

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

THE OKLAHOMA DEPARTMENT OF  
REHABILITATION SERVICES,

Claimant,

v.

UNITED STATES DEPARTMENT OF THE  
ARMY, FORT SILL,

Respondent.

Case No. R-S/15-10

**DECISION AND AWARD**

This arbitration proceeding was convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. §107 *et. seq.* [the “RSA”], upon a complaint letter dated February 3, 2015 directed to the United States Department of Education, Rehabilitation Services Administration (“DOE”) by the Oklahoma Department of Rehabilitation Services (“ODRS” or “Petitioner”). Petitioner contends that the United States Department of the Army, Fort Sill (“Army” or “Respondent”) violated the RSA for its failure to include the RSA priority in Solicitation W9124L-14-B-0001 (the “Solicitation”). The Solicitation is for Dining Facility Attendant (“DFA”) services at Fort Sill in Lawton, Oklahoma.

A hearing was held on July 27, 2016 at Oklahoma City, Oklahoma. Charles E. Geister III, Chair, Steven R. Fuscher and Susan Rockwood Gashel served as arbitration panel members. Peter A. Nolan, Esq. and Richard D. Olderback, Esq. appeared as counsel for Petitioner. J. Mackey Ives, Esq. and Douglas Hale, Esq. appeared as counsel for Respondent.

Testimony was given by witnesses Amber VanHoozer, Donald E. Craig, and Terry Smith. In addition, the following exhibits were offered and admitted: Petitioner Exhibit Nos. 1-10, and Respondent Exhibit Nos. 1-25. Subsequent to the hearing, with leave, Petitioner

submitted Exhibit No. 11 which was received in evidence. (Tr. 162: 12-163:25). Further, upon Petitioner's Motion dated September 8, 2016, Petitioner Exhibit Nos. 12-15 were admitted. Subsequent to the hearing, Petitioner and Respondent submitted post-hearing briefs and proposed findings of fact and conclusions of law. In reaching its decision, the Panel has considered all of the foregoing testimony, exhibits and briefs.

### **ISSUE**

Whether the Army violated the RSA and its implementing regulations by failing to recognize the RSA priority in issuing the Solicitation?

### **FINDINGS OF FACT**

1. Congress passed the RSA for the purposes of providing blind persons with remunerative employment, enlarging their economic opportunities, and stimulating them to make themselves self-supporting. To this end, the RSA authorizes, and grants a priority to, licensed blind entrepreneurs to operate vending facilities on federal property.<sup>1</sup> The term "vending facility" includes cafeterias, and military dining facilities, including dining facilities at bases such as Fort Sill, are cafeterias to which the RSA applies.

2. The RSA directed the Secretary of Education, through the Commissioner of the Rehabilitation Services Administration, to prescribe regulations designed to assure that the priority to operate vending facilities on federal property be given to licensed blind persons and that, whenever feasible, one or more vending facilities would be established on all federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.<sup>2</sup> The RSA was amended in 1974 and implementing regulations were enacted in 1977 at 34 C.F.R. § 395.1 *et seq.* The DOE administers the RSA, and the Secretary of

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<sup>1</sup> 20 U.S.C. §107(a).

<sup>2</sup> 20 U.S.C. §107(b).

Education designates “state licensing agencies” (SLAs) to license blind persons to operate vending facilities.<sup>3</sup> Such licensed blind persons “shall be given priority in the operation of vending facilities on any Federal property.”<sup>4</sup>

3. The RSA regulations provide that “[i]n 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 of 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 [of Education] as required under paragraph (a) of this section”.<sup>5</sup>

4. The RSA grants a priority during the source selection process to blind entrepreneurs to operate cafeterias, on federal property, when the Secretary of Education “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,

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<sup>3</sup> 20 U.S.C. §107(b); 34 C.F.R. §395.7

<sup>4</sup> 34 C.F.R. §395.30(a).

<sup>5</sup> 34 C.F.R. §395.33(b)

whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.”<sup>6</sup>

5. “If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary [of Education] under the provisions of §395.37.”<sup>7</sup>

6. Thus, in order to establish the ability of blind licensees to operate a cafeteria, the appropriate SLA must be invited to respond to solicitations for offers when a cafeteria contract is contemplated. If the proposal received from the SLA is judged to be within a competitive range and has been ranked among those proposals with a reasonable chance of being selected for final award, the federal agency is to consult with the Secretary of Education as required by 34 C.F.R. § 395.33(a). The priority is afforded when the Secretary determines, on an individual basis, and after consultation with the Federal agency, that the cafeteria can be operated by a blind licensee at a reasonable cost, with food of a high quality comparable to that currently provided employees. When a contract is awarded to a SLA, it is operated and managed by a licensed blind vendor.

7. The RSA regulations also provide that “[a]ll 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.”<sup>8</sup>

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<sup>6</sup> 34 C.F.R. §395.33(a).

<sup>7</sup> 34 C.F.R. §395.33(b).

<sup>8</sup> 34 C.F.R. §395.33(c).

8. A SLA is designated by the Secretary of Education to administer the RSA in each state. In issuing licenses for the operation of a vending facility, the SLA is required to give preference to blind persons in need of employment.<sup>9</sup>

9. The ODRS is the SLA for Oklahoma.

10. Fort Sill is a military facility located in Lawton, Oklahoma. Fort Sill is home to the Fires Training Center for the Army; both the Field Artillery School and the Air Defense Artillery School are located there. Fort Sill has multiple dining facilities, including the Staff Sergeant Juan Garcia Dining Facility (Building 3720) (the “Garcia Dining Facility”).

11. The Army designates some dining facility contracts as Full Food Service (FFS), and others as Dining Facility Attendant (DFA) service. According to a Report of the Inspector General of the United States Department of Defense dated April 15, 2008, FFS contracts encompass labor and management required to serve food in a military dining facility, including preparation of meals. DFA/mess attendant contracts encompass labor required to perform discrete support functions related to military dining facility operations, up to but not including meal preparation.<sup>10</sup>

12. According to Army Regulation 30-22 dated July 24, 2012 (governing the Army Food Program), a FFS contract covers activities that comprise the full operation of an Army dining facility. A DFA contract includes activities required to perform janitorial and custodial duties within dining facilities. Included are sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning, and other sanitation-related functions.<sup>11</sup>

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<sup>9</sup> 20 U.S.C. § 107a(b).

<sup>10</sup> Petitioner’s Ex. 6, pp. 7-8.

<sup>11</sup> Respondent’s Ex. 4 (Glossary).

13. The RSA does not define or distinguish between types of contracts for or pertaining to the operation of a cafeteria. The RSA does not define or distinguish between a FFS contract and a DFA contract.

14. Army Regulations prohibit soldiers from performing DFA services.<sup>12</sup> A contractor under a DFA contract provides some, but not all, of the support functions for the operation of a military dining facility. A military dining facility could not operate without the services provided under a DFA contract.<sup>13</sup>

15. No contractor operates an entire dining facility whether the contract is FFS or DFA; the contractor does not buy food, plan menus, set the hours of operation, respond to customer complaints, or control who will eat in the cafeterias, and does not set the cost of the meals.

16. From 2001 to 2015, ODRS, through its licensed blind vendor(s), provided cafeteria services at Fort Sill for multiple dining facilities pursuant to a single contract. ODRS was the incumbent contractor and had been successfully providing FFS and DFA services for the Army at Fort Sill since 2001.<sup>14</sup>

17. On or about September 3, 2014, the Army issued Solicitation No. W9124L-13-R-0005. The scope of work included FFS. A Dining Facility Attendant was defined as “[a] person who performs custodial, sanitation and limited food preparation duties within Army dining facilities.”<sup>15</sup>

18. ODRS was allowed to compete for the FFS contract at Fort Sill. The Army applied the RSA priority and awarded the contract to ODRS on April 1, 2016 to provide FFS

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<sup>12</sup> Respondent’s Ex. 4, ¶3-42(c)(2).

<sup>13</sup> July 27, 2016 Hearing Transcript (“TR.”) 97:25-98:3.

<sup>14</sup> Petitioner’s Ex. 12, pg. 7-8

<sup>15</sup> Petitioner’s Ex. 10.

services for three dining facilities at Fort Sill.<sup>16</sup> The contract award is \$98 million and obligates ODRS to provide FFS services for a base year with four option years.<sup>17</sup>

19. However, in its latest acquisition and procurement process, the Army directed the Contracting Officer at Fort Sill, Amber VanHoozer, to solicit a separate DFA contract for the Garcia Dining Facility that would not be subject to the RSA priority.<sup>18</sup>

20. The Army has contracting goals for the award of small business contracts.<sup>19</sup>

21. The DFA services solicitation for the Garcia Dining Facility was to set-aside the acquisition as a 100 percent HUBZone small business acquisition.<sup>20</sup>

22. On or about February 13, 2015, the Army issued the Solicitation carving out the Garcia Dining Facility into a separate DFA contract as an exclusively small business (HUB Zone) set aside procurement;<sup>21</sup> this would put the Solicitation outside the RSA, and did not allow ODRS to bid the contract because ODRS does not qualify as a small business.

23. A Performance Work Statement (“PWS”) outlines the performance being requested by the United States in connection with a solicitation.<sup>22</sup> The PWS developed for the Solicitation and contract at issue<sup>23</sup> includes a requirement that the contractor hire management and supervisory personnel, including a contract (project) manager with “a minimum of three (3) years supervisory experience in managing cafeteria style, multi-entree menu facility/facilities, providing complete meal service for breakfast, lunch and dinner.”<sup>24</sup> Supervisors and alternates must have five (5) years of experience “working in a large food service operation, cafeteria style

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<sup>16</sup> TR. 60:2-24.

<sup>17</sup> TR. 61:10-15.

<sup>18</sup> TR 78: 1-11, 16-25; 79: 1-7.

<sup>19</sup> TR. 76: 3-13.

<sup>20</sup> TR 70:3-9.

<sup>21</sup> The HUBZone program was enacted into law pursuant to the Small Business Reauthorization Act of 1997, Pub. L. 105-135 (Dec. 2, 1007), Section 601-607.

<sup>22</sup> Tr. 71:1-6.

<sup>23</sup> Petitioner’s Ex.9; Respondent’s Ex. 15.

<sup>24</sup> *Id.* At p. 5.

or multi-entree menu service performs dining facility attendant service (breakfast, lunch and dinner).”<sup>25</sup>

24. The PWS itemizes specific support services to be provided, such as cleaning of serving utensils, beverage containers, insulated food containers and inserts, and other possible food service items that may result from remote site feeding. The contractor furnishes cleaning supplies and expendable durable items required for the performance of the work covered by the contract as well as ladders, floor buffers, and other necessary manually-operated equipment to perform cleaning as specified. Contractor services also include, but are not limited to, preparing, maintaining and cleaning dining areas; cleaning tablewares; refilling condiment containers and placing salt, pepper, sugar, condiments and napkins on tables; cleaning spills and removing soiled dinnerware; cleaning dining tables, chairs, booths; general cleaning of the dining facility, self-service area, utensils; and sanitation of all food contact services.<sup>26</sup> These services are essential to the operation of a cafeteria, and the Garcia Dining Facility.

25. The Mission and Installation Contracting Command (MICC) Desk Book is dated May 5, 2015 (“2015 MICC Desk Book”). It establishes acquisition and contracting procedures for the MICC, and provides procedures that implement Department of Defense (DoD) and Army acquisition regulations.<sup>27</sup> The 2015 MICC Desk Book postdates the Solicitation; it is unclear whether this Desk Book was in force at the time of the Solicitation.

26. The Fort Sill Contracting Officer, Ms. VanHoozer, prepared an acquisition strategy, or business case analysis, as called for in a Department of the Army MICC Command Policy Memorandum dated February 14, 2013.<sup>28</sup> Ms. VanHoozer had an unlimited warrant that

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<sup>25</sup> *Id.* at p. 6.

<sup>26</sup> *Id.* at pp. 41-53.

<sup>27</sup> Respondent’s Ex. 21, p. 1.

<sup>28</sup> Petitioner’s Ex. 12.

authorized her to procure and purchase business services on behalf of the Army. The acquisition strategy defined how Ms. VanHoozer planned to solicit and procure dining services at Fort Sill.<sup>29</sup> Ms. VanHoozer testified that ultimately the Contracting Officer is responsible for the decision made in connection with a solicitation for food service.<sup>30</sup>

27. The February 13, 2014 MICC memorandum provides considerations before initiating an acquisition for food services. These considerations include how many dining facilities are in the procurement, how those dining facilities are currently operated, the history of providing food services, and whether the previous food service contracts have been successful.

28. The MICC February 14, 2013 memorandum provides that the business case analysis must determine whether retaining dining facility services as FFS is in the best interest of the Government, and shall examine specific cost savings to the Government. If the business case analysis concludes the best course of action is to initiate or retain a FFS contract, the contracting office will conduct the procurement in accordance with the RSA.

29. Ms. VanHoozer's acquisition strategy was to keep all cafeteria services at Fort Sill dining facilities under one contract as in prior years, subject to the RSA priority.<sup>31</sup> She concluded that continued consolidation of all food service functions under one contract was both necessary and justified.<sup>32</sup>

30. Because of the dollar value of the government requirement, Ms. VanHoozer's acquisition strategy was reviewed at the MICC Headquarters in San Antonio, Texas. MICC Headquarters legal opined that the RSA does not apply to a DFA contract at the Garcia Dining

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<sup>29</sup> TR. 78:8-23.

<sup>30</sup> TR. 77:11-19.

<sup>31</sup> TR. 78:8-23.

<sup>32</sup> Petitioner's Ex. 13.

Facility at Fort Sill.<sup>33</sup> The decision to split the one contract for the dining facilities at Fort Sill encompassing both FFS and DFA services into two contracts was directed by MICC legal headquarters.

31. By Memorandum dated February 14, 2014, the Office of the Commanding General at Fort Sill observed that splitting the Fort Sill contract into two contracts will cost the Army approximately \$4,000,000. The Commanding Major General found this approach “difficult to understand.”<sup>34</sup> And, it would make it more difficult to efficiently replace cooks in a DFA facility if the cooks were deployed from that facility.<sup>35</sup>

32. Ms. VanHoozer testified it was feasible to continue to operate all Fort Sill dining facilities under one contract, and she knew of no law, regulation or court order since 2001 that required a split of the one contract into two contracts.<sup>36</sup> Ms. VanHoozer also testified that if the one contract were not split into two contracts the RSA priority would apply to the one contract.<sup>37</sup>

33. At the time Ms. VanHoozer’s business analysis was being conducted, ODRS was the incumbent contractor and had been so for over a decade; FFS and DFA services were combined in one contract, and the food service had been successful.

34. 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 [of Education], who shall determine whether such limitation is justified.”<sup>38</sup> The regulations provide: “Any limitation on the location or operation of a vending facility for blind vendors by a department, agency or instrumentality of the United States based on a finding that such location or operation or type of

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<sup>33</sup> TR. 56:5-12; 66:20-67:15; 77:11-19; 78:20-79:7.

<sup>34</sup> Petitioner’s Ex. 15.

<sup>35</sup> Tr. 83:5-19.

<sup>36</sup> TR. 96:4-13.

<sup>37</sup> Tr. 81:17-21.

<sup>38</sup> 20 USC § 107(b)(2).

location 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 warranted.”<sup>39</sup>

35. The Army did not seek from the Secretary of Education a determination of whether carving out the DFA contract for the Garcia Dining Facility from the FFS contract would adversely affect the interests of the United States.

36. The Army never tried to justify its limitation on the existing operations of the Fort Sill dining facilities by ODRS, and the Secretary of Education never made a determination whether such limitation was warranted.

37. The DFA services at issue relate and pertain to the operation of a cafeteria and a cafeteria contract.

38. The “Javits-Wagner-O’Day Act” (“JWOD Act”) created the “Javits-Wagner-O’Day Program”, which was renamed the “AbilityOne Program”. 71 Fed. Reg. 68492; 41 U.S.C. §8501 *et seq.* (formerly 41 U.S.C. §46 *et seq.*). The JWOD Act’s purpose is to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of goods and services from qualified nonprofit agencies. 41 C.F.R. §51-1.1 (a).

39. The United States AbilityOne Commission, formerly known *as* the Committee forPurchase from People Who Are Blind or Severely Disabled (“CFP”) is the federal agency that administers the AbilityOne Program. 41 U.S.C. §§8502, 8503; 41 C.F.R. §51-1.1(a).

40. The AbilityOne Commission publishes the goods or services it considers suitable for purchase by the federal government from qualified non-profit organizations for the blind and disabled. This procurement list is a mandatory source procurement for federal agencies. 41 U.S.C. §8503; 41 C.F.R. §§51-1.3, 51-1.2(a).

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<sup>39</sup> 34 C.F.R. §395.30(b).

41. In January 2006, Congress enacted Section 848 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109-163 (the “NDAA FY 2006”). Section 848 required the DOE, the DoD and the CFP to issue a joint statement addressing the application of the JWOD Act and the RSA to the operation and management of military dining facilities.

42. In August 2006, representatives of the DOE, DoD and the CFP signed a joint report to Congress entitled “Application of the Javits-Wagner-O’Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facility Contracts.” (“Joint Report”).<sup>40</sup> The Joint Report made certain policy recommendations regarding the intersection of the JWOD Act and the RSA and to which types of contracts those Acts’ priorities should apply.

43. The Joint Report itself did not go through the notice, comment, and review procedures required of regulations.

44. Of the recommendations made in the Joint Report, the only one enacted into law by Congress, a “no poaching” provision, is found at Section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364 (“the John Warner Act”). Section 856(a)(1) removed the following specified services from RSA coverage: “full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under Section 2 of the [JWOD Act].” Section 856(a)(2)(A) directed that the JWOD Act does not apply at the prime contract level “to any contract entered into by the [DoD] as of the date of the enactment of this Act with a [SLA] under the [RSA] for the operation of a military dining facility.” Section 856(b)(1) directed the Comptroller General to conduct a review of a representative sample of “food service contracts described in [Section 856(b)(2)].” Section 856(b)(2) described a food service contract as one for “full food services, mess attendant

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<sup>40</sup> Respondent’s Ex. 8.

services, or services supporting the operation of all or any part of a military dining facility,” that was awarded under either the RSA or the JWOD Act, and that was in effect on the date of enactment of the John Warner Act [October 17, 2006].

45. The Office of the Under Secretary of Defense issued a Memorandum in March 2007 directing that the Joint Report “should not be cited in individual solicitations until it is implemented in complementary regulations” by DOE and DoD.<sup>41</sup>

46. In a proceeding before the Court of Claims, the government contended that “the Joint Report does not carry the force of law, and that the guidelines set forth in the Joint Report will not be binding until formal regulations have been issued by DoE and DoD.” The government also argued that even if the Joint Report could be treated as proposed regulations, they would not be binding until finalized. The Court of Claims agreed, and held that the Joint Report was not legally binding on the Army.<sup>42</sup>

47. On December 19, 2014, President Obama signed into law the “2015 National Defense Authorization Act” (“NDAA FY 2015”), Public Law 113-291.<sup>43</sup> Section 632 amended 10 U.S.C. §2942 to add food services to the goods and services authorized for DoD contracts with other federal agencies.

48. The NDAA FY 2015 was accompanied by a Joint Explanatory Statement (the “Joint Statement”) which directed the Secretary of Defense to prescribe implementing regulations for the application of the JWOD Act and the RSA to military dining facilities.<sup>44</sup> The Joint Statement was the product of the respective chairs of the House and Senate Committees on

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<sup>41</sup> Petitioner’s Ex. 8.

<sup>42</sup> *Moore’s Cafeteria Services v. U.S.*, 77 Fed. Cl. 180, 185-186 (2007), aff’d, 314 App’x 277 (Fed. Cir. 2008).

<sup>43</sup> Respondent’s Ex. 19 (excerpt).

<sup>44</sup> Respondent’s Ex. 20.

Armed Services, without a vote of any conference committee or either chamber of Congress. As of this date, no implementing regulations have been adopted.

49. On December 15, 2014, ODRS requested that the Solicitation be amended to comply with the Act; the Army denied that request on January 12, 2015.

50. ODRS filed a lawsuit styled *State of Oklahoma v. United States of America*, No. CIV-15-357-M, U.S.D.C., W.D. Oklahoma, seeking injunctive relief to prevent the United States from proceeding with the Solicitation. The parties agreed to maintain the status quo pending resolution of arbitration related to the Solicitation, including extension of the term of the current contract for the operation of military dining facilities at Fort Sill (No. W9124J-09-D-0003).<sup>45</sup> Pursuant to this agreement, ODRS and its licensed blind vendor, R&R Food Services, continue to provide FFS and DFA services at Fort Sill's military dining facilities, including DFA services for the Garcia Dining Facility.

51. Whenever a SLA determines that any department, agency or instrumentality of the United States is failing to comply with the RSA or any regulations issued thereunder, the SLA may file a complaint with the Secretary of Education. The Secretary shall convene a panel to arbitrate the dispute. The decision of the panel is a final agency action, subject to appeal and review. If the panel finds that the acts or practices subject to the complaint are in violation of the RSA or any accompanying regulation, the head of the subject department, agency or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the Panel's decision.<sup>46</sup>

52. By letter dated February 3, 2015, ODRS requested arbitration pursuant to the RSA for the Army's refusal to include the RSA priority in the Solicitation. ODRS contended that

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<sup>45</sup> Respondent's Ex. 17.

<sup>46</sup> 20 U.S.C. §§107d-1(b) and 107d-2; 34 C.F.R. §395.37.

the current contract for FFS and DFA services would be split into two (2) contracts, that the DFA contract under the Solicitation would be competitive HUBZone set-aside, and that the ODRS's licensed blind manager would not be able to respond to the Solicitation.

53. By letters to ODRS and the Army dated March 26, 2015, the Secretary of Education authorized the convening of an arbitration panel to hear and render a decision on the issues raised in the ODRS February 3, 2015 letter.

### **CONCLUSIONS OF LAW**

1. The issue before this Panel is whether the Army violated the RSA and its implementing regulations by failing to recognize the RSA priority in issuing the Solicitation. Resolution of this issue involves statutory interpretation which is a matter of law. Rather than the DoD, it is the DOE that is charged with the responsibility of interpreting the RSA. The DOE's authority has been passed down to this Arbitration Panel. Determining whether the Solicitation falls within the ambit of the RSA is the issue and thus, this Panel's responsibility to decide.

2. The RSA regulations are entitled to deference, known as *Chevron* deference. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the United States Supreme Court recognized that “[i]f Congress has explicitly left a gap for [an] agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843-44. Here, Congress directed the Secretary of Education to “prescribe regulations to establish a priority for

the operation of cafeterias on Federal property by blind licensees. . .” 20 U.S.C. §107d-3(e). Thus, the RSA regulations are entitled to *Chevron* deference.<sup>47</sup>

3. The RSA and its implementing regulations establish a priority for licensed blind vendors in the operation of vending facilities, including cafeterias, on federal property.<sup>48</sup>

4. The RSA’s implementing regulations require that the appropriate SLA be invited to apply “when a cafeteria contract is contemplated” and establish that the priority shall apply to “all contracts or other existing arrangements pertaining to the operation of cafeterias on Federal property ....”<sup>49</sup>

5. The RSA’s regulations interpret the scope of the RSA to apply to contracts pertaining to the operation of a cafeteria.<sup>50</sup> 34 C.F.R. §395.33(c) recognizes that all contracts pertaining to the operation of cafeterias on federal property are subject to the RSA. The panel majority is not persuaded by the Army’s contention that §395.33(c) is nothing more than a transitional or temporary provision intended to assist in the RSA’s implementation.

6. Applying Congress’s direction “to establish a priority for the operation of cafeterias on Federal property by blind vendors” to include contracts “pertaining to the operation of cafeterias on Federal property” in no way contradicts the RSA.

7. To the contrary, it is consistent with the RSA’s goal of creating opportunities for blind vendors “wherever feasible.”<sup>51</sup>

8. The RSA does not define or recognize a distinction between “full food service” contracts and “dining facility attendant” contracts.

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<sup>47</sup> *NISH v. Rumsfeld*, 348 F.3d 1263, 1270-71 (10<sup>th</sup> Cir. 2003); *NISH v. Cohen*, 247 F.3d 197, 201-202 (4<sup>th</sup> Cir. 2001).

<sup>48</sup> 20 U.S.C. §§ 107(b), 107d-3(e).

<sup>49</sup> 34 C.F.R. §§ 395.33(b) and (c).

<sup>50</sup> 34 C.F.R. § 395.33(c)

<sup>51</sup> 20 U.S.C. § 107(b).

9. The RSA priority applies to all contracts pertaining to the operation of cafeterias on federal property, regardless of whether the contractor actually prepares or serves food. The Solicitation is for a contract pertaining to the operation of a cafeteria at Fort Sill.

10. Nothing in the RSA requires that vendors operate the *entire* military dining facility, or prohibits more than one “operator” of a cafeteria. The DFA contract at issue here is a contract for and pertains to the operation of a cafeteria. Accordingly, the contract and the Solicitation are subject to the RSA.

11. All of the job functions specified in the Solicitation and accompanying PWS for DFA services are integral to the safe, efficient, and hygienic operation of the dining facilities at Fort Sill, and thus they are directly related to and pertain to the operation of those dining facilities, and are subject to the RSA. This conclusion is supported by the U.S. Comptroller General’s determination in *In re Dep’t of the Air Force - Reconsideration*, 72 Comp. Gen. 241, 246 (1993).<sup>52</sup> The Comptroller General concluded that tasks and responsibilities such as housekeeping and grounds maintenance (around dining facilities), although not food-dispensing tasks per se, were “directly related to providing cafeteria services” and covered by the RSA. The Comptroller General recognized that services such as these “clearly are related to operating a cafeteria facility”, and saw “no reason” why a contract containing services “related to cafeteria operation” would be excluded from the RSA. The Comptroller General also observed that the DOE’s interpretation of its RSA regulations is “expansive rather than narrow.”<sup>53</sup> This decision was recognized by another arbitration panel finding that the Army violated the RSA and

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<sup>52</sup> Petitioner’s Ex. 7.

<sup>53</sup> *Id.*, at 246, 248.

regulations by failing to apply the RSA's priority for blind vendors to a solicitation and contract for DFA services at Fort Stewart.<sup>54</sup>

12. It is true, as the Army contends, that its contracting officer has a certain level of discretion and latitude to interpret and apply federal procurement regulations. But when conducting a procurement subject to the RSA, a federal agency's discretion is limited by the priority given to blind vendors. The Competition in Contracting Act, 10 U.S.C. §2304 (the "CICA"), enacted in 1994, directs the military to use "full and open competition" when contracting for property or services, *except* in the case of procurement procedures otherwise expressly authorized by statute. The provisions of the RSA fit the CICA's definition of "procurement", authorizing the Secretary of Education to secure the operation of cafeterias on federal property by blind licenses whether by contract or otherwise. 20 U.S.C. §107d-3(e). Thus, neither the CICA nor the Federal Acquisition Regulation (FAR) apply when the RSA's priority applies.<sup>55</sup> The Army is not free, nor does it have the discretion, to disregard the RSA's priority given to blind vendors, when applicable. And it is this panel's charge to determine whether the RSA applies to the Solicitation.

13. The RSA's priority supersedes preferences such as the HUBZone preference found in more general procurement statutes.<sup>56</sup>

14. Before enactment of the John Warner Act, two separate Circuit Courts ruled that the RSA priority is superior to the JWOD Act preference. The Fourth Circuit held that the RSA deals explicitly with the operation of cafeterias, whereas the JWOD Act is a general procurement

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<sup>54</sup> Petitioner's Ex. 2 at pp. 20-21, 38-39.

<sup>55</sup> *NISH v. Cohen*, *supra*, 247 F.3d at 201-204; *NISH v. Rumsfeld*, *supra* 348 F.3d at 1271-1272.

<sup>56</sup> *Department of the Air force*, *supra* (Petitioner's Ex. 7); *Automated Comm. Sys, Inc. v. United States*, 49 Fed. Cl. 570, 577-578 (2001).

statute; accordingly, the RSA must control.<sup>57</sup> Two years later, in the Tenth Circuit, the Court found that, to the extent a conflict exists between the JWOD Act and the RSA, the RSA must control.<sup>58</sup>

15. The recommendations of the 2006 Joint Report did not go through the notice, comment, and review procedures required of regulations. Of those recommendations, only the “no poaching” provision has been enacted, as part of the John Warner Act. Otherwise, those recommendations have no legal effect.<sup>59</sup>

16. In enacting the John Warner Act, Congress recognized that contracts for mess attendant services, or for services supporting the operation of a military dining facility, were included in those contracts that should have been RSA contracts, but had been awarded under the JWOD Act. This is an implicit acknowledgement by Congress that the RSA applies not only to contracts for full food services, but also for mess attendant services and other services supporting the operation of a military dining facility.

17. The John Warner Act, at Section 856(a)(1), provides that the RSA 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.<sup>60</sup> The Procurement List is a product of the JWOD Act. The John Warner Act’s provision that some contracts for “mess attendant services” and for “services supporting the operation of a military dining facility” (those on the Procurement List as of October 17, 2006) should be excluded from the coverage of the RSA confirms that all other contracts are covered by the RSA’s priority.

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<sup>57</sup> *NISH v. Cohen*, *supra*, 247 F.3d at 205.

<sup>58</sup> *NISH v. Rumsfeld*, *supra*, 348 F. 3d at 1272.

<sup>59</sup> See Findings of Fact ¶46 and n. 42, *supra*.

<sup>60</sup> October 17, 2006 is the date of the enactment of the John Warner Act.

18. Since 2001, all of the dining facilities at Fort Sill, whether FFS or DFA, have been operated by ODRS and its blind vendor under one contract, pursuant to the RSA. The contract falls within the scope of the RSA, according to Section 856 of the John Warner Act, as it has been operated by the ODRS and its blind licensee(s) since 2001.

19. The Army's Contracting Officer, Amber VanHoozer determined that the DFA services at the Garcia Dining Facility should remain as part of a single FFS contract subject to the RSA, but the Army did not follow Ms. VanHoozer's decision to keep all of the facilities under one contract.

20. The Army could not circumvent the RSA by splitting an established RSA contract for full food services into multiple contracts for discrete cafeteria services, without obtaining approval of the Secretary of Education.

21. By splitting the contract into a FFS and DFA contract, the Army placed a limitation on the operation of the Fort Sill contract. This is expressly prohibited unless the Army first seeks, and obtains, the approval of the Secretary of the Department of Education to place such a limitation on the operation of the contract.<sup>61</sup> This has not occurred.

22. The RSA allows such a limitation to be placed on the RSA contract at Fort Sill only if the operation of the DFA facilities by ODRS would adversely affect the interests of the United States; however, that determination by the Army needs to be fully justified in writing to the Secretary of Education, who shall determine whether such limitation is justified.

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<sup>61</sup> 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.

23. The Army did not provide any justification for its actions to the Secretary of Education, nor did the Secretary determine those actions to be justified under the RSA.

24. The NDAA FY 2015 amended 10 U.S.C. §2942, not the RSA. The Joint Statement accompanying the NDAA FY 2015 was not the product of a conference committee or a vote of Congress. The DoD's proposed regulation to the Defense Federal Acquisition Regulation Supplement ("DFARS") is not a final rule and has no application here. In short, neither the NDAA FY 2015 nor the Joint Statement override the RSA's priority for blind vendors and application to the Solicitation.

25. Even if the DoD's proposed regulation eventually becomes final, the RSA directs the Secretary of Education - not the DoD - to prescribe regulations implementing the RSA. *See* 20 U.S.C. § 107(b). ("[T]he Secretary [of the DOE], through the Commission, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation and protection of Federal property prescribe regulations ....").

26. The decisions of other arbitration panels and federal courts support the conclusion that contracts for DFA services such as that sought by the Solicitation are contracts to which the RSA priority is applicable.<sup>62</sup>

27. The RSA arbitration panel is directed to conduct a hearing pursuant to the Administrative Procedure Act., "subchapter II of chapter 5 of Title 5", and render its decision which shall be subject to appeal and review as a final agency action. 20 U.S.C. § 107d-2(a). The

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<sup>62</sup> *Commonwealth of Kentucky Education and Work Force Development Cabinet v. United Department of the Army* (February 14, 2014), Petitioner's Ex. 1; *Georgia Vocational Rehabilitation Agency v. United States Department of Defense, Department of the Army, Fort Stewart*, Case No. R/S 13-09 (January 11, 2016), Petitioner's Ex. 2; *Harvey Johnson v. United States*, 20. 3:14-cv-00317-DCB (W.D. Tex. Sept. 12, 2014), Petitioner's Ex. 3; *Kansas v. United States*, No. 15-cv-04907-DDC-KGS 2016 U.S. Dist. LEXIS 37655 (D. Kan. Mar. 22, 2016), Petitioner's Ex. 4; and *Kansas v. United States*, No. 15-cv-04907-DDC-KGS 2016 U.S. Dist. LEXIS 82678 (D. Kan. June 24, 2016), Petitioner's Ex. 5.

burden of proof rests on Petitioner, as the proponent of a rule or order, to show that the Army's solicitation was in violation of the RSA.<sup>63</sup> The Petitioner has met its burden: the substantial evidence, indeed the weight of the evidence, and the law establish that the Department of the Army at Fort Sill violated the RSA by failing to recognize the RSA priority when it issued the Solicitation specifically as a competitive HUBZone set aside. Moreover, resolution of whether the Solicitation violates the RSA involves statutory interpretation which is a matter of law. The Army's action in issuing the Solicitation is not supported by the facts in the record and is not in accordance with law.

28. If the Panel finds that the acts or practices of any department, agency or instrumentality of the United States are in violation of the RSA or any regulation, the head of such department, agency or instrumentality shall cause such acts or practices to be terminated promptly, and shall take such other action as may be necessary to carry out the Panel's decision.<sup>64</sup>

### **AWARD**

1. The Solicitation is subject to the requirements of the RSA and accompanying regulations.

2. The Army violated the RSA and accompanying regulations by failing to apply the RSA priority to the Solicitation.

3. The Army is obligated under the RSA and its implementing regulations (but not ordered by this panel) to take such action as may be necessary to carry out this Panel's decision, including a new solicitation that meets the priority afforded by the RSA.

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<sup>63</sup> 5 U.S.C. §556(d).

<sup>64</sup> 20 U.S.C. § 107d-2(b)(2).

DATED this 23<sup>rd</sup> day of December, 2016.

/s

Charles F. Geister III, Panel Chair

/s

Susan Rockwood Gashel, Panel Member

Susan Rockwood Gashel, concurring in the result.

I am fully in accord with the arbitration decision in this case. My comments are responsive to Mr. Stephen Fuscher's dissent.

**I. Congress Gave the Secretary of Education the Authority to Administer the Randolph-Sheppard Act; the Army's Role is to Consult with the Secretary of Education, and the Department of Education's Role is to Determine if the Cafeteria Operation can be Provided at a Reasonable Cost with Food a High Quality Comparable to that Currently Provided**

With respect to the dissent, the writer argues that a contracting officer should be able to "interpret" the law. There is nothing in the Competition in Contracting Act, or its implementing regulations that give the contracting officer such authority. 48 C.F.R. § 1.602-1 gives contracting officers the "authority to enter into, administer, or terminate contracts and make related determinations and findings." This is not an authority to interpret the law. Contracting officers are given "wide latitude to exercise business judgment." 48 C.F.R. § 1.602-2. This is a far cry from being given authority to interpret the law.

The writer ignores the statute making it the Department of Education's Rehabilitation Services Administration the agency that is given the sole responsibility and authority to administer the Randolph-Sheppard Act. 20 U.S.C. § 107a(a)(1). See also 20 U.S.C. § 107d-3(e):

The Secretary [of Education], through the Commissioner [of the Rehabilitation Services Administration], shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

It is absolutely clear from the statute that it is the Secretary of Education who decides when the priority applies, and the head of the appropriate installation on Federal property who consults in such decision.

**II. The Competition in Contracting Act and the Federal Acquisition Regulations Do Not Apply where Congress Has Expressly Authorized Other Procurement Procedures**

10 U.S.C. § 2304 expressly states that the Competition in Contracting Act, and regulations promulgated thereunder, do not apply where other procurement procedures are expressly authorized by statute. 10 U.S.C. § 2304(a)(1). The R-S Act is such a procurement procedure. Automated Comm. Syst. v. U.S., 49 Fed. Cl. 570, 577-78 (2001). The Army is not free to ignore the R-S Act.

There is simply no authority for the writer's proposition that the fact that Congress appoints funds to the Department of Defense means that the Department of Defense can override the Congress' express authorization for licensed blind vendors to have a priority to operate vending facilities on all federal property. 20 U.S.C. § 107(a).

The writer appears to be claiming that because appropriated funds are used, that somehow the Randolph-Sheppard Act does not apply. No case has so held, and, in fact, the "regulations also state that the portions at issue were not intended to apply to contracts "awarded using procedures that are expressly authorized by statute." [48 C.F.R.] § 6.001(b). The FAR, like the CIC Act, therefore exempt the R-S Act from their coverage via the use of a 'savings clause.'" NISH v. Cohen, 95 F. Supp. 2d 497, 504 (E.D. Va. 2000), aff'd, 247 F.3d 197 (4th Cir. 2001), NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003),

### **III. The Correct Standard of Review**

The R-S Act specifically states that the APA applies, not the standard for the Court of Claims. The R-S Act arbitration panel is directed to conduct a hearing 20 U.S.C. § 107d-2(b). The arbitration panel is direct to conduct a hearing pursuant to the Administrative Procedure Act., i.e., "subchapter II of chapter 5 of Title 5." 20 U.S.C. § 107d-2(a). The burden is on the SLA to show by substantial evidence that the Army violated the R-S Act. Dickinson v. Zurko, 527 U.S. 150. "This is something more than a mere scintilla but something less than the weight of the evidence." Pennaco Energy v. U.S. Dep't of Interior, 377 F.3d 2247, 1156 (10th Cir. 2004).

### **IV. The Washington Court of Claims Case Has Been Overruled by Congress**

The writer quotes extensively from a case where the Army refused to apply the Randolph-Sheppard Act . Washington State Dep't of Servs. for the Blind v. United States, 58 Fed. Cl. 781, 788 (2003). In 2007, Congress made it clear that the Washington case was wrongly decided.

The John Warner Act,<sup>1</sup> at Section 856(a)(1), states that the Randolph-Sheppard 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.<sup>2</sup> 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. Accordingly, the finding in Washington that the Army could refuse to apply the priority to a dining facility contract has no precedential value.

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<sup>1</sup> <https://www.govtrack.us/congress/bills/109/hr5122/text>

<sup>2</sup> October 17, 2006 is the date of the enactment of the John Warner Act.

Dated: December 23, 2016.

*Susan Rockwood Gashel*

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Susan Rockwood Gashel

Steve Fuscher dissents as regards the issue before the panel and the standard of review to be used to determine the legality of the contracting officer's decision.

### **Summary of Position**

1. The panel has taken the position that its role is to step into the shoes of the contracting officer and made a decision as to the application of the RSA to Dining Facility Attendant (DFA) services. However, the Army through the Army's contracting officer has determined that the RSA does not apply to DFA service contracts. Therefore, in my opinion, the proper issue before the panel is whether or not the decision of the Agency through the contracting officer is a violation of the RSA and, if so the review standard should be the standard defined in the United States Court of Claims in Washington State Department of Services for the Blind and Robert Ott v. U.S., No. 03-2017C, December 17, 2003). The analysis for this position follows.

2. The issue in this arbitration is whether the Army violated the RSA when it determined that the RSA does not apply to DFA services. As a result of this position, the Army did not recognize the RSA priority in issuing the Solicitation. There is no dispute as to the fact that the Army has issued a solicitation for attendant facility services for one facility at Fort Sill. Similarly, there is no dispute that the Army has taken the legal position that the RSA priority does not apply to DFA services. In addition, the parties agree that the Full Food Service 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, the government's role is limited to contract administration oversight of the SLA and its blind vendor.

3. The majority has analyzed the facts in this arbitration as if the panel was the contracting officer and has not given deference to the agency's interpretation that DFA contracts are not covered by the RSA. The failure of the majority to give deference to the contracting officer's interpretation of the RSA is, in my opinion, a significant flaw in the decision of the panel.

### **A dining hall service contract is not a permit**

4. The Randolph Sheppard Program (RSP) has no specific appropriations line item in d1c federal budget; therefore, funding for this DFA contract is provided by the Army as the procuring agency. The RSA also includes permits for blind vendors to operate vending facility on federal properties. These permits are not funded by appropriated funds and the operators are either successful or not based on revenue generated by vending machines located in federal properties. State rehabilitation agencies recruit, train, license and place individuals who are blind as operators of vending facilities located on federal and other properties. This program was developed following the enactment of the Randolph-Sheppard Act of 1936, 20 USC 107 et. seq., as amended in 1954 and 1974. The 1936 act was enacted to provide blind persons with remunerative employment, enlarge their economic opportunities, and encourage their self-support through the operation of vending facilities in federal building.<sup>1</sup>

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<sup>1</sup> See the DoE Website, Introduction for expanded descriptive information on the RSA program at [www2.ed.gov](http://www2.ed.gov).

5. Since the issuance of permits for the operation of vending facilities does not involve the obligation of appropriated funds, a contracting officer does not control the process for negotiation of a permit. However, contracting officers are subject to strict controls for the obligation of federal funds. A vast array of federal statutes and regulations control this process, beginning with the US Constitution. The framers of the US Constitution vested Congress with the power of the purse by providing in the Constitution that “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” *U.S. Const., art. I, § 9, cl. 7*. The Supreme Court has consistently reaffirmed that the language in the Constitution means “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

6. Contracting officers are bound by this basic tenet of constitutional law and must obligate and expend funds only when authorized by Congress. Therefore, an appropriation act passed by Congress must authorize the appropriation of funds for the award of a contract for dining hall services and the contracting officer is accountable for that decision.

### **Contracting officers have broad authority**

7. A contracting officer is a person with authority to enter into, administer, and/or terminate contracts and make related determinations and findings.<sup>2</sup> A contracting officer is not authorized to enter into a contract “unless the contracting officer ensures that all

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<sup>2</sup> FAR 1.602-1(a) Defining the authority of a contracting officer.

requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.”<sup>3</sup>

8. The FAR further defines the responsibilities of a contracting officer to include responsibility for “ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment.”<sup>4</sup> Additionally, a contracting officer has “no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions.”<sup>5</sup>

9. A contracting officer’s decisions regarding the process for the selection of a contractor and the process for award of a contract are broad. Those decisions include the application of statutes, such as the RSA, to the particular procurement action. The issue of deference to the decisions of the contracting officer will be addressed later in this dissent.

### **No Court has objected to the use of the FAR**

10. It is a fact that the Army applied the FAR to this acquisition and the State did not object to the use of the FAR to control the process for source selection under this acquisition. While the DoE has the authority under its enabling statute to issue implementing regulations that define the process for the award of a dining hall services

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<sup>3</sup> FAR 1.602-1(b)

<sup>4</sup> FAR 1.602-2 Expands on the responsibilities of a contracting officer.

<sup>5</sup> FAR 1.602-2 (5)

contract subject to the RSA, the DoE has not implemented FAR type regulations that instruct a contracting officer on the process to be used to make an award determination.<sup>6</sup>

11. Since the DoE has no appropriated funds to pay contractors who are providing dining hall service contracts, agency contracting officers, in this case an Army contracting officer, are tasked to obligate funds to pay for dining hall services under the solicitation in question. Since the local procuring agency must use its contracting officer to award dining hall service contracts with local agency funds appropriated by Congress for that purpose, the decision on the means and process for award directly impacts the procuring agency's budget. DoE's budget is not impacted by the award of these contracts.

12. Contracting officers are issued warrants by their agency.<sup>7</sup> This warrant grants a contracting officer the delegated authority to obligate appropriated funds and award contracts funded by agency appropriations. Since these warrants are issued by their agency head, contracting officers are obligated to follow their agency procurement regulations or be in violation of their warrant. Absent DoE FAR type procurement regulations that authorize obligation of agency funds for a specific purpose authorized by

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<sup>6</sup> Title 34 CFR Part 395—VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL AND OTHER PROPERTY is the implementing regulations for the RSA. While the regulations include specific instructions for the issuance and management of a permit for the operation of vending machines on federal property, they do not include similar FAR type instructions and regulations for the obligation of federal funds.

<sup>7</sup> FAR **1.601 – General.** (a) Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603. (b) Agency heads may mutually agree to— (1) Assign contracting functions and responsibilities from one agency to another; and (2) Create joint or combined offices to exercise acquisition functions and responsibilities.

Congress, the Army contracting officer is required to use the FAR as its source selection process. The DoE does not issue warrants to contracting officer that authorize the obligation of appropriated funds for this purpose and has no process to carry out the acquisition for these services.

13. The FAR is a system of administrative regulations that authorize the contracting officer to award a contract.<sup>8</sup> The FAR is a codification of acquisition policy that apply to ALL executive agencies.<sup>9</sup> The RSA and its implementing regulations are not part of the FAR system and as a result, procuring contracting officers must attempt to determine if the RSA applies to a particular procurement and if so, how that interaction with the FAR impacts the legal authorities necessary to award a contract for dining hall services.

14. The DoE can address this issue by issuing detailed procurement acquisition regulations and entering into interagency agreements to manage the award of RSA dining hall service contracts, but has not. Nor, has the DoE opted to adopt the FAR as its implementing regulation with appropriate modifications to implement its statutory mandate. As a result, procuring agencies through their contracting officers are required by law and regulation to use the FAR to manage the acquisition.

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<sup>8</sup> **FAR 1.000 – Scope of Part.** This part sets forth basic policies and general information about the Federal Acquisition Regulations System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2, 1.3, and 1.4 prescribe administrative procedures for maintaining the FAR System.

<sup>9</sup> **FAR Subpart 1.101 Purpose, Authority, Issuance, 1.101 – Purpose.** The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

## **Deference to the Army's interpretation of the RSA**

15. The question before the panel is whether or not the Army has violated the RSA when it made a legal determination that the RSA did not apply to DFA service contracts. The majority has substituted its judgment as regards the interpretation of the RSA for that of the Army with no deference to the inherent authority of the contracting officer to make that decision.

16. The General Accountability Office (GAO) has published the Fourth Edition of the Red Book that provides guidance to all executive agencies regarding federal fiscal law issues. The GAO has specifically addressed this issue as regards the interpretation of statutes. It is my opinion, that, as in this case, when a procuring agency is tasked to determine the application of a particular statute to a particular procurement, the procuring agency's opinion should be given deference in the absence of clear regulatory guidance from the DoE. The GAO states the following:

When Congress vests an agency with responsibility to administer a particular statute, the agency's interpretation of that statute, by regulation or otherwise, is entitled to considerable weight. This principle is really a matter of common sense. An agency that works with a program from day to day develops an expertise that should not be lightly disregarded. Even when dealing with a new law, Congress does not entrust administration to a particular agency without reason, and this decision merits respect.

In the often-cited case of *Udall v. Tallman*, 380 U.S. 1, 16 (1965), the Supreme Court stated the principle this way:

“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”<sup>10</sup>

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<sup>10</sup> PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Chapter 1, Introduction, Fourth Edition 2016 Revisions, Page 1-66 GAO-16-463SP. Weblink: [www.gao.gov/legal/redbook/redbook.html](http://www.gao.gov/legal/redbook/redbook.html).

While the panel has opined that, in its opinion, the RSA does apply to DFA service contracts, the panel has failed to defer to the agency responsible for the obligations of the appropriated funds necessary to fund the contract.

17. The United States Court of Claims in Washington State Department of Services for the Blind and Robert Ott v. U. S., No. 03-2017C, December 17, 2003) specifically addressed the scope of the RSA and deferred to the agency's interpretation of the RSA, refusing to substitute its judgment for that of the contracting officer. The court stated:

Having considered the language of the statute and the regulations, the legislative history, the policy pronouncements by DOE and several decisions by arbitration panels convened in accordance with **RSA**, and in the absence of any other guidance by DOE, the court finds that the basis for defendant's interpretation of the term "operation of a cafeteria" is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Within the limited scope of this court's review, the court does not substitute its judgment for that of the agency, see *Bannum* 56 Fed. Cl. at 457 ("A reviewing court cannot substitute its judgment for that of the agency ....") and upholds the decision of an agency if there is a reasonable basis for the agency's action. See *MCS Mgmt., Inc. v. United States*, 48 Fed. Cl. 506, 510-11 (2000) ("[I]f the Court finds a reasonable basis for the agency's action, the Court should stay its hand ....").<sup>11</sup>

18. The court acknowledged in this analysis that Congress has not specifically addressed the question as to whether or not the operation of a dining hall facility includes support services that relate to the operation of dining hall facility. While a federal agency must comply with the clear congressional intent, the Court found that the expansive language of 34 C.F.R. §395.33(b), instructing the state licensing agency to establish the ability of blind vendors to provide high quality services similar to other providers of

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<sup>11</sup> *Washington* at 23.



cafeteria services as “administrative guidance regarding the role of the state licensing agencies, rather than an aid to interpretation of the language “operation of cafeterias,” 34 C.F.R. § 395.33(a), or “to operate vending facilities,” 20 U.S.C. § 107(a).” *Id.* at 15.

19. In addressing whether or not deference is appropriate, the Supreme Court has opined that prior to granting deference to an agency decision, the court must determine “whether Congress has directly spoken to the precise question at issue.”<sup>12</sup> The DoE has not updated or clarified its regulations regarding this issue and United States Court of Claims determined that Congress had not specifically spoken on this issue; therefore deference is open for evaluation. If DoE had amended its regulations to specifically address this issue, the deference analysis would be impacted by the Supreme Court’s ruling in *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Where deference to the agency’s interpretation of its own regulation is an issue, the Supreme Court has stated that “[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.” *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Since DoE has not specifically weighed in on that issue, deference to that interpretation of the regulation in an issue before the panel. The panel is left to make its own independent interpretation of the statute and its regulation without the benefit of a formal DoE analysis of the issue.

20. Having addressed the first Chevron test, the question becomes “whether the agency’s answer is based on a permissible construction of the statute.”<sup>13</sup> The Court in *Chevron* went on to say:

“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or

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<sup>12</sup> *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), at 842.

<sup>13</sup> *Chevron* at 843.

manifestly contrary to the statute, Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>14</sup>

The Court in the *Washington* case specifically addressed this point as well, stating:

The court construes the language “operation . . . provided . . . with food” to leave open the question of whether, to bring the operation of a cafeteria under RSA, an operator of a cafeteria must personally provide the food or whether it is sufficient that high quality food is provided on the premises, even if not by the operator directly. The court is not persuaded that the language compels either the restrictive interpretation urged by defendant--that blind vendors are afforded a priority for the operation of a cafeteria only if they can provide food at a reasonable cost and high quality, . . . or the restrictive interpretation urged by plaintiffs that no food need be provided by the RSA operator provided the contract pertains in some way to cafeteria operations.<sup>15</sup>

Since the United States Court of Claims in *Washington* has granted deference to the agency’s decision on this exact issue, it would seem appropriate for the panel to do the same.

### **Panel Decisions Are Not Enforceable By DoE**

21. The irony of the RSA’s arbitration process is that the courts have never used the RSA as authority to direct a procuring agency to award a contract for dining hall services to the SLA that obligates agency appropriated funds. The 11<sup>th</sup> Circuit Court of Appeals has ruled that the “formal set of remedial procedures” set forth in RSA Section 107d-1 grants the SLA (not the blind vendor subcontractor) a right of action to take action when the SLA is dissatisfied with the action taken by a federal agency under the RSA.<sup>16</sup> However, the court found that the arbitration panels convened by the DoE have “no remedial powers whatsoever ” because the procuring agency is responsible for remedying a violation of the RSA.<sup>17</sup>

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<sup>14</sup> *Chevron* at 843-44.

<sup>15</sup> *Washington* at 15.

<sup>16</sup> *Georgia Dep’t of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1484 (11<sup>th</sup> Cir. 1990)

<sup>17</sup> *id.* at 1492.

22. This principle was cited with approval in *Commonwealth of Kentucky v. U.S.*<sup>18</sup> While the arbitration panel's decisions constitutes a final agency action, the Secretary of Education has no authority to order another federal entity to take action consistent with the arbitration board's decision.<sup>19</sup> The Fourth Circuit Court of Appeals agreed with this principle acknowledging that the procuring agency can simply refuse to remedy a violation found by an arbitration panel.<sup>20</sup> As a result, the RSA provides no substantive remedy for Section 107d-1(b) arbitration actions.<sup>21</sup>

23. This analysis comports to the plain reading of Section 107d-(2) that provides if the panel "finds that the acts or practices of [the procuring agency] are in violation of this chapter, or any regulations issued thereunder, the head of any such [procuring 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."<sup>22</sup> If the procuring agency refuses to take action consistent with the opinion of the arbitration panel, the Secretary of Education may initiate another arbitration panel but if the Agency refuses to take action, the SLA and the procuring agency are involved in an endless loop of arbitrations. Or, are they?

### **Returning to the *Washington* Case**

24. In order for the SLA to obtain an order to direct an procuring agency to award a contract for dining hall support services that would obligate a procuring agency's

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<sup>18</sup> *Commonwealth of Kentucky v. United States*, 122914 KYWDS, 5:12-CV-00231-TBR.

<sup>19</sup> *id.* at 122914 KYWDC, 5:12-CV-00132-TBR.

<sup>20</sup> *Maryland State Dep't of Education v. U.S. Dep't of Veterans Affairs*, 98 F.3d 165 (4<sup>th</sup> Cir. 1996)

<sup>21</sup> *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1492 (11<sup>th</sup> Cir. 1990)

<sup>22</sup> 20 USC §107(b)(2)(C).

appropriated funds, a court would need to find the procuring agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>23</sup>

25. Therefore, in order for the parties to avoid an endless loop of arbitrations, the panel needs to find that the Army's legal interpretation of the RSA is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and the Secretary of Education, or potentially the SLA, needs to convince a court to enforce the decision of the panel. Since the United States Court of Claims in the *Washington Case* has evaluated this issue and determined that the procuring agency's exclusion of DFA service from the coverage of the RSA was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the probability of the court reversing this decision is very small. Thus, the failure of the panel to defer to the Army's decision simply raises the specter of another arbitration with potentially the same result unless the Army changes its interpretation the RSA.

### **Agency Action to Address this Issue**

26. There is no dispute that the Secretary of the Army has taken a formal legal position that DFA services are not covered by the RSA. Similarly, the Secretary of Defense is proposing a formal regulatory change to the FAR that would exclude DFA services from RSA coverage. On 7 June 2016 the Department of Defense issued a proposed final regulatory change to the Defense Federal Acquisition Regulation (DFAR) that specifically addressed food services for dining facility on military installations.<sup>24</sup>

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<sup>23</sup> The *Washington* case referenced above citing 5 U.S.C. §706(2)(A).

<sup>24</sup> Defense Federal Acquisition Regulation Supplement: Food Services for Dining Facilities on Military Installations (DFARS Case 2015-D012), Issued by Defense Department on Tuesday 7 June 2016, 81 FR 36506.

27. The proposed DFAR has been published in the Federal Register and was issued for public comment. The public comment period has expired<sup>25</sup> and the agency is in the process of addressing public comments. The stated purpose for the amendment to the DFAR is:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide policy and procedures for soliciting offers, evaluating proposals and awarding contracts for the operation of a military dining facility pursuant to the Randolph-Sheppard Act; the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007; the Joint Report and Policy Statement issued pursuant to the NDAA for FY 2006; and the Committee for Purchase from People Who Are Blind or Severely Disabled statute.<sup>26</sup>

The proposed regulation excludes DFA services from the coverage of the RSA<sup>27</sup> stating:

(b) A State licensing agency will be afforded priority for award of the contract if the State licensing agency has submitted a proposal that-

- (1) Demonstrates the operation of the military dining facility can be provided with food of a high quality and at a fair and reasonable price comparable to that available from other providers; and
- (2) Is judged to have a reasonable chance of being selected for award as determined by the contracting officer after applying the evaluation criteria contained in the solicitation.<sup>27</sup>

The RSA priority is limited to those solicitations for dining hall services where the contractor is contracting for the “operation of a military dining facility”. The proposed DFAR defines the term “operation of a military dining facility” as:

*Operation of a military dining facility* means the exercise of management responsibility and day-to-day decision-making authority by a contractor for the overall functioning of a military dining facility, including responsibility for its staff and subcontractors, where the DoD role is generally limited to contract administration functions described in FAR part 42.<sup>28</sup>

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<sup>25</sup> 81 FR at 36506. “Comments on the proposed rule should be submitted in writing to the address shown below on or before August 8, 2016, to be considered in the formation of the final rule.”

<sup>26</sup> *Id.* at 36506.

<sup>27</sup> DFAR 252.237-70XX

<sup>28</sup> DFAR 252.237-70XX(a) Definitions. See also DFAR 202-101.

The proposed DFAR defines “dining support services to mean:

*Dining support services* means food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendant services, or any and all other services that are encompassed by, are included in, or otherwise support the operation of a military dining facility, other than the exercise of management responsibility and day-to-day decision-making authority by a contractor for the overall functioning of a military dining facility.<sup>29</sup>

The proposed DFAR clearly limits the RSA priority to contracts for the operation of military dining facilities. The DFAR does not extend the RSA priority to dining hall service contracts limited to dining support services; i.e., DFA services.

28. While the majority is correct in stating that the proposed DFAR is not effect, the Secretary of Defense has examined the same statutes and regulations as the panel and has arrived at a different result. The DFAR is relevant to the interpretation of the RSA as regards this particular issue. The Secretary of Defense is on record taking a position that is contrary to the panel’s decision. Even arbitration panels are not universal in their interpretation of the RSA as regards the application of the RSA to DFA services. The panel in the Fort Bliss arbitration opined that the RSA does not apply to DFA services.<sup>30</sup>

29. As discussed above, the procurement agency, not the Secretary of Education has the authority and responsibility to obligate appropriated funds consistent with the United States constitution and the appropriate acts passed by Congress. The proposed DFAR addresses the specific issue before this panel and is addressing the issue through the formal rule making process that will codify that the Department of Defense’s position. Contracting officers, who receive their warrants from the service agencies, not the DOE will be bound to follow the DFAR in awarding contracts for food services for

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<sup>29</sup> DFAR 237-7X01 Definitions.

<sup>30</sup> *Texas Department of Assistive and Rehabilitative Services v. department of the Army, Fort Bliss*, Case no. R-S/13-13, November 2, 2016.

dining facility on military installations. Because of the ruling of the United States Court of Claims in the *Washington Case* that the basis for defendant's interpretation of the term "operation of a cafeteria" is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"<sup>31</sup> the probability of a court directing the Department of Defense to change its position is remote.

### ***Deference to the Contracting Officer's Decision***

30. The panel's willingness to step into the shoes of the contracting officer and substitute its judgment for that of the contracting officer is problematic for a number of reasons. In order to avoid an endless round of arbitrations with conflicting decisions, the panel should have used the *Washington* case analysis to defer to the Agency's interpretation of the RSA and its application to DFA services.

31. The analysis above demonstrates that the procuring agency has a constitutional, legislative and regulatory duty to obligate funds consistent with Congressional funding statutes. As agents for their agency, contracting officers do not have the discretion to ignore their agency procurement regulations when awarding procurement contracts that obligate funds subject to Congressional funding statutes. A contracting officer is exposed to both civil and criminal charges if an award is made in violation of law. Since the Army, in this matter, opined that the award of DFA services was not authorized under the RSA, the contracting officer would have a difficult time justifying an award of a DFA services contract using the RSA as authority for the award.

32. After the proposed DFAR is final, the contracting officer simply has no discretion to ignore the clear, direct and regulatory language of the regulation. If the

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<sup>31</sup> *Washington* at 23.

Secretary of Education does not adopt the DFAR as its own procurement regulation, the Secretary will need to take the issue before Congress for resolution. Since the background, discussion and analysis of the Secretary of Defense is set forth in Federal Register and is directly relevant to this analysis, it is provided as part of this dissenting opinion.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

In order to clarify the application of the Randolph-Shepard Act (R-S Act) (20 U.S.C. 107, et seq.) and the Committee for Purchase from People Who Are Blind or Severely Disabled (CFP) statute (41 U.S.C. 8501, et seq.) formerly known as the Javits-Wagner-O'Day (JWOD) Act, to the operation and management of military dining facilities, DoD is proposing to amend the DFARS to implement the provisions of the Joint Report and Policy Statement (Joint Policy Statement) issued by DoD, the Department of Education (DoED), and the CFP pursuant to section 848 of the NDAA for FY 2006.

The Joint Explanatory Statement to Accompany the NDAA for FY 2015 requested that DoD prescribe implementing regulations for the application of the R-S Act and the CFP statute to contracts awarded for the operation of military dining facilities, and that the regulations address DoD contracts not covered by section 856 of the NDAA for FY 2007.

Pursuant to the Joint Policy Statement, the R-S Act applies to contracts for the operation of a military dining facility, also known as full food services, while the CFP statute applies to contracts and subcontracts for dining support services (including mess attendant services).

The CFP statute, implemented in FAR subpart 8.7, requires Federal agencies to acquire from participating nonprofit agencies all supplies or services on the Procurement List established by the CFP. The purpose of the CFP statute is to provide employment opportunities for people who are blind or have other severe disabilities. If a product or service is on the Procurement List, 41 U.S.C. 8504(a) requires the procuring agency to procure that product or service either from a qualified nonprofit agency for the blind or a qualified nonprofit agency for the severely disabled in accordance with CFP regulations. However, 41 U.S.C. 8504(b) provides an exception to section 8504(a) for a product that is available from an industry established under 18 U.S.C. 307 (Federal Prison Industries) and shall be procured from that industry pursuant to 18 U.S.C. 4124. Section 107(b) of the R-S Act establishes a priority authorizing blind persons, licensed by a State licensing agency (SLA) to operate one or more vending facilities, wherever feasible, on Federal properties. Section 107d-3(e) of the R-S Act requires the Secretary of Education (the Secretary) to promulgate regulations (see 34 CFR 395.33) establishing a priority for the operation of cafeterias when the Secretary determines on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of high quality comparable to that currently provided employees.

Pursuant to 34 CFR 395.33(a), the priority is afforded to the SLA when the Secretary determines, in consultation with the contracting officer, that the operation can be provided at a reasonable cost, with food of a high quality that is comparable to the food currently provided to employees. 34 CFR 395.33(b) requires Federal contracting officers to consult with the Secretary (see 395.33(a)) when the contracting officer has determined that an 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. The evaluation criteria established in a solicitation may include sanitation practices, personnel, staffing, menu pricing, and portion sizes, menu variety, budget, and accounting practices.

During the 1990s, confusion arose as to whether contracts for food services at military dining facilities should be subject to the CFP statute or the R-S Act. There was also confusion as to whether the SLA must be awarded a contract if its proposal is within the competitive range. In order for an SLA's proposal to be selected, the proposal must not only be in the competitive range, but also be ranked among those proposals which have a reasonable chance of being selected for final award. Placement in the competitive range alone does not mean an offer has been found competitive, comparable, acceptable, or reasonable for final award.

In order to resolve the confusion, section 848 of the NDAA for FY 2006 required DoD, DoED, and the CFP to issue the Joint Policy Statement, discussed below in section II.A. Since issuance of the Joint Policy Statement in 2006, the definition of "operation of a military dining facility" has been interpreted inconsistently. This rule proposes to implement the Joint Policy Statement which defines "operation of a military dining facility" to mean "the exercise of management responsibility and day-to-day decision-making authority by a contractor for the overall functioning of a military dining facility, including responsibility for its staff and subcontractors, where the DoD role is generally limited to contract administration functions described in FAR part 42." We invite comments on the interpretation of this definition.

## **II. Discussion and Analysis**

The rule proposes to locate the DFARS guidance for food services in DFARS part 237, Service Contracting, along with the current guidance for contracting for various types of services such as educational services, laundry and dry cleaning, and mortuary services. Because the food services policy emphasizes the R-S Act requirement for competition and potentially affects more than one category of contract source, the new guidance is more appropriately placed in the section on services. The proposed rule amends the DFARS to clarify the application of the R-S Act and the CFP statute to contracts for the operation and management of military dining facilities.

### **A. Joint Policy Statement**

Paragraph 1 of the Joint Policy Statement provides that defense appropriations shall be used to accomplish the defense mission. This mission shall be carried out by providing value and accountability to the taxpayers as well as supporting socioeconomic programs to the maximum extent practicable under the law. DoD has a military mission to maintain some level of in-house food service and military dining facility managerial capabilities to enable forward deployment operations, training, rotation, and career progression for military members. Contract services must enable DoD to feed the troops high quality food at a cost effective price.

Paragraph 2 states that "the Secretaries of the Military Departments concerned, as defined in 10 U.S.C. 101(a)(9), shall have the discretion to define requirements (e.g., contract statements of work, assignment of tasks and functions among workers in a facility) and make procurement decisions concerning contracting for military dining support services and the operation of a military dining facility and shall ensure that procurement decisions support the readiness of the Armed Forces."

Paragraph 3 recommends the enactment of legislation to create a "no-poaching" provision that would maintain contract opportunities current at that time. Section 856 of the NDAA for FY 2007 established the recommended "no-poaching" rule for contracts in effect at the date of enactment of section 856 (October 16, 2006).

Paragraph 4 establishes rules for new contract awards that were not covered by the "no-poaching" rule. Pursuant to subparagraph 4.a., new contracts will be competed under the R-S Act 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 responsibility for its staff and

subcontractors, where the DoD role is generally limited to contract administration functions described in FAR part 42.”

Subparagraph 4.b. provides that “[i]n all other cases, the contracts will be set aside for JWOD performance (or small businesses if there is no JWOD nonprofit agency capable or interested) when [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 [DoD] food service specialists exercise management responsibility over and above those contract administration functions described in FAR part 42.”

Subparagraph 4.c. provides that “[t]he presence of military personnel performing dining facility functions does not necessarily establish the inference that the Government is exercising management responsibility over that particular dining facility.”

Paragraph 5 provides that “[i]n accordance with FAR part 8, if dining support services are on or will be placed on the Procurement List, any State licensing agency that is awarded a contract for operation of that military dining facility under the [R-S Act] shall award a subcontract for those services.” DoD has implemented this requirement consistent with FAR clause 52.208-9, Contractor Use of Mandatory Sources of Supply or Services.

Paragraph 6 provides that “[i]n order to promote economic opportunities for blind vendors and to increase the number of blind persons who are self-supporting, the [R-S Act] requires that State licensing agencies provide blind persons with education, training, equipment and initial inventory suitable for carrying out their licenses to operate vending facilities in Federal buildings. Accordingly, through its rule-making procedures, [DoED] will encourage State licensing agencies who assert the [R-S Act] ‘priority’ for a multi-facility contract for operation of military dining facilities to assign at least one blind person per military dining facility in a management role.”

Paragraph 7 provides that “[t]he DOD shall continue to be able to use the ‘Marine Corps model’ for regional contracts for operation of military dining facilities at several installations or across State lines. In this model, the DoD may designate individual dining facilities for subcontract opportunities under the Small Business Act, the CFP statute, or other preferential procurement programs, and may designate some facilities in which military food service specialists may train or perform cooking or other dining support services in conjunction with contractor functions. State licensing agencies are eligible under the [R-S Act] to bid on contracts based upon this model.”

Paragraph 8 provides guidance for affording the R-S Act priority. DoD contracts for operation of a military dining facility shall be awarded as the result of full and open competition, unless there is a basis for a non-competitive award to a single source and resulting direct negotiations with that source. When competing such contracts, DoD contracting officers shall give SLAs priority when: (1) The SLA has demonstrated it can provide such operation with food of high quality and at a fair and reasonable price and with food of high quality comparable to that available from other providers of cafeteria services and comparable to the quality and price of food currently provided to military service members; and (2) the SLAs final proposal revision, or initial proposal if award is made without discussions, is among the highly ranked final proposal revisions with a reasonable chance of being selected for award.

Paragraph 8 also provides that “[t]he term ‘fair and reasonable price’ means that the State licensing agency’s final proposal revision does not exceed the offer that represents the best value (as determined by the contracting officer after applying the evaluation criteria set forth in the solicitation) by more than five percent of that offer, or one million dollars, whichever is less, over all of the performance periods required by the solicitation.” For the reasons explained in section II.B. below, this dollar limitation is not included in the DFARS.

Paragraph 9 provides that “[t]he contracting officer may award to other than the State licensing agency when the head of the contracting activity determines that award to the State licensing agency would adversely affect the interests of the United States, and the Secretary of Education

approves the determination in accordance with the [R-S Act].” DoED has implemented this policy in its regulations (see 34 CFR 395.30). Paragraph 10 committed the signatory parties to implementing the Joint Policy Statement in complementary regulations.<sup>32</sup>

### **Conclusion**

33. The contracting agency, the Army, has a constitutional, statutory and regulatory responsibility to obligate appropriated funds in accordance with the intent of Congress. When, as in this case, the language in the DoE regulation is subject to different interpretations, the arbitration panel should use the review standard in the Washington Case as a basis for its analysis of the law as regards the interpretation of the statute. This position has even more weight since the Army, not the DoE, is responsible for the implementation of the decision of the panel and should have discretion to interpret the meaning of the RSA. While reasonable individuals may disagree as to the interpretation of the statute, the State has not established that the decision of the Army to exclude DFA services from the scope of the RSA is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Ultimately, the Army, not the DoE, is responsible for awarding the contract.

/s

Steven Fuscher, Panel Member

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<sup>32</sup> 81 FR 36506. Federal Register Volume 81, Issue 109 (June 7, 2016)