

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

**CALIFORNIA DEPARTMENT OF
REHABILITATION, Petitioner**

Case No. R/S 15-20

v.

**UNITED STATES DEPARTMENT OF THE NAVY,
Respondent**

ARBITRATION PANEL DECISION AND AWARD

This case comes before a three-member Arbitration Panel convened by the United States Department of Education (DOE) pursuant to 20 U.S.C. §107d-2 or what is commonly referred to as the Randolph-Sheppard Act (RSA). A hearing in this matter was held in Sacramento, California on May 3, 2018. Lisa Niegel and Anita Asher represented the California Department of Rehabilitation (CDOR). David Turner and Kevin Lyster represented the United States Department of the Navy (Navy). The parties submitted post-hearing briefs that were timely received on June 18.

SUMMARY

This arbitration panel is tasked with adjudicating a dispute regarding the application of the RSA to six U.S. Navy dining halls located in San Diego, California. As in other recent arbitration cases between branches of the military and state licensing agencies, the dispute here focuses on whether the RSA applies if the services contracted for do not include all tasks related to operation of a dining facility. It is well established that RSA coverage of vending facilities includes cafeterias and military dining facilities (MDFs). The question here is whether the services contracted for “pertain to the operation” of the MDFs or, alternatively, amount to “operation” of the MDFs. Based on our review of the RSA, its legislative history, implementing regulations issued by DOE, DOE’s general policy pronouncements, and the multitude of decisions by courts and arbitration panels to address this question, we conclude that the services contracted for by the Navy in this case both involve and “pertain to” the “operation” of a cafeteria. Accordingly, we find that the Navy violated the RSA by its failure to afford the CDOR (as the responsible state licensing agency) an opportunity to submit a bid for the contract to provide services in support of the six U.S. Navy MDFs in San Diego.

I. FACTS

The facts in this case are not in dispute. On January 15, 2015,¹ the Navy posted a “Sources Sought Notice” for certain food services at Navy galleys in San Diego. [Ex. 2] The Notice described the services as “Food Service Attendant Services” for six San Diego Galleys.² By letter dated February 5, CDOR responded to the Notice by informing the Navy that CDOR was interested in pursuing the Navy’s food service requirements under the RSA. [Ex. 3]

The Navy Contracting Officer (CO) responded by letter dated April 13, concluding that “the RSA . . . does not apply to the [Solicitation]; Navy requires mess-attendant services, to include cashier services, only. Navy will not require its contractor(s) to operate or manage its galleys.” This letter explained the limited role the contractor would play, noting Navy’s greater San Diego area galleys are “under the operational control of the Commanding Officer . . . who provides staffing and funding for that operation,” and that “[t]his function is delegated to the Food Service Officers assigned to each galley.” [Ex. 4]

Solicitation N00244-15-R-0014 (the Solicitation) was thereafter issued by the Navy on June 3, as a set-aside for Historically Underutilized Business Zone (HUBZone) small businesses. [Ex. 5] Three amendments followed, but the parties agree that it is the Performance Work Statement (PWS) described in Amendment 2 that describes the work to be performed under the contract at issue here. [Ex. 7]

The PWS indicates that the Navy will not exercise any supervision or control over the contract service providers, but that operational control over the six galleys is delegated by the Commanding Officer to the Food Service Officers (FSOs) at each of the six bases.

The PWS provides that the FSOs are responsible for proper and efficient galley operation. Specifically, “FSOs sign and submit all financial returns, maintain all accountable documents, conduct inventory, maintain equipment, set Navy’s food and supply requirements, and authorize and procure food supplies. Day to day, FSOs establish the menus, ensure overall food preparation by Navy Culinary Specialists, and ensure proper storage of food.” [Ex. 7, at 13] In conclusory fashion, the PWS declares that, “In form and fact, FSOs operate the galleys.”

The PWS requires the contractor to maintain an effective quality control program to assure services are performed consistent with the PWS; to provide a Contract Manager who is responsible for performance of the contract services and who has full authority for all matters relating to the operation of the contract; and to provide supervisors to serve as on-site managers of contractor employees at each of the six galleys. Aside from sanitation training, the contractor is responsible for training its employees in accordance with a training plan to be submitted with the contractor’s proposal.

¹ All dates are 2015 unless otherwise indicated.

² The six galleys are at Naval Base San Diego, Naval Amphibious Base Coronado, Naval Air Station North Island, Naval Submarine Base Point Loma, Naval Mine and Anti-Submarine Warfare Command, and Oceanside BUDS Satellite Galley.

The specific contractor services called for by the PWS include cashier services, “mess attendant services,” scullery services, and galley cleaning services. Cashier services require accounting for receipts of cash patrons (estimated to be less than 20% of all galley patrons) on various Navy forms, and overnight storage of cash in a safe provided by the Navy. “Mess attendant services” encompass duties on the serving line, preparation of all fruits and vegetables, and maintenance of a clean dining area.³ Scullery Services involve washing dishes, pots and pans; ensuring that dishes and “mess gear” are clean and ready for use during meal hours; and replenishing dishes and mess gear in dispensers prior to and during meals. Cleaning services under the PWS call for the provision of cleaning services to galley spaces, equipment, and furniture to Navy specifications. This covers the entire facility, including the dining area, the scullery area, the bathrooms, the galley surroundings (within 10 feet of the outside perimeter), and trash removal.

The PWS further calls for contractor services unique to each dining facility, such as special meals and special events, meals served on patio areas, and meals served in VIP dining areas. [Ex. 7, at 27-28] For the Ocean-side BUDS Satellite galley, the contractor is required to provide all meals each week from Monday through Friday, excluding holidays. Because the BUDS galley does not have its own full service kitchen, the PWS requires the contractor to provide its own delivery vehicle and to pack and transport all meals, beverages, food serving equipment, trays, utensils, and mess gear to and from the NAB Coronado galley approximately one mile away.

³ Under Section 5.1.2 of the PWS, “Mess Attendant Services” require the contractor to provide:

- 5.1.2.1 Serving line and dining area that promotes sanitary, safe, inviting environment, and efficient display and distribution of food items, condiments, dishware, and silverware fifteen (15) minutes prior to each meal (note: serving line may include beverage, salad, dessert, and fruit bars; dining area includes furniture, equipment, and mess gear);
 - 5.1.2.2 Preparation of all fruits and vegetables for salads and other dish offerings for the intended meal period (note: preparation may include washing, slicing, dicing, and chopping);
 - 5.1.2.5 Distribution of food on the serving line to galley patrons in accordance with Navy ration (portion) allowance ensuring that a minimum of six (6) customers per minute are served during peak hours;
 - 5.1.2.6 Continuous monitoring of the serving line and dining area ensuring that:
 - 5.1.2.6.1 Food, condiments, and beverages are replenished as they are emptied throughout the meal hour;
 - 5.1.2.6.2 Vacated tables are cleaned and sanitized for the next patron’s use (note: patrons bus their own tables);
 - 5.1.2.6.3 Food, beverage, and other spills are promptly cleaned up;
 - 5.1.2.6.4 Filled racks with used trays and dishes are moved to scullery room for cleaning.
- [Ex. 7, at 25-27]

On July 3, CDOR filed an Agency Level Protest with the Navy, arguing that the Navy violated the RSA by improperly restricting offers under the Solicitation to HUBZone offers only, thereby excluding CDOR from submitting a bid as the state licensing agency (SLA). [Ex. 16]

On July 6, and in response to the Solicitation, CDOR submitted a proposal from Jerry Gann (a blind vendor) and Food Services Incorporated (collectively, the Vendor) to provide the services described in the PWS.

On July 14, the Navy denied CDOR's Protest and stated that it would not consider the Vendor's proposal as the Solicitation was "not for the operation of a cafeteria, vending facility, [or] cart service." [Ex. 17, internal quotation marks omitted]

On August 24, pursuant to 20 U.S.C. §107d-1d(b) and 5 C.F.R. §395.37(a), CDOR filed the Complaint at issue in this case with the DOE. [Ex. 1] CDOR's complaint contains four allegations that turn on the same threshold issue, i.e., whether the services described in the PWS are covered by the RSA. These allegations are summarized as claims that the Navy violated the RSA by: 1) not creating one of more opportunities for the Vendor to operate vending facilities on the San Diego bases; 2) not inviting CDOR to respond to the Solicitation; 3) not adhering to the process for evaluation of an SLA's proposal; and 4) limiting the Solicitation to HUBZone businesses, and thereby declining to consider CDOR's proposal for award of the contract.⁴

Finally, the Complaint alleges, in the alternative, that the Navy violated the RSA when it advertised the opportunity without first consulting with CDOR for the provision of services at a vending facility other than a cafeteria. Based on our finding that the services described in the PWS involve the operation of a cafeteria, there is no factual basis for CDOR's "failure to consult" allegation.

On September 18, the Navy awarded a contract to NMS Management, Inc., a HUBZone small business, to perform the services described in the Solicitation and its amendments. NMS Management continues to perform these services.

II. LEGAL BACKGROUND

This case covers a stretch of road that has been well traveled, a road littered with the efforts of arbitration panels and courts alike struggling to fill the void left by the absence of Department of

⁴ The complaint further contends that the Navy failed to obtain "concurrence from the [DOE] Secretary for a finding that establishing one or more facilities for a blind vendor on the San Diego bases would be adverse to the interests of the United States." 20 U.S.C. §107(b) requires that, "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." We dismiss this allegation because the Navy never sought to limit the operation of a vending facility based on a finding that such operation would "adversely affect the interests of the United States."

Education clarifying regulations or official guidance regarding the extent to which the RSA covers military dining facilities. As with other tribunals that have addressed this topic, we join the chorus calling for DOE to issue regulations that will finally put an end to the litigation over this question.

At the outset, the panel notes that there is no contention in this case that the Navy is constrained in any way regarding the particular MDF services it seeks to obtain through the contracting process. Moreover, the panel recognizes that the Navy enjoys considerable discretion in the arena of military procurement. In its exercise of this discretion, however, the Navy may not ignore the requirements of the RSA.⁵ And it is the DOE, not the DoD or the Navy, that is charged with interpreting and applying the RSA. The DOE convened this arbitration panel to determine “whether the Department of the Navy violated the [RSA] by denying Randolph-Sheppard priority when they issued a solicitation for food service attendant [services] as a 100 percent HUBZone set aside.”⁶ Our decision involves statutory interpretation – a matter of law, and we review this question *de novo*.⁷

A. Relevant Statutory and Regulatory Provisions

Our analysis begins with the governing language of the Randolph-Sheppard Act and its implementing regulations. The RSA, enacted in 1936 and amended in 1954 and 1974, conveys a broad Congressional mandate for federal agencies to provide employment and entrepreneurial opportunities for the blind by creating a priority for blind vendors to operate vending facilities on federal property. In 1974, Congress lauded the success of its Randolph-Sheppard program as “one of the most effective employment opportunity programs ever enacted by Congress,” but also found that some agencies, notably including the Department of Defense, were evading their responsibilities under the program to provide opportunities for blind vendors. S. Rep. No. 93-37, at 10-12 (1974).

Section 107(a) of the RSA provides that “blind persons licensed under the provisions of this chapter shall be authorized to **operate** vending facilities on any Federal property.” Section 107(e)(7) of the RSA defines the term “vending facility” to include “cafeterias.” While the Navy argues otherwise at great length, our dissenting colleague acknowledges that it is well established that military dining facilities are considered “cafeterias” for purposes of the RSA. *NISH v. Rumsfeld*, 348 F.3d 1263, 1269-

⁵ Both the Navy and our dissenting colleague go to great lengths to describe the breadth of the CO’s procurement authority under federal and DoD procurement laws and regulations. This panel does not question the CO’s authority, nor do we suggest that the CO should ignore governing procurement regulations. The manner in which the Navy and its CO decide to exercise their discretion, however, may not disregard the obligation to provide priority to blind vendors under the RSA.

⁶ DOE’s “convening” letter dated February 25, 2016.

⁷ Our dissenting colleague complains of the panel’s willingness to step into the shoes of the CO to substitute its judgment for that of the CO. However, it is precisely our review of CO decisions by the Navy and other federal agencies that Congress called for in 20 U.S.C. §107d-2 when it required the Secretary of Education to refer complaints over coverage of the RSA to arbitration panels. While it may be true, as the dissent suggests, that the absence of DOE action to define the scope of the RSA has led to often-conflicting arbitration and court decisions, this panel must fulfill its obligation to issue a decision that represents DOE’s final determination in this matter.

72 (10th Cir. 2003); *NISH v. Cohen*, 247 F. 3d 197, 205-06 (4th Cir 2001). And section 107(b) provides that “[i]n authorizing the **operation** of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency,” such as CDOR, California’s sanctioned state licensing agency in this case. The RSA does not define the terms “to operate” or “operation.”

Congress conferred primary responsibility to carry out the RSA on the Secretary of Education (the Secretary), 20 U.S.C. §§107(a), 107(b), and authorized the Secretary to promulgate regulations relating to the RSA’s priority for blind vendors to operate vending facilities on Federal properties.⁸ DOE Regulations appear at 34 C.F.R. §§395.1– 395.38. The pertinent regulatory language tracks the language of the RSA:

Priority in the **operation of cafeterias** by blind vendors on Federal property shall be afforded when the Secretary determines . . . that **such operation** can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees. . . .

34 C.F.R. §395.33(a)(emphasis added). Section 395.33(b) clarifies how this priority is to be established:

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

(Emphasis added). As with the RSA itself, these sections continue to use the words “operation of” and “to operate” cafeterias. However, section 395.33(c) employs verbiage suggesting that the blind vendor priority in the RSA is much broader.

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

(Emphasis added)

B. Evolution of Legal Developments in Application of RSA to Military Dining Facilities

⁸ The RSA provides that the “Secretary, through the Commissioner [of Rehabilitation Services], shall. . . prescribe regulations” to assure that priority is given to licensed blind vendors, and to assure that, “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.” 20 U.S.C. §107(b)(1) and (2). The Commissioner is further authorized to “take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the [RSA].” 20 U.S.C. §107a(a)(6).

As noted above, Congress in 1974 found the Randolph-Sheppard program to be one of its “most effective employment opportunity programs.” Congress was nevertheless dismayed that some agencies, including DoD, were evading their responsibilities under the program and were reluctant to provide opportunities to blind vendors. S. Rep. No. 93- 37, at 10–12 (1974). Responding to the perceived “stagnation” of the Randolph- Sheppard program and the recalcitrance of DoD and other federal agencies, Congress assigned primary responsibility to carry out the Randolph-Sheppard Act to the Secretary of Education (“the Secretary”), 20 U.S.C. §§107(b), 107a(a). 20 U.S.C. §107(b); see Randolph-Sheppard Amendments Act of 1974, P-L 93-651 (1974). Congress delegated these responsibilities to the Secretary “to improve and strengthen the administration of the program at the Federal level” by centralizing administration of the Act in one location. *Id.*

Since the creation of the Randolph-Sheppard program, in spite of the Act’s mandate to maximize opportunities for blind vendors to operate vending facilities, including cafeterias, on federal properties, DoD has continued to disagree with DOE about the parameters of the RSA. In the Senate Report accompanying the Randolph-Sheppard Amendments Act of 1974, Congress noted the substantially higher number of blind vendors on state property than on federal property and attributed this “ironic disparity” to “obstacles at virtually every turn.” S. Rep. No. 93-37, at 10–12 (1974). In particular, it noted,

The vast Defense establishment can report only 9 vendors at Air Force facilities, 17 on Army posts, and 16 at Navy bases. The parent Defense Department association at a major Federal space installation demanded that blind vendors give a portion of their income to the Association – precisely the reverse of what should be taking place on Federal property. . . .

[The Comptroller] also found that, although nonblind vending operations within the Defense Department are extensive, there is very little consideration given to the development of the Randolph-Sheppard program. . . .

Witnesses before the Committee have stated that each military post or base commander is in charge of his particular installation, and that, for the most part, commanders are either hostile or indifferent to the Randolph-Sheppard program.

Id. Since that time, numerous arbitration panels have addressed these issues, and multiple reports have been issued at the federal level. Yet, we still confront the same issues regarding the location of Randolph-Sheppard vendors on DoD property.

In 2006, a “Joint Report to Congress” authored by DoD, DOE, and the Chairman of the Committee for Purchase from People Who Are Blind or Severely Disabled made certain policy recommendations regarding the intersection of the RSA and the Javits-Wagner- O’Day Act (JWOD)(herein Joint Report). The Joint Report sought to clarify the types of contracts to which those statutes’ competing priorities should apply by recommending that the DOE and DoD issue complementary regulations.⁹ The Navy

⁹ The Joint Report recommends that such DOE and DoD regulations reflect that contracts would be “competed under the

argues that, “it would be irresponsible for any arbitration panel not to give [the Joint Report] at least significant persuasive weight.” Navy Br., at 52. There are several reasons that we believe the Navy’s reliance on the Joint Statement is misplaced.

First, of all the recommendations in the Joint Report, only the “no poaching” provision has been enacted as part of the National Defense Authorization Act of 2007 – a provision that has no relevance or applicability here. Second, even the DoD distanced itself from the Joint Report, issuing a Memorandum in 2007 directing that the Joint Report “should not be cited in individual solicitations until it is implemented in complementary regulations by the [DOE] and DoD.”¹⁰ And third, no such implementing regulations have ever been issued. Based on this history, the Court of Federal Claims held in *Moore’s Cafeteria Servs., Inc. v. U.S.*, 77 Fed. Cl. 180, 186 (2007), *aff’d* 314 F. App’x (Fed. Cir. 2008) that the Joint Report was not legally binding.

Eight years after the Joint Report, a “Joint Explanatory Statement” (JES) accompanied the National Defense Authorization for Fiscal Year 2015.¹¹ That statement was not adopted by Congress or any Congressional Committee and was, in fact, drafted at a time when the DOE was without a Commissioner of Rehabilitation Services. For these reasons, the JES lacks the force of law and carries no weight in the panel’s assessment regarding applicability of the RSA priority in this case. It also fails to qualify as legislative history that any adjudicator could rely on to interpret and apply the RSA priority. The JES accompanies a small amendment to 10 U.S.C. §2942. This statute, which previously authorized the DoD to procure goods and services from another part of the federal government, was amended to explicitly include food services. The JES begins by stating, “This change to §2942 of title 10 and the implementation of the food transformation program should not result in the loss of employment pursuant to the [JWOD].” 160 Cong. Rec. H8691 (daily ed., Dec. 4, 2014). The JES goes on to reference the absence of regulatory guidance on the application of the JWOD and the RSA to MDFs. Making reference to the 2006 Joint Report, the JES “directs” the DoD within 180 days to issue regulations implementing the Joint Report.

On June 7, 2016, DoD published a notice of proposed rulemaking soliciting comments on a rule purporting to modify the application of the RSA to DoD food service contracts.

[RSA] when the DOD solicits a contractor to exercised management responsibility and day-to-day decision-making for the overall functioning of [an MDF] . . . where the DOD role . . . is generally limited to contract administration functions. . . .” However, “[i]n all other cases, the contracts will be set aside for JWOD performance (or small businesses . . .) when the DOD needs dining support services, (e.g., food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendants, or other services that support the operation of a dining facility) where DOD food service specialists exercise management responsibility over and above . . . contract administration functions.” The Joint Report also recommended enactment of a “no poaching” provision to essentially freeze those MDF contracts that existed under the RSA and under the JWOD. [Ex. 20]

¹⁰ Memorandum from Shay D. Assad, Director, Defense Procurement and Acquisition Policy, to Directors, Defense Agencies (March 17, 2007).

¹¹ The Navy’s attempt to introduce the “Joint Explanatory Statement” into evidence at hearing as Exhibit 53 was rejected. The Panel has reconsidered this ruling and receives Exhibit 53 into the record.

See Food Services for Dining Facilities on Military Installations, DFARS 2015-D012 (June 7, 2016). During the notice and comment period, over 4,700 SLAs, committees of blind vendors, blind vendors, and others submitted comments opposing the proposed regulation. To date, no final rule has been issued or implemented.

The Navy repeatedly references the Joint Report, the JES, and the proposed DoD regulations in support of its position that the RSA does not apply in this case. What the Navy refuses to acknowledge, however, is that none of these carries the weight of law. The first two “suggest” that regulations be issued to clarify the applicability of the RSA to MDFs. No such regulations have yet been issued. In short, the Joint Report, the JES, and the proposed DoD regulations are without legal consequence.

As much as the Navy and our dissenting colleague desire otherwise, neither the Joint Report nor the JES supplants either the RSA or its regulations. Congress could, of course, enact legislation that modifies the Randolph-Sheppard priority, but it has not done so.

Finally, the Secretary of Education has recently weighed in on the issue of whether DoD contract solicitations for its MDFs fall under the RSA. In her March 5, 2018 letter in response to an inquiry from Congressman Pete Sessions, Secretary Betsy DeVos acknowledges that the DoD distinguishes between contracts that call for full food services (FFS) and those that call for dining facility attendant (DFA) services. While the Secretary notes that there has been some dispute over the “types of contracts to which the priority applies” – FFS or DFA – she then unequivocally states that “[t]he Education Department believes that the Randolph-Sheppard Act priority applies to both types of cafeteria contracts.” [Ex. D]. The Navy protests that her opinion letter should not be minded, but ultimately cites a Supreme Court case finding that such guidance should be treated as “*persuasive evidence.*” *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001). [Navy brief, at 44, emphasis added]. In rejecting the DoD’s bifurcation of MDF contracts as FFS or DFA, the Secretary’s letter cites an arbitration panel’s 2016 decision in *Fort Riley* with approval in support of the simplest and fullest interpretation: that the RSA priority applies to contracts that “*pertain to the operation of a cafeteria.*”

III. ANALYSIS

A. The Navy’s Classification of Food Services Contracts as FFS or DFA

We turn now to CDOR’s frustrated attempt to assert the RSA priority on behalf of its Vendor (Jerry Gann and Food Services, Inc.). The Navy flatly refused, asserting that it would merely require “mess-attendant services,” but would “not require its contractor(s) to operate or manage its galleys.”

The Navy’s dismissal of the RSA priority in this case follows an effort undertaken by the DoD for the last several years to draw a distinction between “full food service” (FFS) contracts and “dining facility attendant” (DFA) contracts, maintaining (as does the Navy in this case) that the RSA preference applies only to FFS contracts, but not to DFA contracts. There is, however, no basis in the RSA or in DOE regulations for the classification of MDF contracts as either FFS or DFA contracts. While it is

easy for the Navy (and DoD) simply to label the constellation of services described in any particular PWS as DFA (or “mess-attendant”) services and to declare that they are discrete functions to support the Navy’s operation, we are unwilling to endorse an approach we believe to be overly simplistic.

The contracts label is immaterial. The relevant information is found in the PWS and the array of functions required to be performed. If the work to be performed lands the contract within the orbit of the RSA, then the priority must apply, regardless of a federal department’s label for the type of contract. As stated by the Court of Claims in *Mississippi Dep’t of Rehab, Servs. v. United States*, 61 Fed. Cl. 20, 28 (U.S. Ct. Fed. Claims 2004), “we are not concerned with ‘spin,’ but with reality.”

B. Test for Application of the RSA Priority

The work to be performed as detailed in the PWS in this case is so extensive and so integral to the functioning of a cafeteria, that it is clearly well within the bounds of the RSA and what Congress intended to be contracted to a blind vendor.

Two potential tests apply. Based on section 395.33(c) of the regulations, CDOR argues that the appropriate test for assessing the RSA priority to be afforded its Vendor is whether the services described in the PWS “pertain to the operation” of the San Diego MDFs. The Navy vigorously opposes any such application of section 395.33(c), arguing that recent arbitration panels that adopted a “pertaining to” test were wrongly decided. Rather, the Navy believes that the test is whether the vendor is the operator.

The meaning of section 395.33(c) has been the subject of much dispute in recent decisions. Several recent DOE arbitration panel majorities have applied the “pertaining to” test (or variations thereof) advocated by CDOR. See, e.g., *Kansas Dep’t of Children and Family Servs. v. U.S. Dep’t of the Army*, R/S 13-08 (2017)(*Fort Riley*); *Oklahoma Dep’t of Rehab. Servs. v. U.S. Dep’t of the Army*, R/S 15-10 (2016)(*Fort Sill*); *Georgia Vocational Rehab. Agency v. U.S. Dep’t of Defense*, R/S 13-09 (2016)(*Fort Stewart*); but see, *Washington State Dep’t of Servs. for the Blind v. United States*, 58 Fed. Cl. 781 (2003)(*Washington*)(rejecting SLA’s argument for application of “pertaining to” test, finding section 395.33(c) to be “transitional provision”). At least one other panel declined to adopt the “pertaining to” test but found that the contract services amounted to “operation” of the relevant MDF. See, e.g., *Kentucky v. U.S. Dep’t of the Army* (Feb. 14, 2014)(Case No. unavailable)(*Fort Campbell*).

In a well-reasoned decision, the *Fort Stewart* arbitration panel considered the governing language of the RSA and closely examined the language of section 395.33, breaking down the structure of the single sentence that comprises section 395.33(c). The “subject” of the sentence is certainly complex: “[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.” The command for all such “contracts or other existing arrangements” is that they be “renegotiated,” and that such renegotiations must happen “pursuant to the provisions of this section.” Lastly, these renegotiations are to take place “subsequent to the effective date” of the regulation (implemented in 1977), but “on or before the expiration of such contracts or other arrangements.”

The *Fort Stewart* panel next describes how,

notwithstanding the limiting language [regarding the time frame within which such renegotiations are to occur], subsection (c) opens up the universe of contracts and arrangements covered by the [RSA] to those “**pertaining to the operation of cafeterias on Federal property.**” Subsection (c) does not limit contracts and other arrangements to those calling for the overall “operation” of a cafeteria[;] it includes those that “pertain[] to the operation of cafeterias.” The latter grouping is obviously broader than the former.

Fort Stewart, at 14 (emphasis added).

As described by the *Fort Stewart* panel, however, the critical question remains. Once section 395.33(c) is seen to broaden the set of contracts and other arrangements that are to be renegotiated, did the same section then foreclose those opportunities once the expanded set of contracts and arrangements were renegotiated? At least one court has indicated that section 395.33(c) is “a transitional provision intended to assist in implementation of RSA rather than to mandate the application of RSA to all contracts relating in any way to the operation of cafeterias on federal property.” *Washington*, at 790. Respectfully, we disagree. Such reasoning would result in the priority for blind vendors applying to contracts “pertaining to the operation of cafeterias” in 1977, but only in 1977. If this were the proper interpretation of § 395.33(c), vendors who successfully renegotiated contracts “pertaining to the operation of cafeterias” in 1977 would lose those contracts when they expired for the very reason that they merely “pertained to the operation of cafeterias,” but did not constitute “operation” of a cafeteria. Such a result defies logic.

As legislative history demonstrates, the RSA’s authors and advocates wanted it to be applied broadly. It would be nonsensical for DOE to open up the scope of contracts in 1977, but then shut them down when those “pertaining to” contracts expired. We find ourselves unable to accept such a constrained reading of § 395.33(c) that would apply a “pertaining to” test in 1977, but then apply an “operation of” test after the renegotiated contracts expired. As stated by the *Fort Stewart* panel, “[t]he scope of the [RSA] should be the same both before and after the renegotiations, should it not?” Buttressed by the aforementioned letter by Secretary DeVos, we adopt the *Fort Stewart* rationale to interpret DOE regulations to require application of the RSA priority to contracts “pertaining to the operation of cafeterias on Federal property.”¹²

C. Services Described in Navy’s Solicitation “Pertain to the Operation of a Cafeteria”

¹² We completely disagree with the Navy’s cavalier dismissal of the *Fort Stewart* panel’s reasoning as “arbitrary.” The Navy references the language of section 395.33(c), but rejects the *Fort Stewart* panel’s reasoning by suggesting that it is “in direct contradiction to . . . DOE’s own stated interpretation as set forth in the [2006 Joint Report],” which the Navy erroneously describes as the “DOE’s current position” on the matter. [Navy brief, at 60] We have already described why the Joint Report has no legal import, but for some unknown reason, the Navy completely overlooks the DOE Secretary’s explicit support for the *Fort Riley* panel’s application of a “pertaining to” test in her March 2018 letter.

Turning our focus to the Solicitation in this case, we find that the services called for by the PWS “pertain to operation of a cafeteria.” Cleaning and scrubbing all cookware and dishware, maintenance of a clean facility inside and out, preparation of fruits and vegetables, dispensing food to patrons at the food line, and performing cashier functions all relate in one way or another to the operation of the galleys. Taken together, there can be little question that these services described in the PWS “pertain to the operation” of the San Diego galleys. For this reason, we find that the Navy’s failure to grant priority to CDOR and its Vendor violated the RSA.

D. Services Described in Navy’s Solicitation Also Involve the “Operation of a Cafeteria”

Even were this panel to apply an “operation of a cafeteria” test instead of the “pertaining to” test, we would reach the same result. Thus, we find in the alternative that the amalgam of functions and tasks described in the PWS involves the “operation of a cafeteria.”

The Navy claims that it maintains “operational control” over the six galleys through its FSO. However, we find nothing unique about the oversight functions described in the PWS. While it is fundamental that the Navy retains fiscal responsibility over its procurement of food services and that any contract would require administrative oversight, this would be the case whether the contract were identified as FFS or DFA services. The Navy’s stronger argument that it maintains control over the functioning of its galleys under the PWS is that it procures food supplies, establishes menus, ensures food preparation by Navy cooks (Culinary Specialists), and stores food. But even here, the PWS calls for the contractor to play a significant role preparing fruits and vegetables, 90% of which go to the salad bar.

More importantly, however, the PWS describes a multitude of tasks in several broad categories to be performed by the contractor. The contractor is to furnish cashier services, “mess attendant services,” scullery services, and galley cleaning services. The contractor must provide a Contract Manager and supervisors as on-site managers at each of the six galleys. The contractor is required to maintain a quality control program and to both establish and implement a training program for all its employees.

Cashier services require handling cash transactions, accounting for cash receipts, and safekeeping of cash overnight. Scullery Services involve washing all dishware and scrubbing pots and pans, and making sure dishes and “mess gear” are clean and always available for patrons’ use during meals. Cleaning services cover the entire facility, inside and out, including the galley spaces, equipment, furniture, the dining area, the scullery area, the bathrooms, the galley surroundings (within 10 feet of the outside perimeter), and trash removal. Most comprehensive of all, the “mess attendant services” encompass oversight and manning of the serving line (to serve six customers per minute during peak times); washing, slicing, dicing, and chopping fruits and vegetables, 90% of which go to the salad bar; and maintenance of a clean dining area.

Aside from the Navy’s retention of menu selection and cooking, its role could best be described as oversight. But the job of keeping the galleys running in an orderly and efficient fashion falls on the contractor. Beyond the preparation of fruits and vegetables (only a small portion of which goes to

the cooks), the contractor dishes out meals to patrons, often at an assembly-line rate of six customers every minute. And if anything is amiss during mealtime, it falls on the contractor to rectify the situation. Thus, contrary to the Navy's self-serving declaration in its PWS that, "[i]n form and fact, the FSOs operate the galleys," we find that it is the contractor who ensures the smooth operation of the galleys where the rubber hits the road. We therefore conclude that the bundle of services described in the Solicitation involves the "operation of a cafeteria" and that the RSA should have been applied.¹³

E. Case Law Supports Our Determination that the RSA Applies

A review of previous court and arbitration panel decisions reveals that the functions and specific tasks associated with what DoD identifies as "DFA" contracts vary widely from base to base and from contract to contract. Outcomes before arbitration panels and the courts have also varied, though the trend is decidedly in favor of finding that the RSA applies, depending, of course, on the particular services called for in each contract. Our result here is consistent with the range of outcomes reached by other tribunals applying the RSA to DFA services at DoD installations.

In the *Washington* case, the Court of Claims was called on to address the SLA's challenge to a Department of the Army (Army) contracting decision not to apply the RSA priority. Among the services to be provided under the PWS were:

- (1) "[p]repare, maintain and clean dining areas,"
- (2) "[c]lean tableware,"
- (3) "[c]lean spills and remove soiled dinnerware occasionally left be diners,"
- (4) "[c]lean dining room tables, chairs booths, walls, baseboards, window . . . ledges, doors/doorframes, ceiling fans, . . . light fixtures, . . . drapes/curtains and Venetian blinds,"
- (5) "[r]emove and replace[] tablecloths when stained or heavily soiled,"
- (6) "[c]lean all non-food contact surfaces,"
- (7) "[c]lean and sanitize all food contact surfaces, including dinnerware, utensils, and trays,"
- (8) "[c]lean floors and floor coverings in all areas,"
- (9) "[w]ax and buff floors,"
- (10) "[d]iscard garbage," and
- (11) "[c]lean restrooms.

Id., at 783. The court in *Washington* upheld the Army's determination not to apply the RSA priority to the limited DFA services at Fort Lewis.

While our colleague relies heavily on the *Washington* decision in support of his dissent, we believe that the *Washington* court's holding is of limited value. Perhaps most troubling is that the DOE, the agency charged with interpreting the RSA, had no role in the case – DOE was not a party and its views were not considered. Further, a close examination of the decision reveals that the court did not conduct a *de novo* review of the legal question under the RSA, i.e., whether the tasks delegated to the contractor amounted to "operation of a cafeteria." Rather, the court deferred to the Army

¹³ Our conclusion is reinforced upon consideration of the PWS requirement that the contractor must provide additional services unique to each of the six dining facilities, particularly with respect to the Oceanside BUDS Satellite facility, for which the contractor does it all, transporting and serving food, and cleaning up after all meals.

CO's assessment that the RSA did not apply, finding that "the basis for the 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.'" *Washington*, at 796. Citing the court's limited scope of review, the court declined to substitute its judgment for that of the Army, finding that there was a "reasonable basis for the agency's action."

With all due respect to the *Washington* court and to our dissenting colleague's view, this panel need not accord any particular deference to the CO's assessment here that the RSA does not apply. As described by the court in *Mississippi*, "the interpretation of statutes is a legal matter for the courts to decide, and contracting officers can claim no special expertise in statutory construction." *Mississippi*, 61 Fed. Cl. at 25. As stated earlier, it is the DOE, as the agency charged with administration of the RSA, that is entitled to deference concerning interpretation and application of the RSA, not the DoD or its departments. *Accord, Fort Riley*, at 21-22 (neither DoD nor CO entitled to deference in application of RSA to contracts).¹⁴

Finally, the facts in *Washington* are clearly distinguishable as the array of services required here is considerably more extensive than those called for in the *Washington* case. The contractor in *Washington* was not required to engage in food preparation to any extent. Nor was the contractor called on to serve meals to patrons, to handle cashier duties, or to deliver and purvey food to patrons at a remote location. In combination with the scullery and cleaning duties described in the PWS, we find that the requirements to prepare all fruits and vegetables, to ensure the smooth operation of the serving line, to handle cash transactions, and to feed patrons at the NAB Coronado galley approximately one mile away compels the conclusion that the PWS calls for the "operation of a cafeteria."

To like effect, the 2-1 panel majority in *Texas Dep't of Assistive & Rehab. Servs. v. U.S. Dep't of the Army*, R-S/13-13 (2016)(*Fort Bliss*), determined that the DFA services there were not subject to the RSA priority. As here, the PWS in *Fort Bliss* required the contractor to hire management and supervisory personnel, including a contract project manager and dining facility attendant supervisors. However, the specific tasks required of the contractor in *Fort Bliss* were again not nearly as wide-ranging as those described in the Navy's Solicitation here. The *Fort Bliss* panel described the contractor's "variety of tasks" under the PWS in the following terms:

pot and pan cleaning and other sanitation related functions in the dining facilities, . . . various managerial tasks related to the operation of a cafeteria, [and] categories of tasks relating to the operation of the cafeterias at Fort Bliss, including washing dishes, scrubbing pots and pans, and cleaning and sanitizing tables, floors, and equipment. The PWS does not include any aspect of food preparation.

¹⁴ Our dissenting colleague suggests that this panel's failure to defer to the Navy CO's "procurement" decision is a "significant flaw" in our ruling. We disagree. While the CO may have expertise in the realm of procurement, Congress assigned the responsibility to interpret and apply the RSA to the DOE, and the DOE has in turn delegated this responsibility to this arbitration panel pursuant to 20 U.S.C. §107d-2.

Id., at 9. The *Fort Bliss* panel’s decision against RSA coverage particularly noted “the fact that military personnel retain responsibility for performing management operations, headcount and cashier services, cooking, and menu planning and serving food at those facilities.” *Id.*, at 21-22. These same facts serve to distinguish *Fort Bliss* from the Navy’s Solicitation in this case. Here, the Navy added cashier services, some food preparation, as well as significant responsibility to ensure that food is served without delay at the serving line.¹⁵

While the panel finds the *Washington* and *Fort Bliss* decisions to be distinguishable, other courts that considered this issue found violations based on the failure to afford RSA priority to DFA services. The *Mississippi* case decided by the Court of Claims is not particularly helpful as a comparator. The services sought by the Navy in the *Mississippi* case were considerably more extensive than here, including not just the cleaning and scullery services described in other cases, but also food preparation, food distribution, and quality control. Moreover, the Commanding Officer’s involvement in the operation tapered off to such an extent that the contractor was left to assume unsupervised control on a day-to-day basis. With the Navy retaining only functions involving menu selection and the purchase of food supplies, the court had no difficulty concluding that the contractor effectively “operated” the cafeteria.

The case with facts that most closely resemble the case here under consideration is *Fort Campbell*. The contractor there was required to hire qualified personnel (including a contract manager), to establish and maintain a comprehensive quality control plan, to train employees, to operate and clean a mechanical vegetable peeling machine, and to “wash, peel and cut potatoes and fruit.” The Army in *Fort Campbell* prepared the food (and presumably established the menus) and collected money from paying customers.¹⁶ On these facts, the *Fort Campbell* panel found that DFA services involved the “operation of a cafeteria,” and that the Army therefore violated the RSA by issuing the solicitation for DFA services without applying the RSA priority to its source selection process.

Three other arbitration panels have concluded that DFA services were subject to the RSA priority even where the DFA services were less extensive than described in the Navy’s Solicitation. In *Fort Riley*, a 2-1 panel majority found the services covered by the RSA, with our dissenting colleague in the minority. The services called for under the *Fort Riley* contract were summarized as

Maintenance of a quality control plan in support of dining facility operations; cleaning and sanitizing food service equipment and surfaces in support dining facility operations;

¹⁵ Two arbitration panel decisions finding against application of the RSA priority to DFA services are similarly distinguishable. See *Hawaii Dep’t of Human Servs., Div. of Vocational Rehab. v. U.S. Dep’t of the Army, Schofield Barracks*, R-S/16-07 (2017)(2-1)(contract for custodial and janitorial functions, but no cashier services, food preparation, or serving line duties, not covered by RSA); and *Alaska Dep’t of Educ. v. U.S. Dep’t of the Army*, R/S 97-02 (2000)(RSA priority does not apply to DFA solicitation limited to “scrubbing of pots and pans, with the only contact with food being the placement of potatoes into the mechanical machine that abraded their skins.”)

¹⁶ It is unclear whether the PWS called on the Army or the contractor to dispense food to patrons in the serving line.

preparing, maintaining and cleaning dining areas in support of dining facility operations; keeping appropriate condiments available without delay; cleaning spills, removing soiled dinnerware and bussing soiled trays within five minutes of occurrence; and bussing and replacing tray carts during meal service period and making space available for soiled trays, without diner delay 100% of the time.

Fort Riley, at 30. The *Fort Riley* panel described the janitorial and custodial services under the PWS to include “cleaning, sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning and other sanitization related functions in the dining facilities.” *Id.*, at 5.

The panel in *Fort Riley* noted the similarities of the contract requirements there at issue and those described in *Oklahoma Dep’t of Rehab. Servs. v. U.S. Dep’t of the Army*, R/S 15-10 (2016)(*Fort Sill*), and essentially adopted the reasoning of the *Fort Sill* panel to find that *Fort Riley* violated the RSA by failing to give priority to the blind vendor in that case. In doing so, the *Fort Riley* panel concluded that “[w]here the tasks to be performed by a contract for DFA services include[] tasks that constitute an integral element of providing food services at a military cafeteria, or pertain to the operation of a cafeteria, or [constitute] tasks without which the cafeterias would not be able to function,” the contract falls within coverage of the RSA. *Fort Riley*, at 31.

In *Fort Sill*, another 2-1 decision, the panel also determined that the RSA applied to a DFA contract. The services called for under the DFA contract in *Fort Sill* were nearly identical to those described in the *Fort Riley* PWS. The tasks in *Fort Sill* involved providing dinnerware, utensils, and trays to diners; cleaning spills on all serving lines and self-service areas during meal periods within five minutes; maintaining a clean area for meal consumption; making condiments available without delay; bussing tables and replacing tray carts during meal periods. The panel considered all such functions as integral elements of providing food service and closely related to the operation of a cafeteria, because “without such tasks being performed on a regular basis, multiple times per day, the cafeteria could not function or operate.”

The facts in *Fort Stewart* indicate that the contractor was required to provide “custodial and janitorial services . . . , including but not limited to sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning, and related quality control.” *Fort Stewart*, at 7. Even with such minimal connection to the preparation or serving of food, the panel determined that the contract was subject to the RSA priority.

Consideration of these three decisions (*Fort Riley*, *Fort Sill*, and *Fort Stewart*) supports our determination to apply the RSA priority in this case. In all three cases, the contracts called for far fewer services than does the Navy’s Solicitation here, yet the RSA priority was found to apply. The janitorial and custodial requirements were much the same, but the contracts in those cases did not include food preparation, cashier services, or the ability to serve food rapidly on the food line as required by the Navy’s PWS here.

Our dissenting colleague expresses concern that the panel’s decision will effectively eliminate competition from JWOD contractors and other socio-economically protected contractors. We do not share this concern for two reasons. First, priority for blind vendors does not automatically result in their selection. SLA proposals on behalf of blind vendors may be rejected if they are not “within a competitive range.” See 34 C.F.R. §395.33(b). Second, we believe this is precisely what Congress intended when it enacted the RSA – to grant priority to blind vendors, even at the expense of other contractors capable of delivering food services.

It may be true, as the dissent suggests, that the absence of DOE action (e.g., by issuance of policy letters or regulations) to define the scope of the RSA has resulted in a patchwork of conflicting arbitration and court decisions. This does not mean, however, that this panel should abdicate its obligation to conduct the very case-by-case *de novo* review that the dissent seeks to avoid by advocating deference to the CO. Were deference to be afforded to COs, there would be no guarantee that it would not also result in a similar mélange of conflicting outcomes.

Finally, we emphasize that our result here is consistent with the broad purposes of the RSA to provide entrepreneurial opportunities to the blind. Our result is also consistent with the policy direction recently endorsed DOE Secretary DeVos. Her March 2018 letter to Congressman Sessions unequivocally enunciates DOE’s view that the RSA priority applies to both FFS and DFA contracts. While this panel does not find these labels particularly helpful, all contracts for food services at MDFs are one or the other. Therefore, Ms. DeVos has effectively articulated DOE’s position that services related to all MDFs fall within the scope of the RSA.

CONCLUSION

This arbitration panel is tasked with determining whether the Randolph-Sheppard Act priority for blind vendors applies to services described in the Navy’s PWS for six U.S. Navy dining halls located in San Diego, California. Despite the Navy’s protestations to the contrary, case law firmly establishes that RSA coverage of vending facilities includes MDFs. Based on our review of the RSA, DOE’s implementing regulations, the multitude of applicable decisions by courts and arbitration panels to address this question, the various efforts by Congress to address the issue, and the DOE and DoD policy pronouncements, the arbitration panel concludes that the services contracted for by the Navy in this case are covered by the RSA.

The panel finds that because the Solicitation calls for services “pertaining to the operation of a cafeteria,” the RSA priority applies. In the alternative, even if the panel were not to apply a “pertaining to” test, the panel would nevertheless find that the array of services required under the PWS involves the “operation of a cafeteria” requiring the same result. This result is consistent with the broad purposes of the RSA to afford blind vendors entrepreneurial opportunities with respect to vending operations on federal property.

Accordingly, we find that the Navy violated the RSA by its failure to afford CDOR (the responsible SLA) an opportunity to submit a bid on behalf of its Vendor for the contract to provide services at the six U.S. Navy MDFs in San Diego.

REMEDY

The RSA specifically limits the remedial authority of arbitration panels. In pertinent part, 20 U.S.C. §107d-2(b)2 reads:

If the [arbitration] panel . . . finds that the acts or practices of any [federal] department, agency, or instrumentality are in violation of [the RSA], or any regulation issued thereunder, the head of any 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 decision of the panel.¹⁷

In short, this panel lacks authority to compel the Navy to take any specific action to remedy the Navy's RSA violations. Rather, the RSA dictates that we may only direct the Navy to terminate the violative conduct and to initiate such other action as may be necessary to carry out our decision.

Accordingly, we direct the Navy to cease and desist from:

1. Failing to create one of more opportunities for the Vendor to operate vending facilities on the San Diego bases;
2. Failing to invite CDOR to respond to the Solicitation;
3. Limiting the Solicitation to HUBZone businesses, and thereby declining to consider CDOR's proposal for award of the contract; and
4. Failing to evaluate CDOR's proposal in accordance with 34 C.F.R. §395.33(b).

The Navy is further directed to take such other action as may be necessary to carry out the decision of this arbitration panel.

Matthew Jarvinen Arbitration Panel Chairman

Brooke Lierman Arbitration Panel Member

DATED: October 8, 2018

¹⁷ Section 395.37(d) of DOE regulations tracks the RSA nearly word for word.

DISSENTING OPINION

At issue in this arbitration is a dispute between the Department of the Navy and the State of California over the applicability of a 1936 statute, The Randolph-Sheppard Act, to the feeding of U.S. Navy sailors at bases located in the San Diego area. This matter generates a sense of *déjà vu*, albeit not in any good sense of that expression.

Numerous courts, administrative bodies, and arbitration panels have dealt with similar if not essentially these same disputes; and the resulting decisions that have been scattered all over the legal landscape are testament to unnecessarily expensive and time-consuming arguments that could be avoided by federal congressional or appropriate Agency intervention. Without congressional guidance or even definitive agency regulations, I have no confidence that these very issues will not result in future expensive and time-consuming litigation.

At the outset, I commend the professionalism of my colleagues on this arbitration panel, who both share my frustration over the lack of definitive guidance which would preclude further disagreements over whether and how the Randolph -Sheppard Act applies to military dining facilities. I also commend the efforts of counsel on both sides of this dispute. Neither Navy nor California lawyers representing their parties' respective interests took any actions or communicated any factual or legal assertions that weren't supported by a reasonable interpretation of existing law or regulation.

Hence, we are left to deal with two opposing views about a jumbled thicket of sometimes complementary but often conflicting laws. Seemingly, these disputes are resolved by how a flipped coin lands on any random day. By that I mean that neither side in the dispute over the applicability of the Randolph-Sheppard Act to federal procurement of services that support military dining facilities acts in bad faith. For that reason, it is a shame that any party should be penalized for following its interests that are legitimately supported by a fair reading of applicable legal authorities. But yet that is what we are forced to do in this arbitration.

At one time, Randolph Sheppard Act ("RSA") was not used to support a position that a blind vendor could operate a military dining facility. Thus, this position has evolved over the life of the Act into justification for this practice. As it has evolved, justifications have been advanced that have interpreted or misinterpreted the RSA, which in turn have spawned innumerable federal agency pronouncements which themselves are frequently at odds. Despite literally decades of back and forth between federal agencies, most notably the Department of Defense ("DoD") and the Dept of Education ("DoE"), and numerous legislative calls for a final fix, no one has stepped forward to remedy this mess (pun intended). I fear our decision in this instant arbitration will likewise do little to bring closure to this unsettled area of the law.

Here is my attempt at sorting through the morass to answer this evasive question: Is the RSA applicable to a Navy solicitation for dining facility attendant services to support an appropriated fund-operated military dining facility? I conclude that it is not, and therefore I respectfully dissent.

FACTUAL AND PROCEDURAL BACKGROUND

A. FACTS

I do not dispute the majority's recitation of the facts, which themselves are not disputed by either party: In June of 2015, the Navy issued a solicitation (N00244-15-R-0014) as a 100-percent set-aside for Historically Underutilized Business Zone ("HUBZone") small businesses for various non-managerial tasks to support six Navy- operated military dining facilities in the San Diego region. On behalf of a blind vendor, the California Department of Rehabilitation ("CDOR") submitted a proposal, which was not considered for the stated reason that it was not a HUBZone small business. The contract was awarded to an otherwise qualified small business in September, 2015.

CDOR perfected an appeal to the DoE, which authorized this arbitration on March 11, 2016.

B. CALIFORNIA'S POSITION

The California Department of Rehabilitation ("CDOR") asserts that Navy has violated the Randolph-Sheppard Act by:

- (1) failing to create one or more opportunities wherever feasible for a Randolph-Sheppard vendor to operate a vending facility on the San Diego bases as required by Title 20 United States Code § 107(b) and Title 34 of the Code of Federal Regulations § 395.30(a);
- (2) disregarding the legal obligation to establish one or more opportunities wherever feasible without first obtaining the Secretary's concurrence that such a facility or facilities would be adverse to the interests of the United States as required by Title 20 United States Code section 107(b) and Title 34 of the Code of Federal Regulations part 395.30(b);
- (3) failing to invite CDOR, as the State Licensing Agency in California, to bid on the contract provided for in the Solicitation as required by Title 20 United States Code § 107(b) and Title 34 of the Code of Federal Regulations § 395.33(b);
- (4) issuing the Solicitation which does not adhere to the process for evaluating a State Licensing Agency's proposal as required by Title 34 Code of Federal Regulations § 395.33(a) and (b), in conjunction with Title 20 United States Code § 107d-3(e);
- (5) excluding CDOR's proposal, submitted on behalf of a Randolph-Sheppard vendor, by limiting the opportunity to certified HUBZone businesses and declining to consider CDOR's proposal for award of the contract as required by Title 20 United States Code § 107(b) and title 34 of the Code of Federal Regulations §§ 395.30(a) and 395.33; and
- (6) alternatively, should the opportunity not be deemed a cafeteria under the Act that can be competitively bid pursuant to Title 34 Code of Federal Regulations § 395.33, advertising the opportunity without first consulting with CDOR, as the State Licensing Agency, for the provision of food, beverages, and other services at a vending facility other than a cafeteria, as required by Title 20 United States Code § 107a(c).

LEGAL BACKGROUND

A. The Randolph-Sheppard Act.

The purpose of the Randolph-Sheppard program is to create and expand economic opportunities for people who are blind to own and operate their own businesses. To grant priority to blind vendors under the RSA, the Secretary of Education designates a State Licensing Agency ("SLA") in each state "to issue licenses to blind persons . . . for the operating of vending facilities" on federal property. 20 U.S.C. 107(a)(5). When a federal agency procures dining facility services, it either may negotiate a contract directly with the SLA or invite the SLA to bid on the contract. In this matter, California is such an SLA.

Under the RSA, California issues licenses to qualified blind entrepreneurs to operate vending facilities. 20 U.S.C. 107a(a)(5). The RSA grants priority to these blind entrepreneurs to operate vending facilities, including cafeterias, on federal properties. 20 U.S.C. 107 et seq. It is the Department of Education ("DoE") which promulgates regulations as to the operation of cafeterias on federal property by blind licensees. Critically, those regulations provide that all contracts "pertaining to the *operation* of cafeterias on federal property" are subject to the provisions of the RSA. 34 C.F.R. 395.33(c) (Emphasis added.).

Per the RSA, blind entrepreneurs do not contract directly with the federal government. Instead, the SLA responds to a solicitation issued by a federal agency for work covered by the RSA. 34 C.F.R. 395.33(b). If the SLA is awarded the contract, a licensed blind entrepreneur is assigned to operate the vending facility. *Id.* The blind vendor then operates the dining facility and manages the day-to-day operations, often with a commercial contractor called a "teaming partner." The teaming partner (herein Food Services, Inc., of Gainesville, or "FSIG"), works with the blind vendor, which not only helps him operate the dining facility, but also trains him in all aspects of the contractor's duties at the facility.

If a dispute arises between the SLA and the federal agency that has solicited vending-facility services, the RSA provides for arbitration of the dispute. The SLA may file a complaint with the Secretary of Education (the "Secretary") whenever it "determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply" with the RSA or regulations issued under it. 20 U.S.C. 107d-1. After the State Licensing Agency has filed a complaint with the Secretary, the "Secretary . . . shall convene a panel to arbitrate the dispute . . . and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.* The decision of the arbitration panel is subject to appeal and review as a final agency action. *Id.* at 107d-2(a).

B. Dining Facility Attendant Services for Naval Bases, San Diego, California.

Although the RSA does not distinguish between the types of contracts pertaining to the operation of a cafeteria, Navy Regulations refer to two types of military dining facility contracts, Full Food Service ("FFS") and Dining Facility Attendant ("DFA"). In an FFS contract, the contractor can be asked to provide all labor and management required to serve food in a military dining facility, including preparation of meals. Even in a dining facility where military food specialists and cooks prepare meals, a contract might include limited food preparation or a contingency capability to fill food-handling and cooking positions on a temporary basis when the military members deploy. If there is

limited food preparation, or even one cook available to fill contingencies, the contract is characterized as FFS. The Navy concedes that FFS contracts are subject to the RSA.

In contrast, under a DFA contract, the contractor provides the labor required to perform discrete support functions related to military dining facility operations, up to but not including meal preparation. The Navy essentially contends that DFA contracts are not subject to the RSA.

WHY THE RSA DOES NOT APPLY TO THIS NAVY CONTRACT

A. “Operate” or “Operation”

The majority views as the critical question whether a blind vendor, despite the contract for discrete tasks, is somehow responsible for the operation of a military dining facility.

The RSA mandates that blind vendors shall be given a priority in the **operation** of cafeterias. It is now established that military dining halls are considered cafeterias for purposes of coverage under the RSA. *Nish v. Cohen*, 247 F.3d 197 (4th Cir. 2001).

Because CDOR does not contest that Navy military personnel are charged with the overall responsibility and accountability for the operation of the dining hall facilities, there is no disagreement that the Navy is operating the dining hall facilities. Petitioner CDOR Closing Brief, at 28. Neither the Act nor the regulations define the terms “operate” and “operation.” See 20 U.S.C. §107(e) (defining terms used in RSA); see also 34 C.F.R. §395.1 (defining terms used in the regulations). Because neither the statute nor its implementing regulations define the term “operate” or “operation”, I attempt to divine their definitions to understand the scope of coverage under the RSA through the following analysis.

The contract at issue is for DFA services, in which the DFA services contractor will provide dining facility attendants, janitorial, and custodial services at the dining facilities located in the designated facilities in San Diego. Military personnel perform multiple tasks in the dining facilities, including selecting the menus, preparing and cooking the food, ordering supplies, maintaining quality control of all food prepared and served, maintaining equipment, conducting headcount of sailors served, and accountability of cash received. Military Personnel serve the food to the troops.

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 whether serving food is a requirement for applying the RSA preference 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. *Washington v. U.S.*, at 15.

The Court then noted that expansive language in 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 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. This distinction is important because the court then proceeded to evaluate the history of the RSA as it applies to the scope of services covered by the RSA.

DoE pronouncements on the meaning of “operation” have been inconsistent. In March 1992, DOE issued a policy letter stating that if the food service contract requires the contractor provide a wide variety of food services and the government’s role is limited, there is a strong possibility the contractor is providing operational services and the RSA applies. If, however, the contractor is providing a limited number of discrete services and the government is providing an important role in the overall functioning of the operation, the contract is not covered by the RSA. *Id.* at 20. DOE withdrew this letter in 1999 as too restrictive. *Id.* at 21. The result is a lack of clarity as to the meaning of the term, requiring a case-by-case analysis of the facts.

The court in *Washington* supported the government’s position that a service contract for DFA services was not subject to the RSA, stating:

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 v. United States*, 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”).

Id. at 23.

In *Mississippi Department of Rehabilitation Services v. U. S.*, No. 032038C, June 4, 2004, the United States Court of Federal Claims evaluated the facts and determined that the Navy violated the RSA because “the contractor is in charge of day-to-day management of the facility, a function to which we afford great weight.” It is thus apparent that the contractor was responsible for the daily

functions of the facility and in that regard must be considered the facility's "operator." "Indeed, we conclude that the amalgam of functions allocated to the contractor so outweighs those retained by the Navy,"

Id. at 13.

These two cases provide some clarity as to the scope of the RSA. The *Mississippi* case re-affirms the standard that the RSA applies to contracts where the contractor is in charge of day-to-day management of the facility. The *Washington* case clarifies that a government determination not to apply the RSA to a contract for discrete DFA services, that does not include Full Food Service, is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Deference to the DOE's Interpretation of the RSA

The majority implicitly recognizes that DoE's failure to issue policy letters and regulations defining the scope of the RSA is problematic. The panel was not able to defer to DoE expertise on this issue, because there is no such legal guidance. The court in the *Washington v. U.S.* summarized the importance of DOE working through the Administrative Procedures Act to issue regulations. Absent DOE regulations and policy guidance, the case-by-case de novo review of this issue has led to conflicting arbitration and court decisions. The court's summary of the importance of the ability of the arbitration panels and the courts to give deference to an agency interpretation of a statutory provision follows:

Chevron deference is afforded to an agency's interpretation of a particular statutory provision "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("*Mead*") (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Evidence of such authority may be shown by an agency's power to engage in notice-and comment rulemaking or formal adjudication. *See id.* at 230. *See also Chevron*, 467 U.S. at 843-44. An agency interpretation meriting *Chevron* deference is reviewed under the Administrative Procedure Act standard, 5 U.S.C. §706, requiring an agency's findings to upheld unless the interpretation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). *Mead*, 533 U.S. at 227. For agency "interpretations [similar to those] contained in policy statements, agency manuals, and enforcement guidelines," however, the Supreme Court has stated that courts may treat the agency's guidance as persuasive evidence. *Mead*, 533 U.S. at 234-35.

Contrary to some of the views expressed in briefing, the DoE opinion letters on which the parties rely as general policy pronouncements addressing the proper interpretation of the term "operation of a cafeteria" under the RSA and its implementing regulations do not merit *Chevron* deference but may be afforded *Mead* deference and weighed as persuasive evidence.

Washington State Department of Services for the Blind and Robert Ott v. U.S. at FN 7.

I agree with the court in *Washington* that the failure of the DOE to issue regulations defining the statutory terms "operation" or "operation of a cafeteria" has created confusion and a lack of clarity

in the administration of the RSA. This lack of clarity has resulted in a mixed bag of decisions that only increases the confusion for contracting officers who are responsible for awarding contracts for dining services.

As a practical matter, contracting officers require clarity in the procurement regulations that apply to their acquisitions. The inability of the DOE to propose RSA regulations that resolve the issue and provide that needed clarity was identified in the Report referenced above. The Report stated that “(t)he RSA policies are vague and allow for interpretations that benefit the purposes of the interpreter. Clarification is required to strengthen current RSA policies across the board.” *Id.* at iii. To provide needed clarification, the Report recommended a coordinated effort to “publish for public and interagency comment appropriate policy and regulations to implement the joint policy recommendations as reported to Congress on August 19, 2006, by DoD, DoED, and CFP.” *Id.* at iv. The Report acknowledged that full implementation requires compliance with Administrative Procedures Act requirements and may require additional legislative action by Congress. *Id.*

What clearly does not measure up to the extensive requirements required before appropriate implementation of a federal policy is the letter quoted authoritatively in both CDOR’s pre-arbitration and closing briefs: Secretary Betsy DeVoss has clearly stated both her position and that of the Department of Education on the central issue presented in this case—the Randolph-Sheppard priority applies to food service attendant services contracts. In a March 5, 2018, letter to Congressman Pete Sessions, [Secretary DeVoss] stated her view that the RSA applies to DFA contracts for “military cafeterias.”

Petitioner CDOR’s Closing Brief, at 12. Despite CDOR’s acknowledgement that this is the Secretary’s own “view,” her pronouncement simply isn’t even close to what is required to promulgate a federal policy. *See preceding section above.*

C. Deference to the Contracting Officer

a. Strict Constraints on Contracting Officers When Spending Appropriated Funds

My colleagues on this arbitration panel seem to believe that its role is to step into the shoes of the contracting officer, making a decision to apply the RSA to DFA services. However, the Navy through its contracting officer, has determined that the RSA does not apply to DFA service contracts. 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.

My view of 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, Supra*. My analysis for this position follows.

The Randolph Sheppard Program (RSP) has no specific appropriations line item in the federal budget; therefore, funding for this DFA contract is provided by the Navy 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.

Because 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 our Constitution. The framers of the 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).

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.

b. Contracting Officers Otherwise Have Broad Authority

A contracting officer is a person with authority to enter into, administer, and/or terminate contracts and make related determinations and findings. FAR 1.602-1(a) (Defining the authority of a contracting officer). A contracting officer is not authorized to enter into a contract “unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.” FAR 1.602-1(b) 4 FAR 1.602-2.

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.” 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.” FAR 1.602-2 (5).

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. *See para. D, infra.*

c. No Court Has Objected to the Use of the FAR

It is a fact that the Navy applied the FAR to this acquisition and California 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 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. 34 CFR Part 395—Vending Facility Program for the Blind on Federal and Other Property is the implementing regulation 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.

Because the DoE has no appropriated funds to pay contractors who are providing dining hall service contracts, agency contracting officers, in this case a Navy contracting officer, are tasked to obligate funds to pay for dining hall services under the solicitation in question. Because 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.

The FAR is a system of administrative regulations that authorize the contracting officer to award a contract. The FAR is a codification of acquisition policy that apply to **all** executive agencies. 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.

DoE could address this issue by issuing detailed procurement acquisition regulations and entering into interagency agreements to manage the award of RSA dining hall service contracts; or could adopt the FAR as its implementing regulation with appropriate modifications to implement its statutory mandate. As explained above, it has done neither. Therefore, procuring agencies through their contracting officers are required by law and regulation to use the FAR to manage the acquisition.

d. Deference to the Contracting Officer

The panel's willingness to step into the shoes of the contracting officer and substitute its judgment for that of the contracting officer is erroneous for a number of reasons. In order to avoid an endless

round of arbitrations with conflicting decisions, the panel should have used the *Washington* analysis to defer to the Agency's interpretation of the RSA and its application to DFA services.

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. Because the Navy, 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.

D. Deference to the Navy's Interpretation of the RSA

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 specifically addressed this issue regarding 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.

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.

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.

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. See *Washington*, at 15, 23.

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.” *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), at 842. 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). Because 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.

Having addressed the first *Chevron* test, the question becomes “whether the agency’s answer is based on a permissible construction of the statute.” *Chevron* at 843. 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 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.

Chevron, at 843-44

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

LEGISLATIVE EFFORTS TO RESOLVE CONFUSION

A. Congress has stated that the Randolph-Sheppard Act does not apply to DFA services.

Although California may not appreciate the unique realities confronting how the Department of Defense operates military dining facilities, Congress has. Several efforts have been undertaken by Congress to fix the confusion that plaques this specific area of confusion.

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

- (a) INAPPLICABILITY OF RANDOLPH-SHEPPARD ACT- The Randolph-Sheppard Act does not apply to any contract described in subsection (b) for so long as the

contract is in effect, including for any period for which the contract is extended pursuant to an option provided in the contract.

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

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

This Statute took a first attempt at defining the work covered by each Act.

However, it did not resolve all of the controversy.

Congress's next intervention occurred on January 6, 2006, when it passed Section 848 of the National Defense Authorization Act for Fiscal Year 2006, Public L. 109-163 ("2006 NDAA"). Section 848 required the Departments of Education and Defense and the Committee for Purchase from People Who Are Blind or Severely Disabled (CFP) to issue a joint statement of policy concerning application of the Javits-Wagner-O'Day Act, 41 U.S.C. § 8501, et seq., (JWOD) and the Randolph-Sheppard Act to contracts for operation and management of military dining facilities and contracts for food services, mess attendant and other services supporting the operation of military dining facilities. This joint statement of policy was completed on August 29, 2006.

The joint report to Congress was issued by the Departments of Education and Defense more than a decade ago, titled "Application of the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facility Contracts" (Report). The Report advised Congress by defining which aspects of dining facility services were to be covered by each act. The Report advised Congress that military dining facility contracts should be "competed under the RSA when DOD solicits a contract to exercise management and day-to-day decision-making for the overall functioning of a military dining facility." *Id.* (emphasis added). However, the Report sought to limit RSA applicability by also recommending:

[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 the DOD needs dining support services, (*e.g.*, food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendants, or other services that support the operation of a dining facility) where DOD food service specialists exercise management and responsibility over and above those contract administrative functions described in FAR Part 42.

Id. ¶4(b) (parentheses in original, emphasis added).

The Report, signed and submitted to Congress with the explicit approval of the Department of Education, belies CDOR's assertion that the Department of Education "has not determined that dining facility attendant services are not covered by the RS-A, or that the RS-A only applies to the overall operation of a military dining facility." Moreover, pursuant to a September 19, 2006, request by the United States Senate Health, Education, Labor and Pensions (HELP) Committee, the Department of Defense, the Department of Education, and the CFP issued a joint analysis of the Report (Analysis) which was "designed to provide background information on the reason or reasons for the section, the thinking behind the approach chosen, and the effect of the section." The Analysis provided agency guidance concerning the interplay between RSA and JWOD and the intention behind the recommendations contained in the Report. Importantly, the Analysis states that RSA contractors only have priority for the operation of an entire military dining facility:

It should be noted that State RSA agencies do not have authority to provide military dining support services as limited contractual services. The RSA role in military food service is for the operation of an (entire) military dining facility (cafeteria), for which these agencies have a procurement priority.

Analysis at p. 4. (parenthetical original, emphasis added).

Congress then adopted these findings through the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109-364, § 856(c) (October 17, 2006) ("John Warner Act"). The John Warner Act provides clear guidance that Congress recognized a distinction between how the RSA and JWOD interplay within the context of military dining facilities – stating that the RSA would not have preference over JWOD for dining facility attendant services. The John Warner Act also tasked the Inspectors General of the Departments of Education and Defense to review their respective procedures under RSA and JWOD. See John Warner Act § 856(c). In accordance with this mandate, in 2008, the Department of Defense, through an Inspector General report, gave a statement on the applicability of RSA to military dining facility attendants under the John Warner Act:

...[T]he Military Departments can provide a priority for blind vendors when a contracting officer determines the contract will be for 'operation of a dining facility.' However, the JWOD and other socio-economic preferences govern contracts for mess attendant services, dining support services, or other services supporting DoD operation of a cafeteria.

Further, if there is a conflict between RSA and JWOD, then RSA provisions are the dominating factors for the overall 'operation' of the cafeterias, but JWOD is controlling over the general services that support the operation.

DOD Assessment of Contracting with Blind Vendors and Employers Who Are Blind or Have Other Severe Disabilities, Apr. 15, 2008, at 5 (emphasis added).

The 2015 NDAA acknowledges this history, incorporating a "Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2015" (hereinafter "Explanatory

Statement”) which “shall have the same effect with respect to the implementation of this Act as if it were a joint explanatory statement of a committee of conference.” Pub. L. No. 113-291, Section 5. The Explanatory Statement notes that Congress tried to “resolve this long-standing issue by requiring a Joint Policy Statement in section 848 of Public Law 109-163 [the 2006 NDAA] and enacting a permanent ‘no- poaching’ provision in section 856 of Public Law 109-364. [the John Warner Act]” *Id.*, D.N. 42-3 at Page ID #1408. However, the Explanatory Statement further explained that “without complementary regulations to implement the Joint Policy Statement, confusion remains on when to apply the two acts, particularly with regard to new contracts that are not covered by section 856 of Public Law 109-364.” *Id.*

In order to alleviate any further confusion, the Explanatory Statement adopted the findings of the August 29, 2006, joint report which clarifies how the two acts are to be applied within the context of all military dining facilities:

Pursuant to the Joint Policy Statement, the Randolph-Sheppard Act applies to contracts for the operation of a military dining facility, or full food services, and the Javits-Wagner-O’Day Act applies to contracts and subcontracts for dining support services, or dining facility attendant services, for the operation of a military dining facility.

Id.

Through the Explanatory Statement, Congress directed the Department of Defense, not the Department of Education, to “prescribe implementing regulations for the application of the two acts to military dining facilities. Such regulations shall implement the Joint Policy Statement and specifically address DOD contracts that are not covered by section 856 of Public Law 109-364.” *Id.*

B. CDOR’s Misplaced Reliance on Statutory Language

California urges the panel to interpret Section (b)(2) of the John Warner Act to expand the coverage of the RSA to include full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility. Petitioner CDOR Closing Brief at 33. I do not concur in this interpretation of the statute. The John Warner Act was an attempt to establish boundaries between RSA contracts for full service operation of dining hall facilities and JWOD and other socio-economic firms that provided mess attendant services and other services supporting the operation of all or any part of a military dining facility. Subsection (b) requires the Comptroller General conduct a study of a representative number of the contracts awarded by the government under JWOD and RSA. The definition provided in (b)(2) of the subsection simply defines the type of contracts to be studied and does not amend 20 U.S.C. §107. The RSA statutory language remains unchanged.

To decide that the definition of the requirements of a study expresses the intent of Congress to expand the scope of coverage of the RSA is simply not supportable and is inconsistent with the comprehensive DoD report above. In addition, “If the statutory language is plain and unambiguous, then it controls, and we may not look to the agency regulation for further guidance.” *Supra.*, citing *Chevron U.S.A., Inc.*, 467 U.S. at 842–43, 104 S.Ct. 2778.

To expand the scope of the RSA to include contracts for mess attendant services or services supporting the operation of a military dining facility effectively bars JWOD contractors and other socio-economically protected contractors from competing for these contracts. Because the RSA has a statutory preference, RSA contractors have a superior priority to these contractors. Therefore, if the decision of the panel is accepted and implemented by the Navy, competition will effectively be eliminated for these services. While the RSA contractors may welcome this expanded sole source authority, the rest of the contracting community will not.

AGENCY ACTION: Proposed Regulatory Change

The Secretary of the Navy 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. Defense Federal Acquisition Regulation Supplement: Food Services for Dining Facilities on Military Installations (DFARS Case 2015-D012)(81 FR 36506).

The proposed DFAR has been published in the Federal Register and was issued for public comment. The public comment period has expired and the agency has addressed 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.

The proposed regulation excludes DFA services from the coverage of the RSA, 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.

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.

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.

DFAR 237-7X01 Definitions. 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.

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 critically relevant to the interpretation of the RSA as it pertains to this specific arbitration. The Secretary of Defense is on record taking a position that is contrary to the panel’s decision.

I acknowledge here that the joint explanatory statement does not carry the force of law. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 236–37 (D.C. Cir. 2003); accord *Kansas v. United States*, 171 F. Supp. 3d 1145, 1161–62 (D. Kan. 2016). *See also, Commonwealth of Kentucky by and through the Education and Workforce Development Cabinet Office for the Blind, v. United States*, U.S. District Court, Western District of Kentucky (Paducah Division), Civil Action No. 5:12-CV-00132-TBR. Thus, I concede that this proposed regulation does not resolve this dispute; however, I remain convinced that it is at least relevant to provide instruction on the intent of Congress and the relevant agencies, and thus, is informative on the intent of the Navy’s contract for DFA services.

As discussed above (*See para. C(d) 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 DoD’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 dining facility on military installations. Because of the ruling of the United States Court of Claims in *Washington* that the basis for Navy’s interpretation of the term “operation of a cafeteria” is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” [*Washington*, at 23], the likelihood of a court directing the DoD to change its position is remote.

CONCLUSION

The contracting agency, the Navy, 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* as a basis for its analysis of the law as regards the interpretation of the statute. This position has even more weight since the Navy, 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, California, which carries the burden of proof, has not established that the decision of the Navy to exclude DFA services from the scope of the RSA is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

No one disputes the authority of the Navy to use its own military personnel to operate and retain responsibility for performing management operations, headcount and cashier services, cooking, and menu planning and serving food at all of the San Diego dining facilities. This practice flows from a decision reserved to the Department of Defense and is entitled to deference.

Likewise, there is little dispute as to the fact that this solicitation is for DFA services only and does not include food preparation. The contractor under the DFA contract is to provide services that include washing dishes, scrubbing pots and pans, and cleaning and sanitizing tables, floors, and equipment. The contractor is not required to provide other support services such as facilities, equipment, maintenance of equipment and facilities, grounds maintenance, utilities, transportation, etc. These services also pertain to the successful operation of a dining hall facility but are provided by Navy. The division of services and the limitation of services is important to understanding the scope of the RSA to dining hall services.

Bottom Line

This Arbitration Panel is chartered to address whether or not DFA services are covered by the RSA. Navy contracting officials made a policy/legal determination that DFA services are *not* covered by the RSA. Specifically, the Navy contracting officials determined that those discrete services required by the language of the solicitation do not rise to the level of “operating” or “operation” of the military dining facilities at issue.

How the Navy makes this determination that is crucial to the sustainment of its fighting force, and, hence, is a major factor relating to Naval operations, is one that most certainly must be left to the expertise of professional Navy contracting officials.

Finally, although the proposed DFAR changes that will resolve this dispute once and for all are not yet promulgated, they will be -- by all indications and based on the Navy’s representations. Though not currently cloaked with the force of law, those proposed regulatory changes are nonetheless instructive as to how Congress and the appropriate Agencies have delineated the contours of the

RSA's applicability to military dining facilities. Under any fair reading of the DFARS, California's right to bid for the DFA services at issue in this dispute is diminished.

It should be our job to address whether the legal determination of the Navy not to apply the RSA to this source selection process for DFA services should be honored by the DoE. The Navy's decision not to apply the RSA to DFA services is entitled to deference and is not a violation the RSA. Because I cannot reconcile my interpretation with that of the majority, I respectfully dissent.

David Cary
October 8, 2018