

16. The R-S Act does provide an exception to the FAR where the SLA shall be awarded a contract if the SLA's proposal is determined to be in the competitive range,

and ranked among those proposals which have a reasonable chance of being selected for final award.<sup>5</sup> However, placement in the competitive range alone does not mean an offer has been found responsive, competitive, comparable, acceptable, or reasonable for final award. The proposal submitted by the SLA must be responsive to the requirements listed in the statement of work and the solicitation requirements, or the SLA runs the risk of being removed from the competitive range.

17. *FAR 15.306 -- Exchanges of Offerors After Receipt of Proposals* specifically addresses the process required to conduct discussions prior to award of a competitive award by a contracting officer where appropriated funds are used to commit the government to pay for the services provided by a contractor. FAR 15.306 (c) addresses the process used by the procuring agency to establish a competitive range where discussions are conducted by the government with the offeror.<sup>6</sup>

18. In this procurement, the government determined that it was necessary to have discussions with offerors and established a competitive range using the process and

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<sup>5</sup> 34 CFR 395.33 (b)

<sup>6</sup> FAR 15.306 (c) *Competitive range*.

(1) Agencies shall evaluate all proposals in accordance with 15.305(a), and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section.

(2) After evaluating all proposals in accordance with 15.305(a) and paragraph (c)(1) of this section, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency.

(3) If the contracting officer, after complying with paragraph (d)(3) of this section, decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors in accordance with 15.503.

(4) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing (see 15.505 and 15.506).

procedure set forth in FAR 15.306(c).<sup>7</sup> The government identified sixty-six weaknesses and/or deficiencies in the SLA's proposal. The SLA was provided with an opportunity to amend its proposal to address these weaknesses and/or deficiencies. The same opportunity to respond to deficiencies/weaknesses was afforded all offerors identified to be within the competitive range. These discussions were conducted in accordance with FAR 15.306(d).<sup>8</sup> The SLA did not revise its proposal. The SLA's proposal was still

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<sup>7</sup> The panel found the following facts which led to discussions:

15. After the proposals were reviewed, Hankins determined that all were within the competitive range and had a reasonable chance of selection. Hankins testified that there was no standard for determining whether a proposal fell within the competitive range other than "seeking contracts that have a reasonable chance of selection for an award."

16. A Source Selection Evaluation Board (SSEB) of five professionals from various military bases across the United States was convened to evaluate the proposals. The team consisted of the panel chairperson, and four panel members with experience in contracting, nutrition, and clinical nutrition food service requirements. The proposals were separated into volumes for review covering Administrative, Technical, and Past Performance elements. Gary Hankins and S. Tolbert, Contract Specialist, participated in the reviews. The identity of Board members cannot be disclosed due to confidentiality requirements.

17. Hankins determined that the proposals had "multiple issues." At that point, he decided that no award could be made and that discussions were necessary. Discussion letters were sent to all offerors in which deficiencies and weaknesses were identified. The SLA proposal had 66 deficiencies/weaknesses.

<sup>8</sup> FAR 15.306(d) *Exchanges with offerors after establishment of the competitive range*. Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

(1) Discussions are tailored to each offeror's proposal, and must be conducted by the contracting officer with each offeror within the competitive range.

(2) The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.

(3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting office judgment.

(4) In discussing other aspects of the proposal, the Government may, in situations where the solicitation

technically deficient and it was eliminated from the competitive range. After the government completed this round of discussions, no further discussions were held.

19. There is no dispute that the SLA was notified of deficiencies in its proposals and was offered an opportunity to revise its proposal to address those identified procedures. The Army received the response from the SLA and the SLA did not amend its proposal. Rather it submitted a letter with the apparent intent of conducting additional discussions as if this award process was a permitting process rather than a competitive award process. However, it would have been a violation of the FAR for the government to have additional discussions with the SLA without providing all offerors an opportunity for discussions. This principle is affirmed in the following General Accountability Office protest decision. *Rotech Healthcare, Inc.*, B-413024; B-413024.2; 8-413024.3 August 17, 2016:

Where, as here, an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range. Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; see FAR § 15.306(d). *Retouch Healthcare Inc. at 8.*

20. Once the contracting officer excluded the SLA from the competitive range, the SLA has the burden of proving the contracting officer's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §

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stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

(5) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision (see 15.307(a) and 15.503(a)(1)).

706(2)(A); 28 U.S.C. § 1491 (b)(4).<sup>9</sup> The SLA has failed to satisfy its burden of proving that the contracting officer's decision was arbitrary, capricious, an abuse of discretion.

21. The State makes an extensive argument that the Army was required to conduct additional discussions that would violate FAR 15.306 but cited no direct authority to support its position. The SLA is entitled to a priority when the SLA's "response to a solicitation for the operation of a cafeteria is within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award<sup>10</sup>." Once the SLA's proposal was removed from the competitive range, it was no longer among those proposals with a reasonable change to be selected for award and was not therefore entitled to the R-S Act priority. There is no violation of the R-S Act.

### III. CONCLUSION

22. Contrary to the panel's decision, it is my opinion that once the SLA's proposal was removed from the competitive range, the issue of the R-S Act priority became moot. Since the SLA was not eligible for award, there was no priority to apply to the proposal submitted by the SLA. The State failed to establish that the contracting officer's decision to remove the SLA from the competitive range was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The State also failed to prove that the agency's actions were without a reasonable basis or violated an applicable

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<sup>9</sup> This is the standard of review used by the United States Court of Federal Claims in *Washington State Dep't of services for the Blind et. All v. United States*, 58 Fed Cl. 781 at pg. 22 cited above.

<sup>10</sup> 34 CFR 395.33 (b)

procurement statute or regulation. As a result, in my opinion, the Army's decision to not apply the R- S Act priority to the SLA's proposal was proper.

Concurring in Part, Dissenting in Part:

/s/ Steve Fuscher      Date: September 1, 2016  
Panel Member