

**UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION
IN THE MATTER OF ARBITRATION**

**Case No. R-S/15-19
Opinion and Award**

**NEW JERSEY COMMISSION FOR
THE BLIND AND VISUALLY IMPAIRED,**

Complainant,

v.

**DEPARTMENT OF THE AIR FORCE,
JOINT BASE MCGUIRE DIX-LAKEHURST,**

Respondent.

Appearances:

For Complainant: Gregory J. Sullivan, Deputy Attorney General, State of New Jersey

For Respondent: Joseph P. Loman, Department of the Air Force, Laura B. Bauza, Captain, U.S. Air Force

Arbitration Panel: David J. Weisenfeld, Chair and Neutral Arbitrator, Steven R. Fuscher, Peter A. Nolan

Pursuant to Regulations issued pursuant to the Randolph-Sheppard Act (“R-SA”), and the Policies and Procedures for Convening and Conducting Arbitration Pursuant to the R-SA, an arbitration panel consisting of David J. Weisenfeld (Chair), Steven R. Fuscher, and Peter A. Nolan, was selected to hear and decide this matter. The Chair was first informed of his potential selection on December 8, 2016, and agreed to serve by contract signed on April 13, 2017.

Prior to the hearing, on December 7, 2017, Respondent submitted to the U.S. Department of Education (“DoED”) a motion to dismiss the matter. On December 15, 2017, the DoED deferred that motion to the Panel.

Both parties submitted pre-hearing briefs.

A hearing was held on January 10, 2018, in Newark, NJ. During the course of the hearing, both parties were afforded a full opportunity to present evidence, examine and cross-examine witnesses, and make oral argument. A transcript of the hearing was taken and provided to the Parties and the Arbitrators.

On February 23, 2018, both parties submitted post-hearing briefs in lieu of closing arguments at the hearing.

By agreement prior to the hearing between the Chair and the DoED, ratified by the parties prior to and at the hearing, the Panel's time to submit this Opinion and Award (by email or deposit with the U.S. Postal Service or other delivery service) was set at April 24, 2018.

STIPULATED FACTS

At the hearing, the parties stipulated to certain facts, as follows. (Joint Exhibit 10) (The Chair has modified the parties' stipulated facts only so far as to conform certain of the defined terms established in those stipulated facts to those used elsewhere in this Opinion and Award.)

1. Joint Base McGuire Dix-Lakehurst ("JBMDL") provides installation management support for 3,933 facilities with an approximate value of \$9.3 billion in physical infrastructure. In addition to tens of thousands of service members that train at JBMDL throughout the year for overseas contingency operations, JBMDL is home to more than 44,000 Airmen, Soldiers, Sailors, Marines, Coast Guardsmen, civilians and their family members living and working on and around JBMDL.
2. Solicitation No. FA4484-15-R-0005 ("the Solicitation") was posted to the Federal Business Opportunities ("FBO") website, www.fbo.gov, on November 17th, 2014.
3. The Solicitation required the contractor to provide all personnel, supervision, and any items and services necessary to perform full food services for the seven (7) dining facilities at JBMDL.
4. All proposals were due on December 30th, 2014 at 3:00 PM EST.
5. The Solicitation informed potential offerors of a site visit on December 2nd, 2014. On December 2nd, 2014, Complainant attended a site visit.
6. Prior to the Solicitation closing on December 30th, 2014, all offerors had the opportunity to ask questions. Complainant submitted the following questions which were answered and posted to FBO as part of the solicitation package:

I am the Randolph Sheppard Manager for the NJ Commission for Blind. Regarding Dix Full Food Service, solicitation # FA4484-15-R-0005, we have received initial inquiries from some of our Randolph Sheppard clients.

So that my office can advise our clients appropriately, can you please provide answers to the following?

First, can you confirm that the following acronyms are correct?

FFP - firm fixed price

PWS - performance work statement

OCO FUNDS

FOB - forward operating base

CLIN - contract line item number

COL - Contingency Operating Location

O & M - Operations & Maintenance
SLIN - secondary contract line item number
IAW - in agreement with
QCP - quality control plan
DFAC - dining facility

Next, are you able to advise as to how many troops are on the base currently?
Are all troops across the entire country required to pass through Ft Dix?

Also, the pre-solicitation notice mentioned \$35,500,000. What exactly does this refer to?

In addition, when will a walk-through / site visit be held, how many individuals will be permitted to be present at the walk-through / site visit, and what steps are to be completed to visit Ft Dix?

7. The Solicitation included FAR 52.212-1. Subparagraph (g) of this FAR provision states that the "Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint."

8. The Solicitation included, Addenda to 52.212-2 - Evaluation Factors for Award. Paragraph H of this section states that "[t]he government intends to award a contract without discussions with respective offerors." Paragraph I of this section states "[t]his solicitation is subject to the priorities afforded under the R-SA."

9. The Solicitation included Addenda to 52.212-2 – Evaluation Factors for Award, which informed all offerors that "[b]y submission of its offer in accordance with the instructions provided in clause FAR 52.212-1, Instructions to Offerors – Commercial Items, the offeror accedes to the terms and conditions of this model contract."

10. On or about December 18th, 2014, Complainant submitted a timely offer in response to the Solicitation.

11. On or about April 30th, 2015, the contract in question was awarded to Cantu Services Inc. ("Cantu"). The contract was funded with Federal funds appropriated by Congress.

12. Complainant requested and received a post award debriefing.

13. Following the debriefing, Complainant filed an Agency Protest with Respondent. Shortly thereafter, Respondent responded to Complainant's Agency protest.

14. On August 18th, 2015, Mr. Jesse Hartle, Program Specialist with the DoED notified Respondent that that the Rehabilitation Services Administration had received a request from Complainant to convene an arbitration panel. The case was assigned number R-S/15-19.

15. On January 6th, 2016, the DoED convened this arbitration panel.

ISSUES PRESENTED

The parties argued three issues to the Panel:

1. Should the Panel dismiss the matter because Complainant waived its right to complain about the terms of the Solicitation when it submitted its offer and by not protesting the terms of the Solicitation before the end of the bid period?
2. If not, did Respondent violate the R-SA when it did not establish a competitive range with respect to offerors for the food service contract at JBMDL and instead awarded the contract to Cantu?
3. If so, what is the appropriate remedy?

THE MOTION TO DISMISS

For the reasons stated below, Respondent's motion to dismiss is denied.

ADDITIONAL FINDINGS OF FACT

1. The Solicitation did not make any explicit reference to a competitive range, either to say that one would be established with respect to offerors for the JBMDL food service contract or that one would not be established.
2. Prior to submitting an offer in response to the Solicitation, Complainant did not question or protest to Respondent regarding the absence from that Solicitation of any reference to a competitive range, or any intention by Respondent regarding establishing a competitive range.
3. Prior to awarding the JBMDL food service contract to Cantu, Respondent did not establish a competitive range with respect to offers submitted pursuant to the Solicitation.
4. Prior to Respondent awarding the JBMDL food service contract to Cantu, Complainant did not question or protest to Respondent regarding the absence from that Solicitation of any reference to a competitive range, or any intention by Respondent regarding establishing a competitive range.
5. Complainant did not make any protest regarding the Solicitation or Respondent's treatment of Complainant or its offer until after Respondent had awarded the JBMDL food services contract to Cantu.

CONCLUSIONS OF LAW

1. When a solicitation is flawed on its face with respect to application of the R-SA priority to the contract bidding process, a State Licensing Agency ("SLA") waives its right to assert a later claim based on such flaws if it waits until after the contract is awarded to assert that claim. *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007); *North Carolina Div. of Svcs. for the Blind v. U.S.*, 53 Fed. Cl. 147 (Fed. Cl. 2002).
2. There was no flaw on the face of the Solicitation such as the courts found in *Blue & Gold* and *North Carolina*. The Solicitation said that Respondent would apply the R-SA priority. Complainant cannot be said to have known, or even that it should have known, that Respondent would backtrack, or that the

reference in the Solicitation to “no discussion” meant that there would be no competitive range and no R-SA priority.

3. Complainant’s protest was not waived and is properly before the Panel.

4. Complainant bears the burden of proof with respect to establishing that Respondent violated the R-SA or its implementing regulations by its actions with respect to Complainant, Cantu, and the JBMDL food services contract which was the subject of the Solicitation.

5. Respondent is not entitled to *Chevron* deference with respect to its interpretations or application of the R-SA and its implementing regulations. The agency charged with interpreting and enforcing the R-SA and its implementing regulations is the DoED, acting through the Secretary of Education (the “Secretary”). *Kentucky, Education Cabinet, Dep’t for the Blind v. U.S.*, 62 Fed. Cl. 445 (Fed. Cl. 2004).

6. When a State Licensing Agency (“SLA”) is among the timely offerors, the R-SA and its implementing regulations, most particularly 34 C.F.R. 395.33(b), require the federal contracting agency soliciting offers for a contract subject to R-SA priority to establish a competitive range with respect to the timely offerors.

7. Given the timely offer submitted by Complainant, Respondent’s awarding of the JBMDL food services contract to Cantu without establishing a competitive range violated the R-SA and 34 C.F.R. 395.33(b).

8. The Panel generally lacks the power to grant relief beyond declaring Respondent to have violated the R-SA or its implementing regulations, and specifically lacks the power to grant the affirmative relief sought by Complainant – that the Panel order Respondent to begin direct negotiations with Complainant regarding the contract. *Georgia Dep’t of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990).

ANALYSIS

Waiver

Simply put, Respondent asserts that Complainant slept on its rights with respect to the substance of its claims and that, as a result, has waived those claims, and that, as a further result, the Panel should dismiss the Complaint.

For this proposition, Respondent cites *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), which states,

Therefore, while it is true that the jurisdictional grant of 28 U.S.C. §1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of §1491(b)(3) for courts to “give due regard to the need for expeditious resolution of the action” . . . favor[s] recognition of a waiver rule. Recognition of this rule finds further support in the GAO’s bid protest regulations and in our analogous doctrines. **Accordingly, a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards** in a §1491(b) action in the Court of Federal Claims. (*Id.* at 1316) (Emphasis supplied).

The court also addressed the issue of potential ambiguity, stating,

[W]here a government solicitation contains a patent ambiguity, the government contractor has “a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation” in a subsequent action against the government. [Citations omitted.] This doctrine was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact. (*Id.* at 1315).

Blue & Gold was, of course, not decided under or with respect to the R-SA. The same general principle has, however, also been applied in the R-SA context in *North Carolina Div. of Svcs. for the Blind v. U.S.*, 53 Fed. Cl. 147 (Fed. Cl. 2002), where the Court of Federal Claims stated,

[The SLA] could not wait to see whether or not it won the contract before challenging the perceived problems with the solicitation. Acceptance of such a practice would be disruptive, unfair to the other offerors, and would serve to undermine the soundness of the federal procurement system. [Citations omitted.] Accordingly, where an offeror declines to raise an objection and obtain a determination on the matter, the court may find that the offeror has waived its right to protest. (*Id.* at 165).

On that basis, Respondent argues that Complainant waived its rights in this matter because it waited until four months after Respondent awarded the JBMDL food services contract to Cantu to file its R-SA-based complaint with the DoED.

Respondent further argues that Complainant waived its right to protest regarding the Solicitation and contract award when it submitted its offer in response to the Solicitation because the Solicitation stated that Respondent would go forward without conducting discussions (and, impliedly) that it would not establish a competitive range.

By submitting its offer, [Complainant] acceded to the terms and conditions in the solicitation and therefore has waived its right to now complain to this panel. . . . Instead, despite having the opportunity to ask questions, [Complainant] incorrectly “assumed” that the Air Force was going to set a competitive range and failed to clarify whether the Air Force “actually” intended to establish a competitive range. [Testimony of Daniel Frye] Tr. at 65 – 66. (Respondent Post-Hearing Brief at 12).

By neither questioning nor protesting what Respondent says was its clearly stated intention not to establish a competitive range, and by submitting its offer nevertheless, Respondent asserts that Complainant acceded to those terms. (See Stipulated Fact #9).

Citing *Blue & Gold*, Respondent asserts that, both by virtue of Complainant’s delay in questioning or protesting the terms of the Solicitation, and by acceding to those terms by submitting its offer, Complainant waived its rights and that the Panel should, as a result, dismiss the Complaint.

While correctly acknowledging that they are not precedential, Respondent further directs the Panel's attention to R-SA arbitration panel decisions in two cases (*Colorado Dep't of Human Svcs, Div. of Vocational Rehabilitation v. Department of the Air Force*, Case No. R-S/10-06; and *Florida Dep't of Educ., Div. of Blind Services v. Department of the Air Force, Elgin Air Force Base*, Case No. R-S/15-13) for the proposition that a SLA waives its right to protest a bid and award process under the R-SA if it fails to assert those rights until after the bid period closes.

For a variety of reasons, the Panel does not find Respondent's waiver arguments to be persuasive with respect to this matter.

There is, of course, a sound policy reason for the timely protest/waiver principle set forth in *Blue & Gold* and applied in the R-SA context in *North Carolina*. The Panel treats that principle as settled law. Doing so does not end the inquiry, however, but merely shifts it to an examination as to whether it is properly applied to the facts of this case.

In *North Carolina*, the problem later protested by the SLA was apparent on the face of the solicitation, which stated that the process would be treated as a small business set-aside, with the R-SA not applicable. Similarly, in *Colorado*, the solicitation defined the competitive range as those offers that were within 5% of the low bidder, which standard the SLA did not achieve. In both cases, the SLA's later-raised claim based on the solicitation deficiency was rejected as untimely.

Since (as discussed below), Complainant's substantive claim relates to Respondent's failure to establish a competitive range, the issues are:

Was it clear on the fact of the Solicitation that Respondent was not going to establish a competitive range such that Complainant was required under *Blue & Gold* and *North Carolina* to assert its rights prior to the end of the bid period, or at least prior to the contract being awarded to Cantu?

Alternatively, was the Solicitation patently ambiguous such as to trigger the second leg of *Blue & Gold*, leading to the same result?

The answers to those questions are potentially determinative of the matter, since, while not specifically stipulated, it is uncontested that Complainant did not assert any of its claims until after the JBMDL food services contract was awarded to Cantu in April 2015.

The facts are clear. The only question is how to interpret and apply them. Respondent plainly stated in the Solicitation its intention "to award the contract without discussions with respective offerors." (Stipulated Fact #7). But Respondent also plainly stated in the Solicitation that, "This solicitation is subject to the priorities afforded under the R-SA." (Stipulated Fact #8). And, while not stipulated, it is clearly the case that the Solicitation did not make any explicit reference to a competitive range, either to say that one would be established with respect to offerors for the JBMDL food services contract or that one would not be established.

In context, what does that mean and where does it leave us with regard to Respondent's waiver argument? Was the Solicitation's reference to "no discussions" sufficiently clear as to Respondent's intention not to

establish a competitive range as to require Complainant to protest – or at least to raise a question which might have clarified the situation – during the bid period?

The only case seemingly on point is the (non-precedential) arbitration decision in *Florida*. The facts there were somewhat similar to those here: the solicitation stated “no discussions”; the solicitation stated that the R-SA would apply; the solicitation was silent regarding competitive range; but, in a significant departure from our facts, the solicitation set forth a detailed, alternative process involving assessing and comparing offerors’ price. The contracting officer determined that the SLA’s price (25% above that of the awardee) was not reasonable. No competitive range was ever set. As here, the SLA protested and sought arbitration post-award, but not before.

On a theory similar to that advanced here by Respondent (relying on *Blue & Gold* and *North Carolina*), the *Florida* arbitration panel determined that the SLA had waived its rights. The panel did not significantly discuss the issue except by extensive quotation from *Blue & Gold*.

As often happens in R-SA arbitrations, one panel member dissented in *Florida*, saying with respect to waiver,

The [SLA] did not waive its rights to challenge the terms of the solicitation by submitting its proposal. Since the solicitation itself said the [R-SA] applied to the procurement, the [SLA] had no reason to challenge the award. It wasn’t until after the award that the [SLA] learned that a violation of the [R-SA] had occurred. In regard to Respondent’s claim that [the SLA] knew no competitive range was going to be established because the solicitation made it clear the award would be made ‘without discussion’, the intent not to establish a competitive range was not clear. . . . The Panel Minority is convinced that [the SLA] did not sit on its rights waiting to see if it was awarded the contract. [The SLA] believed the contract would be awarded pursuant to the [R-SA], and it was not until after the award that it discovered the alleged violation of the [R-SA].

The dissenter went on to discuss the general principle, somewhat at odds with the patent ambiguity theory in *Blue & Gold*, that a waiver is not effective unless made knowingly.

The Panel majority here respectfully disagrees with the panel majority in *Florida* and believes that the dissenting panel member there was correct.

As will be discussed below with respect to the merits, the Federal Acquisition Regulation (“FAR”) and the R-SA are not in conflict. There was no flaw on the face of the Solicitation such as the courts found in *Blue & Gold* and *North Carolina*. The Solicitation said that Respondent would apply the R-SA priority. Complainant cannot be said to have known, or even that it should have known, that Respondent would backtrack.

Respondent argues that the reference in the Solicitation to “no discussion” necessarily meant “no competitive range”. The substance of that proposition is addressed below. As to waiver, however, that connection is not at all clear, especially given the additional assurance in the Solicitation that the R-SA priority would apply.

It is not necessary for the Panel to decide (and it does not do so) whether the correct standard for assessing a waiver argument in the R-SA arbitration context is Knowing Waiver or Patent Ambiguity. Given the clear statement in the Solicitation that the R-SA priority would apply, coupled with the absence of any statement

that a competitive range would not be established, the reference in the Solicitation to “no discussions” does not even rise to the level of establishing a patent ambiguity.

The problem here was not in the wording of the Solicitation, but in a fundamental legal disagreement regarding the application of the R-SA regulations and of the relationship between the FAR and the R-SA.

Complainant’s protest was not waived and is properly before the Panel.

There is another argument to be made on behalf of Respondent to the effect that Complainant could and should have sought arbitration during the bid process. Presupposing, for the sake of argument, that the terms of the Solicitation put Complainant sufficiently on notice to require it to do so (a concept rejected above), the effect of such a requirement (or even allowing arbitration at that stage of the process) would wreak havoc on the federal contracting process that it purports to protect. In this case, for example, 16 months separated Complainant’s request to the DoED for arbitration and the Chair even being approached regarding serving. What could or would Respondent have done if its contracting process had been frozen all that time by an arbitration demand?

Moreover, such an early arbitration demand would seem to be unripe. (As a matter of law, it would be unripe with respect to the Court of Federal Claims. (See *Texas v. United States*, 134 Fed. Cl. 8 (Fed. Cl. 2017)). In the absence at that stage of any final agency action, what could an arbitration panel effectively do? Inserting the R-SA arbitration process into a pending federal contracting decision would be unworkable.

Merits

Moving forward to address the merits of the matter, the material facts are largely uncontested. As stipulated by the parties, the Solicitation indicated clearly that Respondent intended to award the contract without conducting discussions. (Stipulated Fact #7). Respondent also reserved the right to conduct discussions if it later determined them to be necessary. It also stated that the Solicitation was subject to R-SA priorities. (Stipulated Fact #8).

While not specifically stipulated, it is also uncontested that, prior to awarding the contract to Cantu, Respondent did not establish a competitive range. (Tr. 91, 93 – 94, 96, 112 – 114) (Respondent Post-Hearing Brief at 6).

Rather, on those uncontested facts, Respondent maintains that neither the R-SA nor its implementing regulations require it to set a competitive range (and that, therefore, it did not violate the R-SA or the regulations when it elected not to do so.)

Respondent’s Contracting Officer with respect to the Solicitation, Karen Thorngren, testified clearly and cogently on this topic. Discussions – as that term is used in the federal acquisitions context – are communications between a contracting agency and offerors within the competitive range in which the agency identifies weaknesses or deficiencies (or both) and allows offerors the opportunity to modify their proposals. (Tr. 93 – 94) (Respondent Post-Hearing Brief at 9). The subject of the Solicitation – provision of food services – was not a complex topic, was well defined, and was of a nature that was widely available on the commercial market. (Tr. 91 – 94) (Respondent Post-Hearing Brief at 9).

Accordingly, while reserving the right to change course if events so dictated, Ms. Thorngren felt that discussions would not be necessary with respect to assessing the offers and determining which offer to accept. (Tr. 91, 93, 96, 112 – 114) (Respondent Post-Hearing Brief at 9). If, upon analyzing the offers, she had determined that discussions were necessary, then she would have established a competitive range. But since her review of the offers indicated that discussions were not needed, she did not establish a competitive range before awarding the contract to Cantu. (Tr. 112 – 114) (Respondent Post-Hearing Brief at 9).

As a result of this clear record, the merits of this matter reduce to a single, simple legal question:

Complainant asserts that once it submitted its timely offer, Respondent was required under the R-SA and its implementing regulations to establish a competitive range.

Respondent counters that neither the R-SA nor its implementing regulations require the Contracting Officer to set a competitive range and that the decision to set a competitive range is at the Contracting Officer's discretion. (Respondent Post-Hearing Brief at 8, 10).

Respondent correctly points out that the text of the R-SA makes no mention of competitive range. Both parties cite to, quote from, and make extensive reference to 34 C.F.R. 395.33(a) and (b). Accordingly, it is useful and appropriate to set out the entire text of those two regulatory provisions from within the larger §395.33, which is entitled "Operation of cafeterias by blind vendors".

- a. Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.
- b. In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and 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 as required under paragraph (a) of this section.** If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of § 395.37. (Emphasis Supplied).

Suffice to say, the parties to this arbitration propose diametrically opposing interpretations of that regulatory language.

Respondent focuses on the first word of the highlighted sentence (which it points out is the only one within all of the R-SA regulations which references competitive range). Respondent argues that use of “if” at the start of the sentence means that it (and other similar contracting agencies not before this Panel) are not required to set a competitive range, even if an SLA submits an offer. Application of SLA priority rights under the R-SA are subject to the agency’s discretionary decision whether (or not) to establish “a” competitive range. (Respondent Post-Hearing Brief at 7).

Respondent compares that soft language (“if” and “a”) regarding competitive ranges to the more muscular phrasing in the first sentence of §395.33(b) to the effect that SLAs “shall” be invited to respond to solicitations. (Respondent Post-Hearing Brief at 6 & 7) (“34 C.F.R. § 395.33(b) only dictates what must follow if a competitive range is established, but this portion of the regulation itself does not require a competitive range to be established. If the SLA’s proposal is not in a competitive range, then this section does not apply and the SLA does not have priority rights.”) (Emphasis in Original).

Respondent also argues that, since neither the R-SA nor its regulations define competitive range, that term should be interpreted consistently with its use as a term of art under more general federal contracting principles as expressed in the FAR. Further, Respondent argues that “Contracting officers have wide discretion under federal procurement regulations to apply and interpret procurement regulations. *North Carolina, supra.*” (Respondent Post-Hearing Brief at 8) (Citation edited for form).

In contrast, Complainant points to the (asserted) purpose and intent of the R-SA as expressed in, and by the language of, its implementing regulations. (Notably, Complainant relies on the same regulatory provisions as put forward by Respondent.)

In Complainant’s view, the R-SA requires contracting agencies such as Respondent, acting in concert with the Secretary, to provide blind and visually impaired vendors with a priority with respect to food services contracts such as those at JBMDL. The R-SA priority is not an option to be granted or withheld at contracting agency whim. The vehicle by which to balance the government’s legitimate interest in securing quality goods and services at reasonable prices with its interest and public policy goal of assisting blind and visually impaired persons to earn a living – is the competitive range. If the SLA can provide a bid that is reasonably close to other bids (within a competitive range), and otherwise has a reasonable chance of success, then the priority applies and the contracting agency must consult with the Secretary.

By Complainant’s reading, the “if” at the top of §395.33(b) refers to whether (or not) the SLA can produce a bid that is competitive with the other bidders. It does not refer to granting contracting agencies the discretion to avoid applying R-SA priority by the vehicle of simply deciding not to establish a competitive range.

Complainant relies on a previous R-SA arbitration decision, *Maryland Dep’t of Educ. v. General Svcs. Admin.*, Case No. R-S/13-06, in which the panel found an agency obligation to establish a competitive range such as it seeks here.

Respondent addresses *Maryland* in several respects. First, it points out that previous R-SA arbitration decisions are non-precedential with respect to later-sitting arbitration panels. Respondent is correct in that regard. Previous R-SA arbitration decisions are merely advisory rather than precedential.

Respondent also distinguishes *Maryland*, pointing out that the solicitation involved in that case was very specific with respect to the R-SA and competitive range.

In *Maryland* the solicitation expressly stated that if the SLA submitted an offer which is determined to be in the competitive range, the SLA will be awarded the contract in accordance with the Randolph-Sheppard Act. *Maryland* at 3. The solicitation in this case did not include such language and did not promise the establishment of a competitive range. The solicitation in *Maryland* also included a statement that if the State licensing agency submits an offer that is determined to be in the final competitive range, the Government will award the contract to the SLA. *Maryland* at 4. Again, no such promise of establishing a competitive range appears in the solicitation in this case. (Respondent Post-Hearing Brief at 10).

Respondent also criticizes the *Maryland* panel for what Respondent describes as a misapplication of and faulty reliance on a Federal Circuit bid protest case, *Southfork Sys. v. U.S.*, 141 F.3d 1124 (Fed. Cir. 1998), in which the solicitation affirmatively stated that a competitive range would be established. (Respondent Post-Hearing Brief at 11).

Respondent's criticisms of and distinctions from the specifics of the *Maryland* panel's determination appear to be justified. But those criticisms and distinctions neither address nor detract from the panel's underlying premise that the R-SA priority requires the contracting agency to implement the R-SA by establishing a competitive range when there is a bid by an SLA.

Also notably missing from Respondent's critique of the *Maryland* panel determination (and from its substantive argument here) is any citation to any case law – whether judicial or arbitral – supporting its proposed interpretation of the R-SA and 34 C.F.R. 395.33(b).

Based on the arguments presented to the Panel by the parties before, during, and after the hearing, this appears to be a novel question of law – save only for the non-precedential *Maryland* arbitration decision.

On an elemental level, of course, Respondent does not need any such case law support since it correctly places the burden of proof on Complainant. But that still leaves this Panel with the need to choose between two starkly different readings and interpretations of the R-SA and 34 C.F.R. 395.33(b). Only one of them can be correct. So, despite carrying the burden of proof, Complainant prevails on this issue if it convinces the Panel that the R-SA and its regulations required Respondent to have established a competitive range with respect to offers submitted to it in respect of the Solicitation, given that Complainant was one of those offerors. It has done so.

As a preliminary matter, there was much discussion by the Parties regarding the relative weight of the FAR and the R-SA (and its regulations). The Panel does not accept the premise that those two sources of law are inherently in conflict or that we need to choose one as being superior to the other. It seems elemental to the point of being a truism that Respondent must comply with both the FAR and the R-SA (and its regulations). That one permits something (or at least does not ban it) does not then mean that that thing must also be permitted under the other or preclude application of the other.

In theory, if the FAR and the R-SA specifically and irretrievably contradicted each other, then we would have to address and decide the question of precedence. But they do not, so we do not.

Here, rather, while seemingly consistent with the FAR (this Panel specifically disclaims any right, power, or expertise to comment on such matters), Respondent's interpretation of the R-SA and its regulations, and its actions premised on that interpretation, appear to be antithetical to the clear purpose and intent of the R-SA.

In reaching this conclusion, the Panel has taken note of and guidance from the U.S. Court of Federal Claims in *Kentucky, Education Cabinet, Dep't for the Blind v. U.S.*, 62 Fed. Cl. 445 (Fed. Cl. 2004). The case is not directly on point here because the issue specifically arising in *Kentucky* was whether a disappointed SLA (which had failed to secure an Army food services contract) could bypass the R-SA arbitration process and go directly to suing the Army in court. (The Court ruled that the R-SA arbitration process is mandatory.)

For our purposes, the *Kentucky* decision is notable in several respects.

First, Respondent relies in part on its right to apply its discretion within the contracting process (citing *North Carolina, supra*, and other general law to that effect). But the Court made clear in *Kentucky* that, in applying the R-SA regulations at issue there (and here), it is the DoED, acting through the Secretary, rather than the Army (here the Respondent) that is responsible for and accorded discretion regarding administering those regulations. (*Kentucky*, 62 Fed. Cl. at 454 – 455).

Second, the Court in *Kentucky* stressed the need – in interpreting and applying the R-SA and its regulations – to be mindful of its purpose and underlying policy goals. (*Id.* at 453) (“The purpose of a statute and its underlying policy construed from the statutory text may be highly relevant to both the interpretation of words and the application of the statute to the facts at hand. *See, e.g., Crandon v. U.S.*, 494 U.S. 152, 158 (1990).”)

Here, based on the Panel's reading of the R-SA, and aided by the Court of Federal Claims' lengthy discussion in *Kentucky*, the plain purpose of the R-SA is to afford opportunities and priority to blind and visually impaired vendors. Nothing about the R-SA reads as optional – to leave it to the contracting agency to decide whether or not – for otherwise valid cost or administrative reasons which would otherwise control – the R-SA priority will apply.

This is not a bid protest by a disappointed commercial vendor. Respondent was well within its rights under the FAR to say in the Solicitation that it planned and expected not to conduct discussions. And, if Complainant had not submitted an offer, none of the other private commercial vendors who had made offers would have had a basis to protest the award of the contract to Cantu without either discussions or the establishment of a competitive range. The FAR does not require either discussions or a competitive range.

But once Complainant did enter an offer, the R-SA and its regulations also then applied to Respondent and the bid evaluation and award process. Respondent was then required to establish a competitive range. Then, if Complainant was within that competitive range and otherwise had a reasonable chance of being awarded the contract, Respondent was required to consult with the Secretary. Respondent was not entitled – for otherwise generally and ordinarily valid financial and administrative reasons – to elect to ignore the R-SA and award the contract to Cantu without establishing a competitive range. In not establishing a competitive range, Respondent violated the R-SA as expressed through 34 C.F.R. 395.33(b).

Respondent suggests that a decision favorable to Complainant would entail the Panel impermissibly adding to 34 C.F.R. 395.33(b) a requirement (to establish a competitive range) that does not exist, and that doing so is

beyond the Panel's power. The Panel is not adding to or otherwise amending the regulation. It is merely interpreting and applying the regulation consistently with its and the R-SA's underlying purpose.

There is a further argument to be made – relating to but different from Respondent's argument about panel action and regulatory interpretation and application. The argument is to the effect that Respondent was required by applicable federal acquisition law to comply with the terms of the Solicitation with respect to evaluating offerors and awarding the JBMDL food services contract. (See *Texas, supra*). By itself, that statement is correct. Respondent was barred from diverging from the process it had set forth in the Solicitation.

So, the argument goes, Complainant (and by analogy the Panel majority) must be mistaken since Respondent could not have set a competitive range with respect to the Solicitation without unlawfully diverging from the lawful process it had set forth in the Solicitation.

The argument would have merit if (a) raised in an appropriate forum with respect to general bid protests rather than before an arbitration panel specifically charged (only) with enforcing the R-SA, and more importantly (b) the Solicitation had stated specifically that the R-SA priority would not apply or that a competitive range would not be established. Neither condition is met here. The Solicitation clearly stated that "[t]his solicitation is subject to the priorities afforded under the R-SA." (Stipulated Fact #8). In establishing a competitive range as required by the R-SA, Respondent would have been acting consistently with the terms of the Solicitation.

Remedy

Complainant seeks an order from the Panel requiring Respondent to engage Complainant in direct negotiations regarding the food services at JBMDL that are the subject of the Solicitation.

In support of that request, Complainant argues that, by virtue of its having received a rating of "Substantial Confidence" with respect to the Solicitation, it was within a "de facto" competitive range, and therefore had a reasonable chance of being selected for the contract. As a result, Respondent was required to consult with the Secretary concerning implementing the R-SA priority with respect to its offer and the Solicitation.

In further support for its request for such relief, Complainant asserts that Cantu, the successful bidder, should not have received a "Substantial Confidence" rating because of what Complainant asserts are performance failures by Cantu with respect to other federal food service contracts. To support that assertion, Complainant relies on a 2011 report by the Oklahoma State Auditor & Inspector (Complainant Exhibit 1) and a 2017 report by the Department of the Army (Complainant Exhibit 2).

Respondent objects on multiple grounds. First, the matter of Cantu's past performance and its "Substantial Confidence" rating were not listed as issues in Complainant's initial request for arbitration (Joint Exhibit 3).

Second, the issue of Cantu's rating is not properly before the Panel because it is not an issue relating to compliance with or violation of the R-SA or its implementing regulations but is merely a disguised bid protest properly asserted before the General Accounting Office or the Court of Federal Claims rather than in an R-SA arbitration.

Third, the evidence with respect to Cantu's past performance is insufficient to support any finding as to error by Respondent with respect to Cantu's rating with respect to the Solicitation.

Fourth, and more globally, Respondent asserts that the Panel lacks authority to issue any relief beyond a declaration that Respondent has violated the R-SA or its implementing regulations.

For multiple reasons, Respondent is correct with respect to remedy and Complainant's arguments fail.

For purposes of the discussion that follows, the Panel assumes (but does not decide) that Complainant's arguments with respect to Cantu are properly before it.

As to the scope of the Panel's authority generally with respect to remedy, while Complainant cites to non-precedential decisions by other arbitration panels to the contrary, the law on this issue appears to be clear.

Both the 11th Circuit in *Georgia Dep't of Human Resources v. Nash*, 915 F.2d 1482, 1492 (11th Cir. 1990), and the 4th Circuit in *Maryland State Dep't of Education, Div. of Rehabilitative Svcs. v. U.S. Dep't of Veterans Affairs*, 98 F.3d 165, 169 – 171 (4th Cir. 1996), have been completely clear as to the limitations on this, or any R-SA arbitration panel's power with respect to remedy. That power is limited to declaring the agency to be in violation of the R-SA or its implementing regulations. R-SA arbitration panels are not empowered to order the subject contracting agency to take any particular remedial action. "The responsibility for correcting the violation lies with the federal entity head." *Id.*

Accordingly, Complainant's request for relief beyond a declaration that Respondent violated the R-SA regulations must fail.

The Panel notes that, even if it had the power to consider Complainant's request for affirmative relief, Complainant's arguments for such relief would still fail.

Complainant has provided no support for the existence of the concept of a "de facto" competitive range. Having argued convincingly that Respondent failed in its obligation to establish a competitive range, pivoting to urge the Panel to find that Respondent really did establish such a range seems inappropriate at best.

As to Cantu's "Substantial Confidence" rating, Respondent is correct that overseeing the bid evaluation process to the point of second-guessing Respondent's substantive evaluation of offers and offerors for the JBMDL food service contract at issue in the Solicitation would go far beyond the Panel's purview of evaluating Respondent's actions with respect to the R-SA and its implementing regulations. We do not presume to intrude on others' jurisdiction by opining as to the nature or sufficiency of evidence that would be necessary for Complainant to establish that Cantu was undeserving of its "Substantial Confidence" rating, but the documents proffered for that purpose (Complainant Exhibits 1 and 2) seem not up to the task.

Finally, while not strictly necessary to consider given the applicable general limitations on the Panel's power with respect to remedy, Complainant's specific request that the Panel order Respondent to enter into direct negotiations with it also runs afoul of the Court of Federal Claims' more specific guidance in *Texas, supra*. The SLA there, having been found to be within a competitive range, sought to be declared entitled to be awarded the contract at issue. Rather, the Court declared that finding an SLA bid to be within a competitive range, and finding the SLA bid to have a reasonable chance of success, are not the same thing and are separate predicate

steps before the required consultations with the Secretary necessary to determine if the SLA is able to provide food of high quality at reasonable cost. The R-SA arbitration process does not substitute either for final agency action or those consultations. *Id.*

AWARD

1. The matter was not untimely filed and is properly before the Panel.
2. Respondent's awarding of the JBMDL food services contract to Cantu Services, Inc. without establishing a competitive range violated the R-SA and 34 C.F.R. 395.33(b).
3. Respondent shall take further action as necessary to remedy the violation.

Dated: April 24, 2018

David J. Weisenfeld, Panel Chair

Peter A. Nolan, Panel Member

For the reasons and to the extent stated below, Panel Member Steven R. Fuscher dissents from the Award and portions of the Opinion.

Steven Fuscher concurring in part and dissenting in part.

I concur in the majority's finding that the panel lacks authority to order the relief requested by the SLA and that the panel's authority is limited to determining whether or not the Respondent has violated the R-SA or is implementing regulations. I dissent as regards to the panel's finding on waiver.

The majority's analysis demonstrates the need for the DoED to clarify its regulations regarding the interaction of the RSA and the FAR. There is no dispute as to the facts. The SLA was on notice of the clear language in the solicitation. The SLA was given the opportunity to object to the terms of the solicitation and did not.

Mr. Frye, the Executive Director of the New Jersey Commission for the Blind and Visually Impaired, testified before the panel that his office administers the RSA Program for the State of New Jersey.¹ He testified that the SLA was the prime contractor for dining hall services at JBMDL for approximately 25 years until the SLA lost the contract to Cantu in 2014.² He took a particular interest in this contract because of its size and worked with JBMDL to cultivate good relations. He also worked with the SLA's teaming partner in the preparation the SLA's proposal in response to the solicitation.³ Mr. Frye explained his understanding of the competitive range in a federal source selection as follows:

[T]he concept of a competitive range applies primarily in the instances when a state licensing agency is engaged in the competitive bid process to secure a cafeteria. In most other instances, competitive ranges under the Randolph-Sheppard program are not a factor where there is no competition and a permit is issued to operate on federal property. But in the context of cafeteria awards in the military environment, there is an obligation to participate in a competitive exercise.⁴

The majority's analysis can be summarized as follows: The SLA cannot waive its RSA right to the establishment of a competitive range even when a solicitation clearly states that an award can be made to the low responsive, responsible offeror without discussions. The majority position is that a competitive range must be established even though the clear language of the solicitation states that an award can be made without discussions. This interpretation of the RSA would create a legal and regulatory modification to the terms of the solicitation that is not stated in the solicitation and would create ambiguity in the procurement process.

The SLA, in this case, has 25 years of experience managing dining hall service contracts subject to the FAR and was involved in the preparation of the proposal. The SLA was an experienced government contractor and should be held to the standard of all offerors who competed for the award of this contract. The result of the majority's decision would be the establishment of a "*right that cannot be waived*" and the creation of an ambiguity in the agency's procurement process that is a violation of basic government contracting principles.

The U.S. Court of Appeals for the Federal Circuit in *The Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308

¹ Transcript at pg. 28.

² Transcript at pg. 31.

³ Transcript at pg. 32.

⁴ Transcript at pg. 41.

(Fed. Cir. 2007) affirmed the waiver rule, stating:

Therefore, while it is true that the jurisdictional grant of 28 U.S.C. §1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of §1491(b)(3) for courts to “give due regard to the need for expeditious resolution of the action” and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule. Recognition of this rule finds further support in the GAO's bid protest regulations and in our analogous doctrines. Accordingly, a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a §1491(b) action in the Court of Federal Claims.⁵

The court also addressed the issue of patent ambiguity, stating:

Similarly, we have recognized the doctrine of patent ambiguity where the party challenging the government is a party to the government contract. “The doctrine of patent ambiguity is an exception to the general rule of contra proferentem, which courts use to construe ambiguities against the drafter.” *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1342 (Fed.Cir.2004). We have applied the doctrine of patent ambiguity in cases where, as here, a disappointed bidder challenges the terms of a solicitation after the selection of another contractor. See *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed.Cir.2000); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed.Cir.1996). Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has “a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation” in a subsequent action against the government. *Stratos*, 213 F.3d at 1381 (quoting *Statistica*, 102 F.3d at 1582). This doctrine was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact.⁶

The court explained that:

These reasons underlying the patent ambiguity doctrine apply with equal force in the bid protest context. In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation. Accordingly, the same reasons underlying application of the patent ambiguity doctrine against parties to a government

⁵ *Id.* at 492 F.3d 1316.

⁶ *Id.* at 492 F.3d 1315.

contract speak to recognizing a waiver rule against parties challenging the terms of a government solicitation.⁷

The GAO has adopted a similar rule under 4 C.F.R. § 21.2(a)(1) where protests must be made prior to receipt of initial proposals where alleged improprieties are apparent prior to bid opening.⁸ Several decisions of the Court of Federal Claims have also recognized the value of the waiver rule to prevent the inefficient and costly expenditure time and effort to re-submit or re-evaluate proposals. Examples of the cases cited by the court include: *N.C. Div. of Servs. for the Blind v. United States*, 53 Fed.Cl. 147, 165 (2002); *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed.Cl.167, 175 n. 14 (2005); *MVM, Inc. v. United States*, 46 Fed.Cl. 126, 130 (2000); *Allied Tech. Group, Inc. v. United States*, 39 Fed.Cl. 125, 146 (1997); *Aerolease Long Beach v. United States*, 31 Fed.Cl. 342, 358 (1994).

The court cited *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032 (Fed.Cir.1992) to support the principle of laches and equitable estoppel. The court referenced decisions by the Court of Federal Claims that support this principle to avoid delays in the procurement process citing *Transatlantic Lines LLC v. United States*, 68 Fed.Cl. 48, 52, 57 (2005) and *CW Gov't Travel, Inc. v. United States*, 61 Fed.Cl. 559, 568-69 (2004) for the principle of considering delays as part of the laches analysis.

North Carolina Division of Services for the Blind v. United States, 53 Fed. Cl. 147, 165 (Fed. Cl. 2002) also stands for the proposition that the proper procedure to follow when an offeror identifies a problem with a solicitation is to make a timely objection rather than waiting to see if the offeror is the successful awardee under the solicitation.

There is an argument that GAO protests and actions before the Court of Federal Claims are not ripe for adjudication until the issue before the Court of Federal Claims is addressed through a RSA arbitration. The majority argues that this is not a timely remedy since RSA arbitrations may take several months to reach a decision. This is an issue of timely administration and does not provide the justification for a legal exception to the normal timeliness standards applied to government contracting procurements.

The RSA regulations state that a decision by the RSA arbitration panel is a final agency decision. The RSA regulations do not define when a SLA can request arbitration before an RSA arbitration panel. 34 CFR §395.37 **Arbitration of State Licensing Agency Complaints** subparagraph (a) and (b) state:

- a. Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply

⁷ *Id.* at 592 F.3d 1316.

1. ⁸ 4 C.F.R. § 21.2(a)(1) states: “Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.”

with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary.

- b. Upon receipt of a complaint filed under paragraph (a) of this section, the Secretary shall convene an ad hoc arbitration panel which shall, in accordance with the provisions of 5 U.S.C. ch. 5, subchapter II, give notice, conduct a hearing and render its decision ***which shall be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. ch. 7[emphasis added]***. The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency. . .

The SLA had the right to request arbitration under 34 CFR §395.37 but did not. There is nothing in the RSA regulations that requires the SLA to wait until the end of a source selection to request arbitration on a specific issue impacting the SLA in a particular competitive source selection that is required to accommodate the RSA priority. If the SLA makes a timely request for arbitration, the result is an arbitration decision. The administrative remedies are exhausted and the Court of Federal Claims has jurisdiction. The SLA has a remedy. The result is an opportunity to address the concerns of the SLA in a timely manner.

The government has the authority to extend the current contract until the arbitration issue is resolved. Once the arbitration decision is final, the issue is ripe for litigation and/or negotiation between the parties. As expressed by the court in *The Blue & Gold Fleet, L.P. v. United States*, the establishment of clarity, so all parties to the competitive source selection process have a clear understanding of the procurement rules, is fundamental to basic government contracting principles of fairness and equity.

COMPLIANCE WITH SOURCE SELECTION TERMS

I concur with the majority that both the RSA and the FAR apply to a source selection that obligates federal funds to pay a SLA for providing dining hall services. However, neither the RSA and its implementing regulations nor the FAR address the interaction between the two sets of regulations during a competitive source selection subject to the RSA. The Court of Federal Claims in *Texas v. US*, No. 17-847C, November 7, 2017, addressed a broad range of RSA issues, including the requirement for the government to comply with the terms of the solicitation in evaluating offers. The court stated:

The court further notes that protestors' argument that the State of Texas was entitled to an immediate priority contract right as soon as it was included in the competitive range is also not consistent with the Randolph-Sheppard Act, the implementing regulations at 34 C.F.R. § 395.33, and the established principle in this court that an agency cannot deviate from the terms of its solicitation when conducting its evaluation of proposals. Relevant to this bid protest, the solicitation set forth evaluation criteria for determining whether and when to afford the priority to the SLA, which are consistent with the Randolph-Sheppard Act and the implementing regulations. Agencies are required to evaluate proposals and make contract awards based on the criteria set forth in the solicitation. See *NEQ, LLC v. United States*, 88 Fed. Cl. 38, 47–48 (2009) ("It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation."). It is equally well-established that agencies cannot evaluate proposals

based on criteria that are not disclosed in the solicitation. See *NVE, Inc. v. United States*, 121 Fed. Cl. 169, 180 (2015).⁹

The court continues:

This court in *Banknote Corp. of America, Inc. v. United States* stated:

It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation. This requirement is firmly rooted in the *Competition in Contracting Act* (CICA) . . . which indicate[s] that an agency shall evaluate competitive proposals and assess their qualities solely on the factors and subfactors specified in the solicitation. See 10 U.S.C. §§ 2305(a)(2)(A), 2305(a)(3)(A) (2000) It thus is beyond peradventure that the government may not rely upon undisclosed evaluation criteria in evaluating proposals, *Acra, Inc. v. United States*, 44 Fed. Cl. 288, 293 (1999), and, where appropriate, must disclose the factors' relative importance, *Isratex, Inc. v. United States*, 25 Cl. Ct. 223, 230 (1992). See also *Cube Corp. v. United States*, 46 Fed. Cl. 368, 377 (2000); *Dubinsky v. United States*, 43 Fed. Cl. 243, 266 (1999). That said, an agency still has “great discretion in determining the scope of an evaluation factor.” *Forestry Surveys & Data v. United States*, 44 Fed. Cl. 493, 499 (1999). Consistent with these precepts, in a case such as this, a protester must show that: (i) the procuring agency used a significantly different basis in evaluating the proposals than was disclosed; and (ii) the protester was prejudiced as a result—that it had a substantial chance to receive the contract award but for that error.¹⁰

There is strong legal precedent that JBMDL was required to comply with the terms of the solicitation. As the Court in *Texas v. US* reaffirms, basic government contracting procedure requires the government comply with the terms of the solicitation when evaluating offers. This basic principle re-enforces the obligation of the SLA to make timely objection through RSA arbitrations of RSA issues that impact a source selection early in the source selection process. This requirement supports the need for timely objection by the RSA. The following analysis addresses timeliness.

TIMELINESS

While it may seem harsh to apply the waiver rule to the SLA, the SLA has not been without remedies. Timely requests for arbitration resolve the “ripeness” of an issue for adjudication. While the Court of Federal Claims will not hear an RSA case until after the arbitration is complete, the fact that the RSA arbitration decision is a final agency action addresses the jurisdictional issue. Timely arbitrations also address issues regarding the adequacy of the terms of the solicitation to address the RSA priority. For example, the SLA could have made a timely challenge to the competition for the award of the contract by requesting an arbitration to determine if

⁹ *Texas v. US*, No. 17-847C at 19.

¹⁰ *Id.*

JBMDL and the SLA could negotiate a sole source contract under the authority of 34 CFR §395.33 (d)¹¹. The SLA had been providing dining hall services at JBMDL on a sole source basis for a approximately 25 years.¹² If the SLA and JBMDL were able to negotiate a contract that demonstrated the SLA could continue to provide for the operation of the dining facilities at a reasonable cost, with food of a high quality to that currently provided employees, JBMDL would need to take the position that not awarding the contract would adversely affect the interests of the United States. This position would need to be made to the Secretary of the DoED. By taking this timely action before the initiation of the competition, the SLA would have retained the rights granted the SLA under the RSA.¹³

The SLA could have also immediately requested an arbitration objecting to the inclusion of FAR 52.212-1 subparagraph (g) that would have put JBMDL on notice that the SLA objected to JBMDL's intent to award without discussions. Similarly, the SLA was put on notice by JBMDL that the Solicitation included, Addenda to 52.212-2 - **Evaluation Factors for Award**. Paragraph H that states "[t]he government intends to award a contract without discussions with respective offerors." Paragraph I of this section states "[t]his solicitation is subject to the priorities afforded under the Randolph-Sheppard Act."¹⁴

A timely objection to the terms of the solicitation would have allowed an arbitration panel to determine if the terms of the solicitation complied with 34 CFR §395.33(a)¹⁵ that grants the SLA a "[p]riority in the operation of cafeterias by blind vendors on Federal property." This priority "shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible."¹⁶

¹¹ 34 CFR §395.33(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, Federal property managing departments, agencies, and instrumentalities may afford priority in the operation of cafeterias by blind vendors on Federal property through direct negotiations with State licensing agencies whenever such department, agency, or instrumentality determines, on an individual basis, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees: *Provided, however*, That the provisions of paragraphs (a) and (b) of this section shall apply in the event that the negotiations authorized by this paragraph do not result in a contract.

¹² Transcript at pg. 37. Testimony of Mr. Frye.

¹³ CFR 395.30(b) states: "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 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. A determination made by the Secretary concerning such limitation shall be binding on any department, agency or instrumentality of the United States affected by such determination. The Secretary shall publish such determination in the Federal Register along with support documents directly relating to the determination.

¹⁴ Findings of Fact 7. "Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint." See also Findings of Fact 8.

¹⁵ 34 CFR §395.33(a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.

¹⁶ In addition to 34 CFR §395.33(a), the RSA supports the regulation stating: 20 USC 107(a) Authorization: For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind

By waiting until after the notice of award to raise their objection to the terms of the solicitation, the SLA is in the position of using the knowledge gained from the competition to strengthen its negotiation position at the expense of its competitors and forces the government to incur the expense of after-the-fact arbitration and potential litigation expense. This is the exact result addressed by the United States Court of Appeals, Federal Circuit in *The Blue & Gold Fleet, L.P. v. United States*.

Mr. Frye's testimony highlights a fundamental difference between the non-competitive process for the placement of vending machines on a federal facility under a permitting process and a competitive procurement that obligates federal funds for the provision of dining hall services subject to the FAR and numerous federal appropriation statutes. Mr. Frye continued saying: "The language of the regulation clearly anticipates the existence of the creation of a competitive range."¹⁷ The majority agrees with Mr. Frye. However, it is my position that the SLA can waive this right and the SLA had the obligation seek clarification and/or modification of the language. As Mr. Frye testified: "We did not seek clarification of the no discussion language. Honestly, it struck us as throw away language that really had little significance except we assumed it meant what it said sort of on its face. We didn't assume that it had some significant term of art of legal standard."¹⁸

Mr. Frye's testimony supports the basic reason for the waiver rule set forth by the U.S. Court of Appeals for the Federal Circuit in *The Blue & Gold Fleet, L.P. v. United States*, where the court stated: "Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has 'a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation' in a subsequent action against the government."¹⁹

It is clear from Mr. Frye's testimony that the SLA was aware of the source selection process included in the solicitation but simply ignored the language. It is also clear that the SLA was given the opportunity to seek clarification from JBMDL and did seek clarification from JBMDL on a number of issues, but chose not to raise the issue of award without discussions. The SLA simply failed its duty to seek clarification in a timely manner and has therefore waived its right to raise this issue after award.

to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property. (b) Preferences regulations; justification for limitation on operation: In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, 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 designed to assure that—(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and (2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States. 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.

¹⁷ *Id.*

¹⁸ Transcript at pg. 66.

¹⁹ Excerpt from *The Blue & Gold Fleet, L.P. v. United States, Supra* where the court cited *Statistica*, 102 F.3d at 1582.

April 23, 2018

Steven R Fuscher, Concurring in part and dissenting in part to the Majority Decision

Panel Member