

**HAWAII v. ARMY ARBITRATION DECISION**  
**Case Number: R-S/16-07**  
**7.31.17**

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**UNITED STATES DEPARTMENT OF EDUCATION REHABILITATION  
SERVICES ADMINISTRATION  
RANDOLPH-SHEPPARD ARBITRATION**

**HAWAII DEPARTMENT OF HUMAN  
SERVICES, DIVISION OF  
VOCATIONAL REHABILITATION,**

**PETITIONER**

**v.**

**Case Number: R-S/16-07**

**UNITED STATES DEPARTMENT OF THE  
ARMY, SCHOFIELD BARRACKS,**

**RESPONDENT**

**APPEARING FOR PETITIONER:**

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## ARBITRATION DECISION

### FINDING OF FACTS

#### Introduction and Summary

Petitioner Hawai'i State Licensing Agency (SLA) had a contract from 2005-2016 with the Army, Respondent, for performance of the full operation of the cafeteria/dining facility at a federal facility at Schofield Barracks in Hawaii, with a Randolph Sheppard Act (RSA) priority including both full dining facility service (FFS) and dining facility attendant (DFA)<sup>1</sup> responsibilities under one contract. Blind Vendor, Ted Chinn was selected by the Petitioner for that contract. As that contract ended the Army decided to resume in-house operation and management of the cafeteria/food facility and solicited for DFA only without RSA priority or re-negotiation of contract. Petitioner State challenged and is now in arbitration.

Petitioner claims Army Respondent cannot place that *limitation* without DoE approval justified by an explanation of adverse impact on U.S. interests. And Petitioner argues that RSA mandates Respondent to offer DFA to the SLA because RSA requires it and per law it *pertains to the operation of cafeterias on federal property* (34 C.F.R Sect. 395.33(c)). Ambiguities seemed to arise from interpretations of laws and non-binding policy statements, as well as from changing vocabulary uses under the RSA that began with the priority of blind vendors to *operate vending facilities*, including in later years, *cafeterias and dining facilities*. In 2012, the Army bi-furcated the operation of the cafeteria, distinguishing full food service facilities (FFS) and dining facilities attendant services (DFA): the latter was precluded by Army regulations from having soldiers perform those duties so it had to be contracted out.<sup>2</sup> The issues continued with questions whether DFA-only contracts fell outside the *operation* of cafeterias and thus outside the RSA or whether those contracts pertained to those responsibilities and were thus covered by the RSA? Legislation and non-binding government reports and pronouncements have attempted to clarify the applicability of the RSA, including through interpretations by the DoE and DoD, with some ambiguities persisting.

#### Background Facts

##### *Combined Contract for Full Food Service (FFS) and Dining Facility Attendant Services (DFA)*

From 2005 to 2016, the Army obtained FFS and DFA services from the Petitioner under one combined contract that covered four (4) dining facilities on Schofield Barracks and the adjacent Wheeler Army Airfield. During this period, the Army required a contractor to operate these dining facilities and provide FFS because the Army cooks who would ordinarily perform were often on overseas military operations.

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<sup>1</sup> FFS and DFA are used by the Army to describe duties and are used throughout this decision as a short-hand reference to the functions rather than as a legal statutory term.

<sup>2</sup> Army Regulation 30-22, paragraph 3-42 (c) (2).

Respondent claims because the contractor was operating the entire facility and not merely providing janitorial services under the DFA contract, it included the RSA priority in the Solicitations during this period, and Petitioner ultimately received the contract awards and performed at a very high quality.

#### *Removal of Full Food Service Contract in 2016*

With the end of major combat operations in Iraq and Afghanistan, however, the Army's requirements changed and the Army Soldiers and cooks after 2016 were now back at home station on a more reliable basis. As a result, the Army no longer required a contractor to operate its dining facilities on Schofield Barracks. However, the Army continued to require janitorial (DFA) services because Army Regulations prohibit Army cooks from performing those functions. Accordingly, the Army narrowed the scope of required services to be provided in the follow-on contract (2016-22) to janitorial (DFA) services only.

#### *Solicitation for DFA Services at Schofield Barracks*

The DoE administers the RSA and the Secretary of Education designates "state licensing agencies" (SLA) to license blind persons to operate vending facilities. Petitioner is the SLA for the State of Hawaii. Under the RSA, blind vendors do not apply directly for government contracts. Rather, blind vendors register with the SLA, which then obtains contracts on their behalf after they have been trained and licensed. The SLA bids on contracts involving the operation of vending facilities, and upon award, the SLA assigns contracts to blind vendors to operate the facility.<sup>3</sup>

On February 25, 2016 the Army issued a solicitation for the DFA contract only<sup>4</sup> without a RSA priority, to which the Petitioner objected and sought legal recourse that was later settled and there was an agreement to proceed to arbitration.

#### *Request that DoE Convene an Arbitration Panel*

On April 1, 2016, Petitioner sent a letter to DoE requesting an arbitration panel that was granted on July 29, 2016.<sup>5</sup>

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<sup>3</sup> RSA, 20 U.S.C. §§ 107a(a) and a(b); 34 C.F.R. 395.33 and 395.2-17.

<sup>4</sup> On February 2, 2016, Regional Contracting Office - Hawaii issued Solicitation No. W912CN-16-R-0005, a Request for Proposals for DFA services at Schofield Barracks for one base year and four (4) option years. When originally issued, the Solicitation included the RSA priority. However, on February 25, 2016, U.S. Army Contracting Command directed the 413th Contracting Support Brigade to remove the RSA priority from the Solicitation in order to align the Solicitation with Army policy that the RSA does not apply to contracts for DFA services only. Army Contracting complied with this directive by issuing Amendment 0004 to the Solicitation, which removed all references to the RSA priority and changed the contracting method to a 100% small business set-aside.<sup>11</sup> Once the RSA priority was removed from the Solicitation, Petitioner was ineligible to compete for the DFA contract because it does not qualify as a small business.

<sup>5</sup> This was pursuant to Randolph-Sheppard Act (RSA), 20 U.S.C. § 107d-1(b) established to resolve the dispute with the Army regarding the application of the RSA to the follow-on DFA contract at Schofield Barracks. Following the Petitioner's request for arbitration, Petitioner filed for a preliminary injunction to

## Laws, Regulations, and Policies

### Randolph Sheppard Act (RSA)<sup>6</sup>

Since 1936, the RSA provides *priority* for blind vendors for operation of vending facilities on federal property as long as it is competitive. The RSA was amended in 1974<sup>7</sup> and implementing regulations were promulgated in 1977.<sup>8</sup>

Section 107(a) provides priority to blind vendors to “operate vending facilities on any federal property.” 107(a) further provides that “any limitation on the placement or operation of a vending facility” that adversely affects the interest of the United States will be reported to the Secretary of Education. Respondent argues and it appears to essentially apply to the “operation of a vending facility,” not for various service contracts or other support contracts on federal installations.<sup>9</sup> In the definitional section related to Section 107 of the RSA, “vending facility” is defined as meaning “automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by blind licensees...”<sup>10</sup> Section 107(a)(5) provides that the Secretary of Education, shall, among other responsibilities, require (State) agencies “to issue licenses to blind persons who are citizens of the United States for the operating of vending facilities for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages and other articles or services dispensed automatically or manually and prepared on or off the premises...”<sup>11</sup>

Section 107d-3(e) of the 1974 amended RSA specifies that the “Secretary, through the Commissioner, shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual

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enjoin the Respondent from awarding the contract to a non-RSA recipient, on August 29, 2016, the parties entered into a settlement agreement in U.S. District Court under which the Army agreed to maintain the contractual status quo between the parties pending a decision from the arbitration panel. In return, Petitioner agreed to take all reasonable steps to expedite resolution of the arbitration, and to dismiss, without prejudice to re-filing, its federal injunctive action. Following the execution of this Agreement, Petitioner moved to dismiss its Motions for injunctive relief; the Court granted the motions, and dismissed the action without prejudice. Since then, Army Contracting has continued to extend the original contract under which the RSA vendor is providing services, in accordance with the settlement agreement.

<sup>6</sup> Randolph-Sheppard Act (RSA), 20 U.S.C. §§ 107(a) and 107d-3(e).

<sup>7</sup> Act of Dec. 7, 1974 Pub. L. No. 516, 88 Stat 1623 (1974).

<sup>8</sup> 34 C.F.R. 395.33.

<sup>9</sup> 20 U.S.C. Section 107(a) 1974. Respondent argues the RSA provides a priority for blind vendors in *the operation of* vending facilities, and the “*of*” is significant in that the language does not say that such vendors get a priority for operation *in*, or operation *at*, a cafeteria or other vending facility. It is argued the latter two would expand the priority to blind vendors at cafeterias or *in* cafeterias and if that had been the purpose of the drafters it could have been made clearer. So, for blind vendors to obtain a priority, they must be must be operators of the facility.

<sup>10</sup> 20 U.S.C. Section 107e (7). The items referred to as being appropriate for operating a vending facility with the preference include the “vending” of newspapers, periodicals, confections, tobacco products, foods beverages and other articles or services dispensed automatically or manually and prepared on or off the premises...” See also, 34 CFR 395.1(x).

<sup>11</sup> Section 107a(5).

basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees...”<sup>12</sup>

### **Javits-Wagner-O Day Act (JWOD) (later called AbilityOne)**<sup>13</sup>

In addition to the Randolph-Sheppard Act giving preference to blind vendors, the Javits-Wagner-O Day Act (JWOD)/AbilityOne) does likewise. Under the JWOD/AbilityOne program, the Committee for Purchase from People Who are Blind or Severely Disabled (CFP) publishes a list of services it considers suitable for purchase by the Federal government from qualified non-profit organizations (41 U.S.C. § 8502). Services appearing on this list are mandatory purchases for the Federal agency desiring such services. Some of those have to do with cafeterias, such as for DFA services; and, that being so, there is some potential ambiguity between priorities of the two statutes as there is a history of RSA entities operating full service cafeterias, including DFA support services.

Both JWOD and RSA impact government procurement for services provided by the blind and issues may arise, particularly where there is disagreement on the definitions under pertinent laws and regulations, and therefore on eligibility. Whereas the RSA provides entrepreneurial opportunities for blind vendors to operate facilities, JWOD provides blind and disabled persons the right to perform designated services on the CFP list for the Federal government. In the past, RSA entities competed for full food service contracts for cafeteria operations, including the DFA services under those contracts, and JWOD offered stand alone DFA contracts if on the CFP list, often as a subcontractor, but sometimes in competition with the RSA contractor. Naturally conflict arose.<sup>14</sup> The attempted resolution of that conflict is discussed hereafter.

### **Department of Education Regulations (1977)**<sup>15</sup>

Department of Education (DoE) regulations provide that military dining facilities on federal property, including cafeterias, are considered vending facilities under the RSA and priority is given under RSA, as well as maximum opportunities for “all contracts or other existing arrangements *pertaining to the operation* of cafeterias on Federal property.”<sup>16</sup>

Pursuant to the congressional statutory mandate, the Department of Education promulgated regulations in 1977. Section 395.1 references the RSA as the “RSA Vending Stand Act” and in section (d) defines “cafeteria” as being a food dispensing

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<sup>12</sup> Section 107d-3(e), entitled Regulations establishing priority for operation of cafeterias. This was the first unequivocal statement that cafeterias were clearly covered by the priority. Later, “cafeteria” under the RSA was expanded to include Military Dining Facilities, by DOD’s own interpretation.

<sup>13</sup> 41 U.S.C 8501 (1938) as amended 1971.

<sup>14</sup> Petitioner points out that before enactment of the John Warner Act, two separate Circuit Courts ruled on the relative relationship of RSA and JWOD. NISH v. Cohen, 247 F.3d 197, 205 (4th Cir. 2001); NISH v. Rumsfeld, 348 F.3d 1263, 1272 (10th Cir. 2003).

<sup>15</sup> 34 C.F.R. 395

<sup>16</sup> 34 C.F.R. 395.33(c).

facility capable of providing a variety of prepared foods and .... primarily through the use of a line where the customer serves himself or displayed selections.” Section X continues by defining a “vending facility,” (used for blind licensee priority) as being “automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, food, beverages and other articles or services dispenses automatically or manually...”<sup>17</sup>

It appears that the thrust of the above provisions is to regulate “vendors” and the functions are about food dispensing and not cleaning and busing.<sup>18</sup>

Section 395.33 appears clear “Priority in the operation of cafeterias by blind vendors...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.”<sup>19</sup>

When discussing the priority in the operation of cafeterias by blind vendors, Section 395.33(b) gives specified criteria by which SLA offers will be judged; such criteria may include “sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices.” Here again, the criteria contemplate “operating” or “managing” a full-service operation. These various functions are part and parcel of “operating.” They appear to be not stand-alone responsibilities, but pertain to the priority given for the operation of cafeterias.

Petitioners argue that Section 395.33 (c) expands the instant regulation to apply beyond *operating a cafeteria* in order to obtain a priority and applies it to all contracts having anything to do with a cafeteria; or more precisely, those acts integrally related to the operation of a cafeteria are argued to therefore be within the “operation” of a cafeteria. In this connection, the 1977 Regulation Section 395.33(c) provides that “[All] contract 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.”<sup>20</sup>

For an interpretive conclusion that all contracts relating to and even integral to the operation of a cafeteria fall under the RSA, in the judgment of the Arbitration Panel would too greatly expand the intent of the RSA beyond its legislative intent of requirements of vending and dispensing of food, and thus beyond the meaning and reach of the RSA. The RSA is to give a priority to blind vendors in their “operation,” in the case of a cafeteria, of the full services of the dining facility. When the statute and regulation refer to the operation of cafeterias, it is meant as having control to operate the food portion of the dining facility and not the busing portion, except as it might be

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<sup>17</sup> Id.

<sup>18</sup> Though “sanitary practices “are required in the operation of the cafeteria. 34 CFR 395.33(b).

<sup>19</sup> 34 C.F.R. 395.33

<sup>20</sup> 34 C.F.R. 395.33(c )

included in or incidental to the primary contract to operate the cafeteria.

**National Defense Authorization Act for Fiscal Year 2006 Pub. L. 109-163 (NDAA for Fiscal Year 2006)<sup>21</sup>**

When the military started keeping operation of dining facilities (FFS) in-house, there was potential conflict between RSA and JWOD contractors. In 2006, in Section 848 of the NDAA, Congress directed that DOE and DOD and CFP issue a **joint statement of policy**<sup>22</sup> report (“Joint Report,” discussed below) to clarify application of the JWOD and RSA to dining facility operation and management, and other contracts for food services, mess attendant and other services in support of the operation of dining facilities. In response, these agencies published a “statement of policy,” agreed by the agencies, though it was not implemented by regulations, as discussed under point 7 below.<sup>23</sup>

**John Warner Defense Authorization Act for the Fiscal Year 2007 (JWA)<sup>24</sup>**

The JWA, Section 856 (a) incorporates at least one of the recommendations of the Joint Report to Congress, and is set out in part hereafter:

**(2) INAPPLICABILITY OF THE JAVITS-WAGNER-O’DAY ACT TO CONTRACTS FOR THE OPERATION OF A MILITARY DINING FACILITY.—**

**(A)** The Javits-Wagner-O’Day Act (41 U.S.C. 46 et seq.) does not apply at the prime contract level to any contract entered into by the Department of Defense as of the date of the enactment of this Act with a State licensing agency under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) for the operation of a military dining facility.

**(B)** The Javits-Wagner-O’Day Act shall apply to any subcontract entered into by a Department of Defense contractor for full food services, mess attendant services, and other services supporting the operation of a military dining facility. The statute sets forth the dichotomy between the prime contract for mess hall operations in which case RSA priority applies and JWOD does not, and also when RSA does not apply but JWOD does for “services supporting the operation of a military dining facility” which were extant as of the October 17, 2006 publication of the law. This is in essence a temporary freeze on contract competition between extant RSA/JWOD contractors for cafeteria services. It is in effect a “no poaching” provision, for contracts extant as of the day of the passage of the law.<sup>25</sup>

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<sup>21</sup> National Defense Authorization Act for Fiscal Year 2006 Pub. L. 109-163.

<sup>22</sup>NDAA for Fiscal Year 2006, Pub. L. 109-163.

<sup>23</sup>Joint Report to Congress. Section 848 of the National Defense Authorization Act for Fiscal Year 2006: Application of the Javits-Wagner-O’Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facilities Contracts, August 29, 2006.

<sup>24</sup>John Warner Defense Authorization Act for the Fiscal Year 2007 (JWA); Section 856, Pub. L. 109-364, 120 Stat. 2347, Oct. 17, 2006, at <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title41/pdf/USCODE-2009-title41-chap1-sec47.pdf>.

<sup>25</sup> Petitioner’s position is that this law’s utility is limited to the prior and not the future and that JWOD only applies in two instances: to contracts poached before October 17, 2006 and to subcontracts.

## **Other Non-Binding Policy Guidance<sup>26</sup>**

**DoE Commissioner Carney (1992)**<sup>27</sup> stated if DOD had an in-house operation of cafeteria then there would be no RSA obligations.

**DoE Commissioner Schroeder (1999)**<sup>28</sup> stated for solicitation of offers of operation of the cafeteria RSA applies; but for the issue of what food services on military bases constitute the operation of a cafeteria under the RSA, the DoE will assess on a case-by-case basis.

**Prior case law:** Prior to the promulgation of the August 29, 2006 Joint Report by the DoE, DoD, and CFP, the United States Court of Federal Claims (COFC) had issued two opinions interpreting the application of the RSA to DFA services contracts.<sup>29</sup>

**Washington State Dep’t of Servs. for the Blind v. United States**, 58 Fed. Cl. 781, 794 (2003). The case upheld a contracting officer’s ruling as not arbitrary or capricious, that the correct meaning of “operate” and “operation” of a dining facility under the RSA, did not include a contract for DFA performing janitorial functions, and hence, the RSA did not apply.

**Mississippi Dep’t of Rehab. Svcs. v. United States**, 61 Fed. Cl. 20 (2004). The court allowed the RSA to apply. “In summary, the contractor is required to manage the cafeteria, prepare the food, serve the food, provide cleanup and cashier services, implement quality control and training programs, provide certain supplies and equipment and hire the personnel, both managerial and support. Of particular note, the contractor is in charge of day-to-day management of the facility, a function to which we afford great weight. See also Louisiana Office of Rehab. Svcs., Civ. No. 98-1392. It is thus apparent that the contractor is responsible for the daily functions of the facility and in that regard must be considered the facility’s ‘operator.’”<sup>30</sup>

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<sup>26</sup> The below items (a-g) are likely not legally binding. Petitioner points out the following. The Joint Report is not legally binding. [Moore’s Cafeteria Servs. V. United States, 77 Fed. Cl. 180, 186 (2007), *aff’d*, 314 F. App’x 277 (Fed. Cir. 2008)]; and (Georgia Vocational Rehabilitation Agency v. United States Department of Defense, Department of the Army, Fort Stuart, Case no. R/S 13-09 (January 11, 2016) at 13. (Petitioner’s Exhibit 15 at Ex. C) The Proposed Rule Amending Defense Federal Acquisition Regulation (DFARS) has not been voted on by Congress.

<sup>27</sup> Washington State Dep’t of Servs. for the Blind v. United States, 58 Fed. Cl. 781, (2003); see p. 2, *at*, <http://docplayer.net/3178066-In-the-united-states-court-of-federal-claims.html>

<sup>28</sup> Mississippi Dep’t of Rehab. Svcs. v. United States, 61 Fed. Cl. 20 (2004) 13, *at*, <http://www.wifcon.com/cofc/03-2038c.pdf>

<sup>29</sup> These cases do not appear to “conclude what ‘operation’ means and did not hold that the RSA does not apply to DFA services contract.” Kansas v. United States, 171 F. Supp. 3d 1145 (D. Kan. 2016).

<sup>30</sup> As observed in the prior footnote, this language did not resolve the definition or limitations of “operator.” Mississippi Dep’t of Rehab. Svcs. v. United States, 61 Fed. Cl. 20 (2004) 13, *at*, <http://www.wifcon.com/cofc/03-2038c.pdf>



**Joint Report** <sup>31</sup> **under JWOD (2006)** – deals with priorities between both JWOD and RSA per CFP procurement list as each assist blinds vendors regarding operation of dining facilities; but which law for what?

Joint Report on the issue mandated by Section 848 of the National Defense Authorization Act for Fiscal Year 2006 requiring the DoE and DoD, which was completed on August 29, 2006. <sup>32</sup>

Joint Report **advises** Congress (2006)

No poaching (enacted by JWOD)

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. 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**. [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).

**Joint Report Analysis** (2006): Following the submission of the Joint Statement to Congress, and, following passage of the John Warner Act (JWA), the NDAA of 2007, <sup>33</sup> the 3 agencies, DOD, DOE and the CFP, agreed to an analysis of the previously submitted Joint Report To Congress. <sup>34</sup> The Analysis stated, 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.

**Joint Explanatory Statement of the National Defense Authorization Act for Fiscal Year 2015 (JES)** <sup>35</sup>

The 2015 NDAA incorporates a “Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2015” <sup>36</sup> The Explanatory Statement

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<sup>31</sup> Joint Report to Congress. Section 848 of the National Defense Authorization Act for Fiscal Year 2006: Application of the Javits-Wagner-O’Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facilities Contracts, August 29, 2006, at <http://www.acq.osd.mil/dpap/policy/congress/pdf/Section848-20060908.pdf>

<sup>32</sup> NDAA for Fiscal Year 2006, Pub. L. 109-163.

<sup>33</sup> Section 856, Pub. L. 109-364, 120 Stat. 2347, Oct. 17, 2006.

<sup>34</sup> Section 848 of the National Defense Authorization Act for Fiscal Year 2006 Joint Policy Statement: Application of the Javits-Wagner-O’Day Act and the Randolph-Sheppard Act to the Operation and the Management of Military Dining Facilities Contracts.

<sup>35</sup> Public Law 113-291.

<sup>36</sup> It states “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. The Arbitration Panel, based on the record, is unable to conclude there is legal consequence to this statement. The record is devoid of any “house rules” in Congress that address this issue. See also, <https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT92738/pdf/CPRT-113HPRT92738.pdf>, p. III. And see, See Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003) [non-binding nature of a JES].

states that Congress tried to resolve this long-standing issue whether the RSA applies to DFA contracts “by requiring a Joint Policy Statement in section 848 of Public Law 109-163 and enacting a permanent ‘no poaching’ provision in section 856 of Public Law 109-364.” However, the Explanatory Statement further explains 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.”

The Explanatory Statement further adopted the findings of the 2006, Joint Report prepared by the DoE and DoD and the CFP and stated: “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.”

### **Implementing Rule proposed but not yet finalized.<sup>37</sup>**

**Congress mandated in the 2015 NDAA** and the accompanying JES that the DoD (not DoE) publish regulations within 180 days of the 2015 NDAA enactment implementing the 2006 Joint Policy Statement adopted by DoD, DoE, and the Committee, and “specifically address DOD contracts that are not covered by section 856 of Public Law 109-364.” The proposed rule was submitted to the Office of Information and Regulatory Agency, Office of Management and Budget for distribution and coordination with federal agencies in February 2016. On June 7, 2016, the DoD published its proposed rule in the Federal Register to amend the DFARS and thus clarify the application of the RSA and the CFP statute (JWOD) to the operation and management of military dining facilities. The 60-day public comment period ended on August 8, 2016.

## **C. Analysis and Conclusions of Law**

The Parties agree that at a military facility, the RSA applies to contracts for the full-service operation of cafeterias that includes the support services of janitorial and clean-up at the dining facility. The Parties disagree as to whether the RSA applies to a single contract for only the support services so that a blind vendor through the SLA is eligible for that contract. The Petitioner agrees in this arbitration it has the burden of proof by substantial evidence to show the Respondent violated the RSA. A number of issues relating to the question of whether the RSA applies to a DFA-only contract solicitation, discussed below, are addressed.

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<sup>37</sup> THE NATURAL CONSEQUENCE OF DEFINITIONAL CONFLICT AND THE CONFLICT OF PRIORITIES Defense Federal Acquisition Regulation Supplement: Food Services for Dining Facilities on Military Installations (DFARS Case 2015-D012), A Proposed Rule by the Defense Acquisition Regulations System on 06/07/2016, at, <https://www.federalregister.gov/documents/2016/06/07/2016-13257/defense-federal-acquisition-regulation-supplement-food-services-for-dining-facilities-on-military>

## *Eligibility*

Is the Respondent placing a limitation on the operation of a vending facility by pulling back its cafeteria service to an in-house operation, changing its full service FFS contract requirements to a DFA contract?

Respondent explains its decision by noting that it contracts out these services when its core cafeteria staff of soldier-cooks, etc. are deployed overseas and are unavailable to function for the soldiers remaining on base. In recent years the troops have been returning from Iraq and Afghanistan and are available to resume their cafeteria functions. However, by Army regulations soldiers are precluded from DFA duties. In 2012 the Army Regulations governing its food service program and polices were modified to differentiate between two types of dining facility operations – FFS and DFA and it maintains that a FFS service contract requires the contractor to operate the entire military dining facility including performing the food preparation as well as the janitorial functions.

Petitioner agrees that the change by Respondent of resuming its own in-house FFS work caused its prior FFS contract to be lost and the available DFA jobs made unavailable to it by Respondent in the solicitation in question. This, it argues is a limitation placed on the operation of a vending facility in violation of RSA section 107(b)(2). Respondents argue the RSA provides a priority for blind vendors in *the operation of* vending facilities, and the “*of*” is significant in that the language does not say that such vendors get a priority for operation *in*, or operation *at*, a cafeteria or other vending facility. It is argued that to allow the latter would expand the priority to blind vendors *at* cafeterias or *in* cafeterias and if that had been the purpose of the drafters it could have been stated more clearly. So, Respondent argues, for blind vendors to obtain a priority, they must be “operators” of the facility and if they meet that precondition they will be eligible under the RSA.

The Arbitration Panel notes that under the 2007 JWA no-poaching provision, a “prime contract for operation of a military dining facility” (left for RSA) is distinguished from one that is “supporting the operation” (left for JWOD). JWA reflected the 2006 non-binding Joint Report which had distinguished the FFS and DFA contracts. While there is some logic to think that the Army returning to an in-house status is a change producing a limitation, such a conclusion without clearer legislative guidance would seem to too heavily impact the Army’s ability to operate. Therefore, the Panel is disinclined to accept the argument and does not find RSA section 107(b)(2) violated.

Whether DFA services are “pertaining to the operation” of cafeterias on a federal facility?

Under the RSA, blind vendors were provided priority to operate vending facilities at federal facilities. This was later expanded to include dining facilities and cafeterias. The full service, FFS, activities included the DFA functions of janitorial services. There always seemed to be a primary food component to the blind vendors’ activities. At the

same time, JWOD and JWA recognized there was a separate function under an individual DFA contract and thus inform the interpretation and application of the RSA in this arbitration. This demonstrates though the functions may be related – prepare, serve, and clean up, nevertheless they are separable and under existing law in effect and they may be contracted separately. If the prime contract is for FFS, the blind vendor has the priority under RSA even as the FFS single contract includes DFA duties. If it is a single contract for DFA, other non-profits are authorized to bid.

While at best, it may be arguable that blind vendors are not precluded by law from being solicited for the contract notwithstanding non-legally binding, possibly-evolving, policies and regulations to the contrary, suggesting blind vendors may soon be ineligible for these DFA contracts. However, that legal conclusion calls for more legislative guidance; which while perhaps evolving and awaiting new rules/regulations, are not yet legally binding. The “no poaching” language in 856(a)(2)(B) in the JWA doesn’t appear to explicitly preclude the Petitioner’s argument, but neither does it clearly support it. Therefore, on balance, the Panel is disinclined to find that Respondent violated the RSA by not including the blind vendors in the solicitation at issue, and so finds.

#### Other Non-Binding Policy Guidance

It is clear there are policy statements and a pending regulation all calling for delineation between FFS and DFA functions, with the DFA functions falling outside the RSA. While these policies are perhaps indicative of the emerging intent on the RSA eligibility of blind vendors for DFA contracts, nevertheless there is sufficient basis without it under existing statutes to conclude the Respondent has not violated the Randolph-Sheppard Act when it solicited a contract for Dining Facility Attendant without applying the priority and procedures of the Act.

The Panel cannot help but note that it seems strange indeed why after all these years of differing views on how to resolve this issue, the Department of Education has not assumed its role of over-seeing the RSA and clarifying the issues by appropriate regulations.

#### **Conclusion and Holding**

Based on the record as a whole, the Arbitration Panel finds the Petitioner has not met the burden of proof by substantial evidence and concludes the Respondent, Department of the Army, did not violate the Randolph-Sheppard Act in its regulations when it solicited a contract for Dining Facility Attendant (“DFA”) services at Schofield Barracks without applying the priority and procedures subject to the Randolph Sheppard Act (“Act”).

Ronald C. Brown Panel Chair

Dated this 31<sup>st</sup> day of July 2017

## CONCURRING OPINION

Department or Education Arbitration, Case No. R-S/1607, Hawaii Department of Human Services, Division of Vocational Rehabilitation v. United States Department of the Army, Schofield Barracks Hawai'i. Statement of Panel Member Vincent J. Faggioli, CONCURRING IN THE DECISION FOR THE ARMY.

INTRODUCTION: I concur in the opinion by the panel chair, Professor Brown, that the Respondent, Department of the Army, did not violate the Randolph-Sheppard Act (R-SA) when it solicited for Dining Facility Attendant (DFA) services at Schofield Barracks, and Wheeler AAF, Hawaii, without the R-SA priority. However, the contradictory, vexing and contentious nature of myriad court and arbitration decisions, in fact situations identical to ours, make it prudent to peruse the history of the Randolph Sheppard Act (R-SA) over the last 7 decades. By now, the question of the Randolph Sheppard priority for Dining Facility Attendant (DFA) solicitations, should be firmly decided. At the very least, the Department of Education (DOE) should have provided authoritative guidance. Yet, as keeper of the flame of interpretation, DOE, (Rehabilitation Services Administration) has failed to authoritatively elucidate this issue. Instead, DOE subjects the Army, SLAs and their contractors, to a purgatory of relentless combat, litigating every solicitation for DFA contracts. Every solicitation summons legion attorneys and advocates for both sides, who join the persistent combat, over whether the priority should be applied. This is disgraceful, and unnecessary, given the ease with which an authoritative policy could be issued. The brouhaha surrounding every solicitation for DFA services proves that clarification is needed.

The issue is not whether Congress intended to favor blind entrepreneurs with a priority to operate facilities. It did. And, the majority does not disagree that if the solicitation is for "the operation" of a dining facility, then the R-SA priority reigns supreme. That is a big IF, and Nish

V. Cohen and Nish V. Rumsfeld, cited by the dissent (SEE, dissent p. 5) deal with whether or not

R-SA applies to military dining facilities. It does, but that is not the issue before us. The question is, whether they intended to favor blind entrepreneurs in every situation, even those **not involving** operation of facilities by the blind. If writing on a tabula rasa, unmoored from the history and purpose of the R-SA, I would find, as does the dissent, in favor of Mr. Chinn, and the Hawaii SLA Ho'opono. By all accounts, for years Mr Chinn has done a good job operating Schofield and Wheeler dining facilities under a Full Food Service (FFS) contract.<sup>38</sup> Nevertheless, because the Army has chosen to *operate* the

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<sup>38</sup> This case like *Washington, infra*, represents a change from the contract held by the SLA (from 2011 to 2016) to **operate** dining facilities at Schofield Barracks and Wheeler AAF (FFS AND DFA services), to a contract for DFA services only, for which no priority was accorded to the SLA/Mr. Chinn. The PWS at TAB 10 of Respondent's pre-hearing submission, provides, for the 2011-2016 solicitation for SLA/Mr. Chinn, at C.1: The Scope of Work, "Contractor shall provide all personnel, supervision...to perform Full Food Service **and** (emph.added) Dining Facility Attendant (DFA) in dining facilities located at Schofield Barracks and Wheeler AAF..." In the definition section, C.1.1, FFS is defined as "Those activities that comprise the full **operation** (emph added) of an Army dining facility." DFA service is defined as: "Those

dining facilities in-house, it no longer needs Mr. Chinn, to do so. And, since R-SA contemplates that a priority for a solicitation will be given to SLA designees for *THE operation* of a vending facility, Mr. Chinn does not qualify for a priority for DFA services. As a result, the decision of the Army to solicit, under the provisions of the Small Business Set-aside program, was not a violation of the R-SA.<sup>39</sup> The facts upon which this decision rests, are set out in the submissions of the parties and in the majority decision. That which follows focuses on relevant legal and factual issues in the statutory and regulatory background of the R-SA, and case law filling the definitional vacuum created by the exegesis of the priority from operating vending stands to operation by blind vendors of large, high-volume, multi-million-dollar dining facilities. In this case, the Army altered the status quo FFS requirement by instituting in-house operation of the dining facilities. This exercise of discretion, meant that there was no longer a contract available to operate a dining facility. The need was limited to DFA services. Since the DFA contract would not be for “operation” of the dining facility, the Army sought to use a Small Business set aside contract to obtain these services, but the legal system was interposed.<sup>40</sup> So, the Army could not hire a small business, and Mr. Chinn serves as DFA contractor, until instant entanglements are resolved.

Some of the objections raised by the Dissent do not merit specific responses. However, I have attempted to interject certain rebuttals to the dissent herein. Hopefully this opinion and reference to the views of the dissent will avoid use of terms like “Illogical,” or “absurd,” as used by the dissent, to describe the majority views. This area of law is not absolutely, crystal-clear or well-settled as the dissent seems to assert. There

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activities which comprise janitorial and custodial functions within a dining facility including, but not limited to; sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning and related quality control.” FFS involves operation of a dining facility and DFA is a cleanup service contract. This PWS and SOW became the contract which the SLA agreed to. The SLA and contractor are advised of the importance of this distinction at C.5.1 of the PWS pertaining to specific tasks for FFS: “The contractor shall be responsible for the performance of FFS services...The Government reserves the right to reduce services to DFA upon return of military food service staff. The Government shall provide 30-day notice to establish a FFS operation or to reduce services to DFA.” The difference made clear to the SLA/Contractor, between FFS and DFA is clear. FFS=operation. DFA=cleanup services. These provisions are in the contract that governed SLA/Mr. Chin’s services.

<sup>39</sup>This discussion is prolix, but not unnecessarily so. Interpretation of R-SA is labyrinthine and calls for focused scrutiny. Given the lack of guidance from the DOE, the Army, legal practitioners, SLAs and blind entrepreneurs seek evidence to buttress their positions, as to what the drafters of the statute would have intended had they known the future. As a result, we use all relevant and informative evidence in the search for the proper application of a R-SA priority. Our arbitration is not a court of law and the rules of evidence do not apply. We seek and have used relevant evidence seeking to discern when it is proper and legal to apply the priority.

<sup>40</sup> Again, there is no dispute on the set of facts set forth by Petitioner at Exhibit 13 which in essence stipulates that the Army denied the SLA a priority under the R-SA for DFA contracts in favor of the Small Business set aside program. The facts are set out with sufficient particularity in the principal decision, pp. 2-3. While the Small Business set aside program was used here, there are other socio-economic concerns favored in government contracting, (15 U.S.C. § 644; 48 C.F.R. §§19.502-2 & 19.502-3). Government contracts can be set-aside for small businesses in the following certification programs: 8(a) Business Development, HUB Zone Program, Women Owned Small Business (WOSB) Program (Includes Economically Disadvantaged Women Owned Small Business concerns and Service Disabled Veteran Owned Programs (SDVO). All are worthy. Yet, the priority under R-SA trumps them all, when the solicitation is for operation of a dining facility.

is room for disagreement without being disagreeable. Hopefully, I can walk that line.

**CONCURRING RATIONALE:** Ho’opono and derivatively Mr. Chinn were not qualified to receive a priority for the solicitation for DFA stand-alone services for Schofield Barracks and Wheeler AAF Dining facilities (RFP W912CN-16-R-0005). The language of the R-SA statute, as amended, (1936, 1954, and 1974), the provisions of DOE Regulations implementing R-SA (34 CFR), written discussions by DOE (HEW), Joint Reports and Analysis by the agencies involved, court cases by courts of nationwide jurisdiction (Court of Federal Claims), NDAAs of 2006, 2007 and 2015, and concurrence by DOE with the proposed DFARs guidance adopting the Joint Report, do not provide R-SA priority for DFA solicitations. Thus, the contracting officer did not violate the law by using small business set aside procedures instead of R-SA procedures for DFA services at Schofield and Wheeler dining facilities.

If a law is unambiguous then it is unnecessary to delve into its history, case, law and definitional debate. The R-SA is not such a law. Courts and panels alike have complained as to the confused state of analysis concerning the priority for R-SA contractors.<sup>41</sup> The confusion results, from parties trying to interpret and apply the law in a way which benefits them. In the case of the R-SA community, it seeks to obtain DFA contracts in the absence of FFS solicitation availability. In the case of the Army, it draws a distinction between FFS and DFA solicitations and application of the priority based on its interpretation of statutes and regulations and military necessity. This allows military dining facility personnel to practice their trade to prepare for deployment by operating dining facilities in-house. However, when the need arises, as it did during the period of Middle-East deployment, military dining facilities had to be operated nationwide by SLA appointed-contractors such as Mr. Chinn. In our case, only when it became unnecessary for the Army to hire a contractor to operate the dining facilities as a FFS contractor, that Ho’opono/Mr. Chinn were left without an FFS contract. Understandably, having no FFS opportunity available, Ho’opono turned to compete for DFA contracts, which were and still are required by the Army, but for which the Army maintains, and we find, no R-SA priority exists.

The general rule in government contracting under the Competition in Contracting Act (10 USC 2304 et seq) is robust, full and open competition, not the granting of priorities. That competition is narrowed in favor of R-SA and other socio-economic purposes, in which case, competition is not full and open, but circumscribed. In our case, the majority has decided that competition may be circumscribed in favor of small

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<sup>41</sup> The exasperated tone of interpreters of the priority can be seen in every case and arbitration. While opinion writers complain about ambiguity and muddled historical development, they do, in the end, provide answers, which often conflict. No one has yet, however, resorted to the language used by George Chapman in 1654 or Charles Dickens in 1838 that “the law is an ass - a idiot.” Despite limited failed attempts at clarity, by both the Congress and Department of Education, courts and arbitration panels rarely agree on application of the priority. As was said in a 2016 Arbitration, Georgia Vocational Rehabilitation Agency v US Department of Defense, Department of The Army, Fort Stewart, Georgia, case no R/S 1309, pertaining to the distinction between Full Food Service and DFA services, “The result has been a consistent lack of clarity (a fog?) through which lawyers, judges, arbitrators and contracting officials have searched for an answer that has proved to be elusive.” Elusive answers are not good enough.

business, because the R-SA priority does not apply to DFA competition.

For a priority to be given over other worthy competitors for FFS services, a contracting officer must believe that the R-SA priority is proper in a given fact situation. And, ***IF*** R-SA applies, the SLA designee wins. The same cannot be said for variants of contracts, i.e., service contracts, that may occur in and around a dining facility, but do not require the contractor to operate the facility. These service contractors, such as DFA contracts, perform their duties in the dining facility, but they do not operate the dining facility. That is what this case is about; whether for DFA contracts, given the history and purpose of R-SA, the Army should recognize a priority for the R-SA contractor. If so, then the Army violated the R-SA. Or, if R-SA does not apply, then the Army may decide to award to other small business concerns. What does R-SA contemplate as a condition for the priority? The historical development of R-SA is somewhat Byzantine.<sup>42</sup> Though Byzantine, it is not impossible to interpret. But, interpretation must consider original intent and changes from 1936 until the present.<sup>43</sup>

**Randolph Sheppard Act, 20 USC Sec. 107.** Passed in 1936, the statute had a goal to help blind people to have economic opportunity by offering them **the opportunity to operate vending stands in federal buildings** (emph added).<sup>44</sup> Even in 1936, there were conditions attached to the opportunity. Foremost among them, was the condition that agency heads had the authority to limit blind vendors if their stands could not be “properly and satisfactorily **operated** by blind persons (emph added)”<sup>45</sup> Please note that the *sine qua non* of such stands was that the blind could satisfactorily “operate” facilities. Since then nothing has changed; the precondition is that the blind beneficiary “operate” the facility.

In 1954, recognizing the march of technology, and congressional dissatisfaction with opportunities provided to blind vendors, the statute was amended. The amendment was to ensure that the blind benefit would not be mooted by the advent of the vending machine, which seemed more popular among federal patrons than vending stands.<sup>46</sup> For the first time, agencies were required to give a preference to the blind, when feasible, when authorizing “the operation of vending stands on federal property.”<sup>47</sup> Again, we look at the words “operation” and “vending stands”. Both are easily interpreted. To “vend” is from the Latin meaning “to sell.” So, the law allows a place on a federal installation or building where the blind could “operate” a stand, to “sell” items to Federal patrons. Even early on, “**operate**” meant just that, to be in charge of their vending effort,

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<sup>42</sup> See, **Christianson, The Applicability of the Randolph Sheppard Act To Military Mess Halls**, April 2004, THE ARMY LAWYER • DA PAM 27-50-371, p. 1. See also, **Gaydos, The Randolph Sheppard Act: A Trap for the Unwary Judge Advocate**, THE ARMY LAWYER, April 1984, DA PAM 27-50-134, at 21.

<sup>43</sup> Randolph Sheppard Act, Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559 (1936) (amended 1954, 1974). 1936 Act hereafter. The somewhat tendentious rendition in Title 20, Chapter 6A covers the development very thoroughly.

<sup>44</sup> Unfortunately, for some, the term “operate” was not adequately defined in the statute. It did not have to be. The law gives a right to operate a vending stand, not operate within a vending stand owned by someone else.

<sup>45</sup> Supra note 6, at Section 1.

<sup>46</sup> Act of Aug. 3, 1954, Pub. L. No. 565, 68 Stat. 663 (1954). Referred to as the 1954 Act.

<sup>47</sup> 1954 Amendment Section 4(a).



effecting sales on Federal property. The Federal government recognized, in fact favored, these opportunities to sell, in small vending carts, or similar activities, by permission/permits vice contracts. In 1974 that changed as cafeterias were added under the vehicle of a contract instead of merely a permit.

**The 1974 Changes.** In 1974, after years of hearings, the 1974 Amendments were passed.<sup>48</sup> Problems then extant included military insensitivity to the program (42 blind vendors on those installations out of 490 potential opportunities); direct competition from vending machines; the preference of agencies for cafeteria operations vice vending stands; and the apparent reluctance of commanders to lose vending machine income to blind vendors.<sup>49</sup> The 1974 Act provided, for the first time, a **priority**, not just a preference or opportunity for blind vendors and included “cafeterias” as vending facilities under R-SA. New buildings were required to include satisfactory sites for blind vendors and vending machine income from any source, was to be paid to the blind.<sup>50</sup> This change opened new vistas for the blind as entrepreneurs, but introduced issues, such as the distinction between FFS and DFA contracts, not germane when the opportunity to sell wares out of vending carts was legislated.

Section 107a of the 1974 Act, while setting forth Federal and State responsibilities, provides at (a)(2), that the commissioner is to make surveys of the “concession vending opportunities for blind persons.”<sup>51</sup> A concession is aimed at vending activities, not cleaning or busboy opportunities. Section 107(b) authorizes SLAs to give a license for blind individuals for the operation of vending facilities on Federal property and provides after (b)(2) that “any limitation on the placement or operation of a vending facility” that adversely affects the interest of the United States will be reported to the Secretary of Education.” Note that here, unlike as stated by the dissent at page 3, fn 14, (107(b) vice 107b), there is no limitation on the placement or operation of a vending facility, i.e., a cafeteria. The section seems to apply to location, not disagreement as to the application of R-SA. There is no limitation on placement in our case, there is still a vending facility, the cafeteria and the operation has been taken in-house. It is just that the SLA/Entrepreneur is not asked to operate it as he is not qualified for a priority for this DFA contract. Again, the priorities and protections stated in (b)(2) are for the “operation of a vending facility,” not various service contracts such as janitorial or other support contracts on federal installations.<sup>52</sup>

Section 107a (a)(5) is instructive, providing that the Secretary of Education, shall, among other responsibilities, require (State) agencies “to issue licenses to blind persons, **for the operating of vending facilities**(*emph added*)...for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages and other articles or services dispensed automatically or manually and prepared on or off the premises...”<sup>53</sup> Here, the

<sup>48</sup> Act of Dec. 7, 1974 Pub. L. No. 516, 88 Stat 1623 (1974). See, Christianson, *supra* at 5 p. 24.

<sup>49</sup> Christianson, Id at 24 citing *1973 Hearings and Review of Vending Operations on Federally Controlled Property, Comp. Gen Rpt. No. B-176886* (Sept. 27, 1973).

<sup>50</sup> 20 U.S.C Section 107(b); Section 107(S)(1) and Section 107-3(b)(1).

<sup>51</sup> 20 U.S.C. Section 107a 1974.

<sup>52</sup> Note that “vending facilities” supplanted vending stands, without changing the “operation” prerequisite.

<sup>53</sup> 20 U.S.C. Section 107a (5). Thus, whether or not they prepared the food on the installation or prepared it

language involves the blind vendor selling, dispensing or making available products, to include food, in some instances, in order to receive a license. This continues to be an important azimuth when trying to understand what “to operate” means in the context of R-SA. It is noteworthy, that during this time, from 1936 until 1974 there were all kinds of cleanup contracts, busboy services, janitorial services on Federal facilities, but blind vendors were not given a priority for a license or a permit under R-SA for these services. The essence of R-SA is always operating and vending.

Other sections in 107 are illuminative, such as 107(b): “The State licensing agency shall, in issuing each such license **for the operation of a vending facility** (*emph added*), give preference to blind persons who are in need of employment.” It would have been easy for the drafters of the law to add vending facility cleanup as a stand-alone head for licensure. Instead, the focus remained on “operation of a vending facility” by the vendor. The statute speaks in terms of “the” operation, not simply operation. **The** (*emph added*) when combined with operation connotes management, more than merely anything going on within the facility. Vending and operation go hand-in-hand, as the *sine qua non* for priority.

Given the detail of the descriptions in this statute, and the lack of bus or cleanup service in that language, it would be strange, if such DFA services were intended to stand as a separate basis for priority. If that was the case, it would have been stated. From words of the statute, it is apparent that to trigger a priority, the key is to be an “operator” of a “vending” facility. This is confirmed in 107b(2) which provides that the State agency shall agree “to provide for each licensed blind person such vending facility equipment, and **adequate initial stock of suitable articles to be vended therefrom** (*emph added*), as may be necessary.” Again, vending by the blind licensee as he or she operates their facility, is integral to this law. In our case, the only “vending” proposed is the vending of services by the contractor to the Army, not the vending of articles (such as the sale of meals, and the operation of the cafeteria/dining facility) to patrons.

In Section 107d-3(e) of the R-SA, the attachment of the priority is inextricably tied to **operation by that licensee** of a facility providing food (not cleanup):

“The Secretary, through the Commissioner, shall prescribe regulations to establish a **priority for the operation** (*emph added*) of cafeterias on Federal property by blind licensees **when** (*emph added*) he determines... **that such operation can be provided at a reasonable cost with food of a high quality** (*emph added*) comparable to that currently provided to employees...”<sup>54</sup>

DFA services as stand-alone services, such as in this arbitration, have little to do with providing food of a high quality. The priority is not elastic enough to be stretched over any and all services **in** a cafeteria, especially those not anchored to a blind vendor operating a cafeteria. The priority is available for the blind contractor who operates a

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at another location and brought it onto the installation, it had to be their operation to get the priority.

<sup>54</sup> 20 U.S.C., Section 107d-3(e), entitled *Regulations establishing priority for operation of cafeterias*.

vending facility, not who provides cleanup services in support of it.<sup>55</sup> To interpret the language otherwise would elevate personal preference over what the law provides. A priority cannot be implied, but must be unequivocal. Given personal preference, I would give a priority for the DFA solicitation to Ho’opono. Given the language of the law, such a conclusion is not logical.

Further interpretive assistance is provided in the definitional section related to Section 107 of the 1974 Act where “vending facility” is defined as meaning:

“automatic vending machines, **cafeterias** (emph added), snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may **be operated by blind licensees**...”(emph added).<sup>56</sup>

Again “operated by” and vending appear in tandem. Cafeterias are *sui generis* with vending carts, machines, etc., and therefore, anticipate that the blind vendor operate it.

Through the decades, the R-SA has provided privileges, licenses, or priorities to blind vendors who operate those facilities, as in 107e (7). This obligation to “operate” holds the same meaning today as in 1936 and 1954, even though R-SA has long-since increased opportunities beyond vending stands to operating large multi-million-dollar cafeterias. To operate is the trigger for a priority. No statutory change has acted in derogation of that historical-legal verity.

**REGULATIONS PROMULGATED BY THE DEPARTMENT OF EDUCATION (HEW/DOE).** In accordance with the statutory mandate,<sup>57</sup> in 1977 HEW(DOE) promulgated final regulations. These now appear at 34 C.F.R. CH III, Section 395.<sup>58</sup> They attempted to interpret and fill gaps in the statute. They **should** have helped clarify what HEW/DOE believed was the predicate for blind vendors to obtain a priority. They did not. They discussed many less significant issues, but avoided meaningful discussion of the priority. The result has been decades of confusion.

Section 395.1(a) begins by referencing the R-SA as the “R-SA Vending Stand Act,” then section (d) defines “cafeteria” as being a food dispensing facility capable of providing a variety of prepared foods and beverages primarily through the use of a line

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<sup>55</sup> Again, when the language is clear, there is no need for varied interpretation. Here “operation” is used twice; First, a priority for the operation and Second, when “such” operation meets certain food standards.

<sup>56</sup> 20 U.S.C. Section 107e(7). The items referred to as being appropriate for operating a vending facility with the preference include the “vending” of newspapers, periodicals, confections, tobacco products, foods beverages and other articles or services dispensed automatically or manually and prepared on or off the premises...” Vending by whom? Vending by the R-SA licensee who is operating the facility.

<sup>57</sup> Id. At 107d-3(e).

<sup>58</sup> 34 CFR Ch. III (7-1-10 Edition, p. 428.). The regulations culminated a years’ long process from 1975 69II 1977.

where the customer serves himself or displayed selections.” Here, early on, we see that reference is made to food dispensing, and nothing about cleaning or providing DFA services. Section (x) continues the theme by defining a “vending facility” (the springboard for blind licensee priority) as meaning,

“automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment ***which may be operated by blind licensees*** (emph added) and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, food, beverages and other articles or services dispensed automatically or manually...”

Do cleaning or busing fit the definition of vending facility? Apparently not. This is more evident, because in no small measure, the function of cleaning is not *sui generis* with the stated items appropriate for vending. Cleaning and janitorial services are required, but, should blind vendors receive a priority over all others in providing these or other support services as opposed to operating the facility? Yes, the priority for an R-SA contractor is superior to all others in the limited universe of operating a dining facility, not in the way suggested by the dissent. The dissent on page 3 cites two cases to show that the R-SA is superior to an 8(a) priority. Indeed it is, in the right circumstance. The cases cited are the Intermark and ACSI cases, which deal with whether R-SA applies to military cafeterias. In fact, those cases are both FFS operator contracts, not DFA contracts. They have nothing to say about DFA service contracts and are inapposite to the issues in our case. In a FFS scenario, it is true R-SA priority is the winner. But, the cases cited do not apply in DFA scenarios.

One of the principal inquiries in our case is what does “operate” mean in terms of obtaining a priority for operating a dining facility? Court and arbitration opinions in the past have complained that “operate” is not defined. However, it is obliquely defined. In 1975 HEW set out proposed regulatory changes to Chapter IV of Title 45 of the Code of Federal Regulations (the antecedent to Section 395 et seq) and proposed revocation of previous guidelines established by HEW pertaining to the Randolph Sheppard Act.<sup>59</sup> Here, in Part 1369, definitions were set out regarding the Vending Facility Program. There are two definitions of note. “A Blind Licensee” is defined as a blind person licensed **to operate** a vending facility on Federal or other property.<sup>60</sup> Then, operator is defined. “...(k) “operator” means a blind person licensed **to operate** a vending facility on Federal or other property.”<sup>61</sup> To say that this is tautological is an understatement. Unfortunately, a more meaningful definition was not set out to dissipate the persistent fog of conflicting interpretations as to what it means to “operate” a facility.

To bring the definition of “operator” up to date in the final regulations, we look to the Preamble/supplementary information related to the 1977 final version.<sup>62</sup> There, in a discussion of the significant areas of comment on the proposed regulations from the

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<sup>59</sup> Federal Register, Vol. 40, No. 247-Tuesday, December 23, 1975, p. 59408 et seq.

<sup>60</sup> Id. At Section 1369.1(b).

<sup>61</sup> Id at (k).

<sup>62</sup> Federal Register, Vol. 42, No. 56-Wednesday, March 23, 1977, p. 15802.

1975 Federal Register notice, is a subparagraph explaining the definition of “blind vendor.”<sup>63</sup> Not surprisingly, as just discussed, of the many comments received by HEW, many of them involved the two terms that were used unchangeably in the 1975 notice. As discussed earlier, both of these referred to a blind person **operating** a vending facility. Again, these terms were “blind vendor” and “operator,” both of which were defined to mean “a blind person licensed to operate a vending facility...” HEW recognized that these terms needed clarification, and the term “vendor” was substituted for both terms in the 1977 final version of the regulation. Vendor now means a blind licensee ***who is operating a vending facility***.<sup>64</sup> This change to the regulations continues the theme that a blind licensee is to **operate** a vending facility to obtain the priority.

According to law and regulation, blind vendors, to obtain a priority, must not only operate the facility, but food must be provided. That is what separates the contract for operation of a cafeteria, from contracts to perform duties such as DFA services **in** a facility. There is a quantum difference between operating a cafeteria and operating **in** a cafeteria. Section 395.33(a)<sup>65</sup> of the 1977 regulations provides that, “***Priority in the operation of cafeterias*** (emph added) by blind vendors...shall be afforded ***when*** (emph added) 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.” This provision parrots the R-SA without adding further light. Further light is not needed. If cleanup or busboy services were contemplated for the priority, how would that cleanup responsibility dictate whether food is provided at reasonable cost and high quality? It should be noted that the dissent asserts that because this provision provides that Cafeteria operations “shall be expected to provide maximum employment opportunities to blind vendors...”, that award to anyone else for anything else to do with a cafeteria would be violative of the regulation. That is not the case, otherwise blind vendors would be competing for and awarded contracts for painting the facility, building the facility, wiring the facility, replacing windows in the facility or any number of activities having anything at all to do with cafeterias. Pretty clearly the intent of the language is that a priority is available when the blind vendor **operates** a cafeteria and is able to provide high quality food in that cafeteria. There is no language that specifies that such priority is available to one who provides cafeteria support service in the facility, such as DFA services. DFA services are not grounded in the foundation of a vendor being an “operator” or “operating” the food service facility. DFA services are bereft of the priority for those who “operate” facilities. The next paragraph, Section 395.33(b), when discussing the priority in the operation of cafeterias by blind vendors, gives guidance relative to SLA responsibilities when a cafeteria management contract is contemplated. Here are the criteria by which SLA offers will be judged: “***Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices.***” These are dining facility operating standards. They contemplate operating food services, not participating in such operation. These are part of “operating.” They connote management.

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<sup>63</sup> Id. at 15803 para 1.

<sup>64</sup> Id. at 15811 para (aa). Note, the words are operating a vending facility, not operating **in** such facility.

<sup>65</sup> 34 CFR Ch. III (7-1-10 Edition) p. 440. (Section 1369.33(a), Fed. Reg., Vol. 42, No. 56, Wed., March 23, 1977, p. 15816

The dissent strongly believes the next Section, 395.33 (c), cures the aforementioned deficiencies, and provides, **for the first time**, a priority for DFA services. (SEE, Dissent page 7). Such an interpretation would expand the instant regulation to apply beyond *operating a cafeteria*, to those operating **in** a cafeteria, such as DFA services. This interpretation would recognize, for a priority, those acts which may be related to the operation of a cafeteria, but fall short of operating the cafeteria. Section 395.33 (c) provides that,

“All contract or other existing arrangements pertaining to (emph added) 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.”

What does “pertaining to” mean? Does it mean that providing any services **in** the cafeteria qualifies for a priority? Does it mean that any service at all, related to, or pertaining to operation (by someone else) of a cafeteria qualifies an R-SA vendor for a priority? The dissent confidently says yes. But this interpretation relies on the first phrase of the provision, and ignores the remainder of it. The language begins by referring to pre-existent contracts or arrangements for “the” operation of cafeterias. It does not mention support services for those operations. Then it says, that the contracts/arrangements are to be renegotiated after the date of this regulation, on or before their expiration. The key, however is that the contracts or arrangements must relate to the operation of a cafeteria, not simply support of that operation. Also, Section 395.33(c) is a transitional provision. This is explained in detail in one of the cases examined hereafter, the Washington case.<sup>66</sup> There, referring to this very provision and this very word, “pertaining,” the court says this clause is a;

“transitional provision intended to assist in the implementation of R-SA, rather than to mandate the application of R-SA to all contracts relating in any way to the operation of cafeterias on federal property. The “pertaining to” phrase relates only to the coverage of the transition to R-SA, the court notes that subsections (a), (b) and (d)...contain cross-references between and among each other, but contain no cross-references to subsection (c) of 34 C.F.R Sec. 395.33.”

This seems to be the correct interpretation of the words of the regulation, “pertaining to,” which were created in 395.33(c), without explanation in the regulatory Preamble, and do not appear at all in the statute. The regulation was written after the statute, which included for the first time “cafeterias” under the R-SA. So, between the time of the implementation of the statute in 1974 and the regulation in 1977, there developed confusion as to the impact of the regulations on existing cafeteria operations by R-SA contractors or others. It was not contemplated that existing arrangements be revoked, but that they be renegotiated upon expiration of those arrangements, with the R-

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<sup>66</sup> Washington State Department of Services for the Blind and Robert Ott, Plaintiffs, v. The United States, Defendant, 58 Fed. Cl 781 at 790; 2003 U.S. Claims LEXIS 381.

SA contractors if R-SA applied. Surely, it was not the intent of the drafters of the regulation to introduce, for the first time, without fanfare or further elucidation in the regulation itself, non-operator, support DFA contracts as a recipient of the priority.<sup>67</sup> And, if they did, such an extension of a priority without statutory authority would be *ultra vires* the statute. Referring to the history of the language of the 1936, 1954 and 1974 statutes, it was always contemplated that the blind “operate” their vending stands, vending machines or cafeterias, not perform duties “pertaining to” those operations. But how, really, did this talismanic phrase come to be?

This phrase, “pertaining to” is key to the Ho’opono case, and central to the logic of the dissent, and is used to claim that the R-SA priority applies to DFA contracts, as they **pertain to** dining facility operation. As stated earlier, to SLA advocates, the 1977 Regulations, especially this phrase “pertaining to” extended, beyond the intent of the R-SA, the reach of R-SA vending facility priorities, to include every conceivable activity that pertains to the operation of a cafeteria. Is there interpretive material in the regulations?

We look first to the Preamble and explanatory statements for the Regulations, at Fed. Reg. Vol. 42, No. 56, March 23, 1977. There, the reasons for the Regulations adopted in 1977 are explained. We look for the words “pertaining to,” in the Federal Register explanation as to when the priority should apply. We look in vain. If radical expansion was intended, why is there no mention or highlighting at all, of the phrase “pertaining to” in the Preamble/supplementary information? There is not a hint of the phrase. Yet, it is seized upon as expanding, for the first time, the priority to DFA contracts.

Notwithstanding a great deal of explanatory material in the supplementary information dedicated to such matters as, the division of profits from vending machines, and other procedural issues, the words, allegedly of earth-shattering import, specifically, “pertaining to,” are, aside from the obvious temporal clause of Section 395.33(c), not mentioned at all.<sup>68</sup> Even in the paragraph specifically dealing with the operation of cafeterias by blind vendors,<sup>69</sup> **paragraph 9** of the supplementary information, there is no mention of “pertaining to.” Paragraph 9 is the source of detailed information concerning Section 395.33 - the home of the phrase “pertaining to.” Paragraph 9 is extensive, yet does not mention “pertaining to.” It discusses the requirement of the 1974 R-SA, that a priority is now established for the “operation of cafeterias,” yet omits any discussion of “pertaining to.” It explains that blind vendor groups commented that the proposed

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<sup>67</sup> To hold otherwise would by regulation provide a broader priority than the Act itself. An implementing regulation cannot have broader impact than that given by the statute, especially when it bestows a priority that trumps all other socio-economic programs such as Disabled Vets, HUBZONE, 8a contracts etc.

<sup>68</sup> Fed. Register, Vol 42, No. 56, March 23, 1977 at 15802 et seq.

<sup>69</sup> Id at 15809 paragraph 9. This section, 9, is replete at p. 15809 confirmation that R-SA requires blind vendors to operate a cafeteria. For example, column 3 at the top speaks in terms of a priority when the SLA offer for the operation of a cafeteria is within the competitive range; It continues to explain that the offer need not be the best overall in to win competition for the operation of the cafeteria. This can only be reasonably read to be speaking of overall operation by the blind vendor, not merely pieces of the operation.

regulations did not provide for an adequate priority, even as others complained that the proposed priority gave blind vendors too great an advantage. In response to comments received, a definition of cafeteria was added as Section 1369(1)(d) ((395(1)(d)) and provided for direct negotiations with Federal agencies by the SLA to increase the power of the priority. Yet, no mention is made, in this critical paragraph, concerning expanding the activities available to SLAs, to **any or all** activity “pertaining to” a cafeteria. If such expansion was intended it would have been mentioned and discussed.

Other changes are also discussed in paragraph 9, which are intended to strengthen the priority. Most of these deal with the negotiating position of SLAs. Nevertheless, there is no mention of “pertaining to” as a means of expanding the universe of work for which SLA competitors would receive a priority. In fact, the penultimate paragraph of column 3 of page 15809, discusses direct negotiations as a means of strengthening the priority. There it is said that:

“These negotiations will be undertaken to determine whether the State licensing agency is capable of **directly operating** (emph added) the cafeteria in a manner comparable to the operation of a cafeteria by a private firm, within the food service industry. If...the State licensing agency.... **can operate a cafeteria** (emph added) at a reasonable cost with food of high quality, a contract will be awarded to the State licensing agency.”

The last paragraph of page 15810 then limits the impact of these changes to a temporal scenario:

“Insofar as their impact on existing contracts or other arrangements is concerned, it is noted that it is not intended that such contracts or other arrangement be immediately revoked. It is expected that upon the expiration of existing contracts after these regulations have become effective, however, negotiations will be undertaken in accordance with these regulatory requirements.” (Fed. Reg. Vol. 42, No. 56, March 23, 1977, p. 15809-10).<sup>70 71</sup>

The language of Section 1369.33(395.33) requires “directly operating,” as a predicate for a priority. It provides at (a), (b) and (d) substantive rights to priority for **directly operating** cafeterias where direct negotiations are authorized. Subparagraph (c) however is different. There for the first time “pertaining to” appears. It provides that if other contracts or existing arrangements for the operation of cafeterias are extant, pertaining to cafeteria operation, then rather than termination of such operating contracts, those contracts may continue to their expiry and then the provisions of (a), (b) and (d) take effect to make award for the “operation” of a vending facility by the blind.

This interpretation is made even more clear in the same regulation, in a companion paragraph, related **only** to the operation of vending machines. There the

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<sup>70</sup> Fed. Reg. Vol. 42, No. 56, March 23, 1977, p. 15809-10.

<sup>71</sup> Please note the parallelism between this explanatory provision and Section 395.33(c), except for the absence of the term “pertaining to” in the supplementary material.



phrase “pertaining to” is used in a way that cannot possibly be interpreted to be an expansion of preference or priority. At paragraph Section 395.32(h) it states:

“(h) All arrangements **pertaining to** (emph added) the operations of vending machines on Federal property not covered by contract with, or by permits issued to, State licensing agencies, shall be re-negotiated upon the expiration of the existing contract or other arrangement for consistency with the provisions of this section.”

This exact language applies only in a temporal sense, to issuing permits or contracts upon expiration of existing agreements. It cannot be said here that the intent is to gather in any or all activities in any way pertaining to vending machines. Likewise, the language in 395.33(c) cannot be said to provide a priority for all activities pertaining to the operation of a dining facility.

The dissent makes the case (**SEE**, Dissent p. 6) in an effort to escape the obvious meaning of the term “operate,” that the contractor operates a facility because he operates his contract – “the facility is the DFA contract.” This assertion is without authority as contracts are not facilities, the dining facility is the facility. Neither the statute nor the regulation define the contract as a facility. To make a statement that the contract is a facility is bereft of authority of any kind except as ipse dixit by the dissent. The Blind Vendor is a contractor for his piece of the cafeteria operation. He performs or executes line items in the cafeteria, thereby managing his contract. But he does not manage the facility unless he is awarded a dining facility operation contract. He does not operate the facility. The facility is not a contract. The facility is the place the contract for DFA is being performed. Of course, he manages his contract. But, the contract manager of the dining facility manages all the contracts in the facility, ensures compliance with the contract requirements to ensure compliance with contract obligations. A DFA contract is not a facility. The DFA contract is not for operation of the dining facility. It is a service contract for support in the dining facility.

## **WRITTEN ADMINISTRATIVE INTERPRETATIONS OF LAW AND REGULATION BY DOE .**

Into the self-created miasmic bog of contradictory interpretation, DOE has seldom ventured. Could not DOE provide insight pertaining to priority for blind vendors for DFA versus FFS contracts? In fact, there have been interpretations, seeking to clarify the priority, since the publication of the regulations in 1977. In 1992 the DOE Commissioner, Neil C. Carney made such an attempt by writing:

“If the food service contract requires the contractor to provide a wide variety of food services and DOD personnel play a very limited or no role in the overall functioning of the cafeteria, then there is a strong possibility that the food service contractor has undertaken the operation of a cafeteria. In such a case, DOD is not operating the cafeteria on an “in-house” basis, and as a result, contracting out for those operational services with a party other than a licensed blind vendor poses a conflict with the Randolph-Sheppard Act. On the other hand, if the food service contract calls upon the contractor to provide a limited number of discreet(sic) food services, and DOD personnel play an important role in the overall functioning of the cafeteria, DOD would be viewed as operating the

cafeteria on an “in-house” basis, and as a result the food service contract would not conflict with the Randolph Sheppard Act.”<sup>72</sup>

Pretty clear, right? This would allow for rejection of an R-SA priority, even though **some** food services are to be performed by the R-SA contractor, if DOD **operates** the facility. But, while the letter required that blind vendors had to “operate” the cafeteria to obtain the priority, the letter was limited or even nullified seven years later, by then Commissioner Fredric K. Schroeder:

“...Commissioner Carney’s letter...is too limiting given that one of the purposes of the Act is to expand the opportunities for individuals who are blind to operate cafeterias on Federal property. Consistent with this purpose, the regulations promulgated pursuant to the Act in 34 C.F.R. 395.33, require a military base to consult with the secretary about awarding a State licensing agency (SLA) a priority under the Act whenever it solicits ***offers for the operation*** (emph added) of a cafeteria and finds the SLA to be within the competitive range. Based on the foregoing, [DOE] is in the process of reexamining the issue of what food services on military bases constitute the operation of a cafeteria under the Act. In the interim, [DOE] will assess issues that arise on a case-by-case basis.”<sup>73</sup>

Even in this narrowing of the Carney ruling, the discussion focuses on “offers for the operation” of a cafeteria. There is no discussion of “pertaining to” operation of the cafeteria.

DOE could do better. No reexamination ever occurred as promised. They are still “assessing” decades later by means of myriad arbitrations. DOE must prefer the **ad hoc** decision making of arbitration panels and confused Army contracting officers, and the expenditure of millions of dollars for litigation and arbitration panels, to the clarity that could come from definitional intervention by the Agency whose job it is to clarify the law through its unique prism. The dissent attacks this statement aimed at DOE/RSA at page 4 of the dissent. However, I am not alone in my criticism of DOE’s apparent lack of energy. In a statement by the Executive Director of Strategic Programs for the National Federation For the Blind in 2005, albeit in a slightly different context, it was stated: “If the Department of Education is either unable or unwilling to fulfill its responsibilities, perhaps it is time for the Department of Commerce or the Small Business Administration to assume the stewardship responsibility for the Randolph-Sheppard program from a business-friendly perspective.” (SEE, S. Hearing 109-360, **“Opportunities too Few? Oversight of Federal Employment Programs for Persons with Disabilities.”**, Hearing of the Committee on Health Education, Labor and Pensions, United States Senate, 109<sup>th</sup> Congress, First Session, October 20, 2005. Years have passed since that testimony, but its thrust is on target.

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<sup>72</sup> For both letters, The Carney letter and the Schroeder letter, See, **Washington**, infra note 38 below at 793, 794.

<sup>73</sup> Even this letter seems to assume at least some level of food services must be operated for a priority to obtain.

## **APPLICABLE COURT CASES THAT BEAR ON THE SUBJECT AT HAND - PRIORITY AND OPERATION OF DINING FACILITIES.**

The dissent avers (**SEE**, page 1) that “The panel ignored four recent arbitrations decisions and two federal court decisions that provide that the R-SA applies to DFA only contracts.” The panel ignored nothing. The panel sought to apply the law as it is written, not as some may mistakenly interpret it. Previous arbitrations were studied carefully for background and understanding, but they break both ways. And, more importantly, they are informative, but nonprecedential. As to the two cases cited by the dissent (**SEE**, Dissent, p. 1, **Kansas** and **Johnson**) they do not stand for the stated proposition argued by the dissent that R-SA applies to DFA contracts. These are both injunctive relief cases where the issue is whether the court thinks arbitrations should take place to decide that very issue. They do not find that DFA contracts are covered under the R-SA. For example, in the **Kansas** case, the court granted the SLA request for injunction saying “It...grants Kansas a preliminary injunction pending the arbitration panel's decision.” The decision was made, in no small measure, based on what the court called “a more lenient standard,” as regards “irreparable harm.” In fact, again contrary to what the dissent alleges (that the court says that R-SA applies to DFA contracts, **SEE**, dissent p. 1 footnote 1), the court said: “The Court **does not decide** (emph added) that the RSA applies to the Fort Riley contract, or that it does not. Congress conferred the power to decide that question on a panel of arbitrators convened in the fashion specified by the RSA.” (**SEE** Johnson, 171 F. Supp. 3d 1145, 1157 (D. Kan. 2016). That is far from deciding that “the R-S Act applies to DFA only contract(s)”.

There have been few federal courts of nationwide jurisdiction examining R-SA and application of a priority for blind vendors, for other than directly operating a cafeteria. Yet, there are two cases in the Court of Federal Claims that are on point.<sup>74</sup> These predated subsequent legislation, addressed below. However, that legislation does not act in derogation of the illumination, nor repeal the logic, provided by these two COFC cases as to the meaning and application of R-SA. These cases are of immense assistance in our definitional quest, helping to determine the meaning of “operating” and “pertaining to” cafeterias.

The first was *Washington State Department of Services for the Blind and Robert Ott, Plaintiffs, v. the United States, Defendant.*<sup>75</sup> In this 2003 case, plaintiffs brought an action seeking to apply R-SA priority to a DFA services contract. The Army decided that the incumbent contractor would not be extended for FFS purposes because it was going to operate the dining facility in-house. The Army refused to apply the priority for the remaining DFA-only services.

The court in this case in equity, (Plaintiffs requesting referral of issues to DOE, which request was denied) examined the exact issue that before our panel, that is, whether the term “operation of a vending facility” required the Army to give an R-SA

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<sup>74</sup> With jurisdiction arising from The Tucker Act of 1887, the Court now enjoys nationwide jurisdiction for most claims against the United States except admiralty, tort and equitable claims. Since the Court’s jurisdiction is nationwide, its holdings and discussions are of particular interest in R-SA claims.

<sup>75</sup> *Washington*, Supra, note 29.

priority for a DFA services contract. The court held that the Army did not abuse its discretion **or violate law** by refusing to apply the priority of the R-SA to the solicitation for DFA services.<sup>76</sup> In Washington, the court upheld a contracting officer's decision that a contract for DFA functions was not the same as the operation of a dining facility. And, as a result, the decision that the Plaintiff could not receive a priority under the R-SA for DFA services vis a vis other socio-economic programs was not a violation of the R-SA. Thus, the RA priority was not applied.<sup>77</sup> The case is rich in historical antecedent, case law and arbitrations on this very issue. And, in fairness, it provides interpretive assistance to both sides of the issue. However, in our case, as there, the contracting officer decided that DFA services are not entitled to the priority afforded by R-SA and our result should be the same. In Washington, as here, the basis for the contracting officer's interpretation of the term "operation of a cafeteria" is not "arbitrary, capricious, an abuse of discretion, or ***otherwise not in accordance with law***." (emph added)<sup>78</sup>

It should be noted as we seek to understand what it means to operate a vending facility, that the Court in Washington, noted that the Plaintiff Washington SLA had an extant contract "to operate the dining facilities at Fort Lewis..."<sup>79</sup> This shows how, when the contractor is operating the Full Food Services and management of the dining facility, they are "operating" the dining facilities and are qualified to obtain a priority, up until the time when the Army no longer needs FFS.

The next case, Mississippi Department of Rehabilitation Services, Plaintiff v. The United States of America, Defendant<sup>80</sup> followed the logic of the Washington case. Even though the Navy lost the case, it may be more important as an interpretive guidepost.

In Mississippi, the court recited the necessity of "operation" of a cafeteria and that such operation must be "... (P)rovided at a reasonable cost, with food of a high quality comparable to that currently provided employees" in order to obtain a priority."<sup>81</sup> After analyzing the court decisions, (especially Washington) laws and regulations, as well as DOE letters, the court concluded, in dicta, that:

"...courts have not applied the R-SA in cases where the contract is merely for busboy and other cleanup services. However, these cases have not clearly addressed the issue of what constitutes the "operation" of a cafeteria when the RFP at issue contract out some, but not all of those duties we would ordinarily ascribe to the "operation" of a cafeteria."<sup>82</sup>

In the case before us at Schofield and WAAF, the duties ordinarily ascribed to "operation," were retained by the Army, because cooks and cafeteria managers were now to operate cafeterias, previously operated as FFS by the SLA designee. In Mississippi, on

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<sup>76</sup> Of course, the standard was not a de novo review, and focused on the abuse of discretion standard for exercise of federal agency discretion. Yet in order to make their finding, the court believed that Army action was not a violation of the R-SA.

<sup>77</sup> Supra note 29 at 796.

<sup>78</sup> Id.

<sup>79</sup> Supra note 29 at Background, 782.

<sup>80</sup> 611 Fed. Ct. 20, 2004 U.S. Claims LEXIS, 140 No. 03-2038C.

<sup>81</sup> Id at 22.

<sup>82</sup> Id at 27.

the other hand, the reason the Navy lost, was that they proposed to contract out to the DFA contractor, the perquisites of “operation” of the facility. This fit the definition of “providing food.” The court said:

“(T)he contract also controls the day-to-day management of the cafeteria....(T)he tapering off of the CO’s(commanding officer’s) involvement in the operation leaves the contractor to assume unsupervised managerial control on a day-to-day basis.”<sup>83</sup>

The Navy lost the Mississippi DFA case, because it was not a DFA case! Most of the responsibilities of *operating* the dining facility resided in the contractor. In our case, the contractor under the DFA solicitation was to perform cleanup functions and not to operate the facility. In Mississippi, since the contractor had operational control, the priority should have been given.

These two cases clarify what it means to operate a dining facility. If a solicitation seeks only DFA responsibilities, then R-SA does not apply. It is not enough to “operate” within a dining facility. If the contract is for operation of the cafeteria (FFS), including the DFA function, the priority applies for blind vendors. But when the Army takes responsibility for operating the cafeteria in-house, any contract for DFA services is outside of the authority of R-SA. To offer a priority when the R-SA does not apply, would be inappropriate.

#### **THE NATURAL CONSEQUENCE OF HISTORICAL DEVELOPMENT, DEFINITIONAL CONFLICT AND THE CONFLICT OF PRIORITIES- Legislative attempts to clarify R-SA Priorities.**

The Randolph-Sheppard Act is not the only act favoring blind vendors. Other priorities are provided for AbilityOne or Javits-Wagner-O Day Act (JWOD) contractors or offerors.<sup>84</sup> Under the JWOD or AbilityOne program, the Committee for Purchase from People Who are Blind or Severely Disabled (CFP) publishes a list of *services* it considers suitable for purchase by the Federal government from qualified non-profit organizations. Services appearing on this list are mandatory purchases for the Federal agency desiring such services. Some of these have to do with cafeterias, especially DFA services. R-SA typically provides entrepreneurial opportunities for blind vendors to operate facilities under FFS contracts, while the JWOD requires blind and disabled persons to be given the right to perform designated services on the CFP list for the Federal government, typically discrete supporting services. In the past, R-SA designees competed for and won FFS contracts for operating a cafeteria, which often included DFA services as one of the line items under those contracts, and JWOD was offered stand-alone DFA contracts if on the CFP list, often as a subcontractor, sometimes in competition with the R-SA contractor.

The conflict between R-SA and JWOD contractors was exacerbated when the military started keeping operation of dining facilities (FFS) in-house, using food service workers and managers. This, among other causes, led to increased competition from R-SA contractors for DFA contracts. In 2006, Congress directed that DOE and DOD and

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<sup>83</sup> Id at28.

<sup>84</sup> 41 U.S.C 8501 (1938) as amended 1971.

CFP bring order out of chaos and issue a Joint Statement of policy to clarify the application of R-SA and JWOD to military dining facilities.<sup>85</sup> That statute provides:

“The Secretary of Defense, the Secretary of Education, and the Chairman of the Committee for Purchase From People Who Are Blind or Severely Disabled shall jointly issue a statement of policy related to the implementation of the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner- O'Day Act (41 U.S.C. 48) within the Department of Defense and the Department of Education. The joint statement of policy shall specifically address the application of those Acts to both operation and management of all or any part 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, and shall take into account and address, to the extent practicable, the positions acceptable to persons representing programs implemented under each Act.”

The statute orders a report, informing Congress of the specific application of R-SA and JWOD to military mess halls or dining facilities. In response, these agencies published an exhaustive statement of policy, agreed by the agencies.<sup>86</sup> This Joint Report (JR) is not merely a haphazard, spur-of-the-moment, meaningless, self-serving, stray-electron, nice-to-do interpretation by the 3 interests involved. It was a serious response to a statutory obligation, agreed by all parties. It sets forth, as an interpretive tool, the philosophy and understanding of the interests regarding how the work is to be divided. It also draws a clear line between operating a dining facility and providing supporting services.

The Joint Statement 1) provided for a “no-poaching policy” between R-SA contractors and JWOD Procurement List contractors and 2) set forth a clear delineation and distinction between priority for R-SA contractors and JWOD designees **or other small business contractors** if there is no JWOD list participant available. This “no poaching” provision has been broadly misunderstood. Here is an extract of the Joint policy statement: (paragraph numbers appear below).

“2. The Secretaries of the Military Departments concerned...shall have the discretion to define requirements...and make procurement decisions concerning contracting for military dining support services and the operation of a military dining facility...”

3. The parties recommend that legislation should be submitted that creates a “no-poaching” provision **maintaining the current distribution of contract opportunities as outlined in this paragraph** (emph added). The Procurement List protects the jobs of people who are blind and/or severely disabled, and does not conflict with the R-SA opportunities of blind vendors who may employ these workers through a JWOD nonprofit agency. **The R-SA shall not apply to any requirement for military dining support services** (emph added) identified on the Procurement List or to any contract,

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<sup>85</sup> Section 848, NDAA for Fiscal Year 2006, Pub. L. 109-163.

<sup>86</sup> Joint Report to Congress. Section 848 of the National Defense Authorization Act for Fiscal Year 2006: Application of the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facilities Contracts, August 29, 2006.

purchase order, agreement or other arrangement for operation of a military dining facility (emph added) that is a requirement identified on the Procurement List and was being provided by a JWOD nonprofit agency as of the date of enactment of the “no-poaching” provision. The JWOD shall not apply at the prime contract level to any contract for operation of a military dining facility....as of the date of enactment of the “no poaching” provision...(A)s contracts with SLA expire, the DOD will solicit competitive proposals under the R-SA.

4. For contracts not covered by the “no poaching” provision:

a. The contracts will be competed under the R-SA when the DOD solicits a contractor to exercise management responsibility and day to day decision-making for the overall functioning of a military dining facility, (emph added) ... where the DOD role in the contract is generally limited to contract administration functions...

b. In all other cases, the contracts will be set aside for JWOD performance (or small business if there is no JWOD nonprofit agency capable or interested) (emph added) 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 those contract administration functions...”<sup>87</sup>END OF EXERPT

This statement sets forth a clear delineation between operation of dining facilities (for R-SA) and services in support of dining facilities by contractors (for JWOD) and provides resolution if there is no JWOD contractor available, that is, “other small business.” Some argue that this JS is of no legal force and effect, and should be ignored, as several legislative changes occurred after 2006. Again, our purpose here is to divine what the parties said through the years as an aid to interpret application of the priority. Given that purpose, this JS helps us understand the thinking of the relevant agencies at the time, interpreting the same words we are interpreting.

As regards the “no poaching” provision, it is clear that it has a temporal quality, only applying as between R-SA contractors and JWOD support services from The List. When those end, they must be competed or awarded, in the case of R-SA contractors, under R-SA for the operation of a facility.

This JR language was not committed to regulation as was contemplated when drafted.<sup>88</sup> Nevertheless, its language confirms the understanding of the parties relative to the same statute and regulations we are interpreting. It provides a distinction between operation of a dining facility and DFA services. It provides at least some persuasive

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<sup>87</sup> Joint Report, August 29, 2006, by DOD, DOE, and the Committee. *See*, TAB 4, Resp. Post Arbitration Brief.

<sup>88</sup> *See*, GAO, B-299539, *Moore's Cafeteria Services d/b/a MCS Management, June 5, 2007* saying that the language had no “legal effect” because it had not been promulgated through regulations. DOD unilaterally advised that the JR should not be relied upon in solicitations until complementary regulations are drafted. That does not change the fact that it presents agreement among the parties showing that there was unanimity on the issues outlined therein.

evidence, concerning the dichotomy between operation of cafeterias and subdivisions thereof, such as cleaning and busing. We cannot pretend it never did exist.

The JR does not stand alone as an interpretive key. Following the submission of the Joint Statement to Congress, and indeed, following passage of the John Warner Act (JWA), the NDAA of 2007,<sup>89</sup> which adopted most of its provisions, the 3 agencies, DOD, DOE and the CFP, agreed to an analysis of the previously submitted Joint Report To Congress.<sup>90</sup> Though in some ways “after the fact,” the analysis was requested by Senators in a meeting on September 19, 2006 with the Senate Health Education Labor and Pensions Committee and Participating Agencies. Here again, this language informs as to the thinking of the parties concerning the application of the R-SA priority sought by Ho’opono. The analysis sets forth the reasons behind the Joint Statement and says that one of its goals was to,

“...reach multi-Departmental administrative agreement...on issues where there had been long-standing confusion, or lack of agreement among the parties. The history of high-level debate on these conflicts in military food service contracting extends back to the 1990s, including discussions at the Office of Federal Procurement Policy. No solutions were obtained at that time.”<sup>91</sup>

The analysis offers illumination as to the intent of the JS. Section 3 of the analysis explains the “no poaching” provision. As regards existing R-SA contracts, it is explained that they will not be affected, except as they expire. It also explains that the JS “...commits DOD to ensuring the continued opportunity for State R-SA agencies to compete for future contracts and maintain existing work.” That is, extant contracts will not be disrupted and SLAs will be able to compete for the work when those dining facility operation contracts expire. This, of course is subject to the overriding authority that DOD possesses to manage and operate dining facilities in-house.

Section 4, deals with contracts not covered by the “no-poaching” provision. This paragraph deals with those contracts which have expired or have never been covered by R-SA. The guidance is made clear by the analysis language of section 4, and shows consistency with the definitions and cases set forth previously in this opinion. Section 4a “recognizes DOD’s legal obligation to foster competition in contracting, while recognizing the SLA/blind vendor’s right to compete for new contracts for operation (*emph added*) of military dining facilities.” This is explicit recognition that the R-SA applies to such new work. And, of course, the implication is that if this new work, is not for operation of the military dining facility there will be no priority under R-SA.

Section 4 analysis continues:

“It should be noted that State R-SA agencies (SLAs) do not have authority to

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<sup>89</sup> Section 856, Pub. L. 109-364, 120 Stat. 2347, Oct. 17, 2006.

<sup>90</sup> Section 848 of the National Defense Authorization Act for Fiscal Year 2006 Joint Policy Statement: *Application of the Javits-Wagner-O’Day Act and the Randolph-Sheppard Act to the Operation and the Management of Military Dining Facilities Contracts.*

<sup>91</sup> Id at 3.



provide military dining support services as limited contractual services. The R-SA role in military food service is for the operation of an (entire) military dining facility (cafeteria), for which the agencies have a procurement priority.”

DOE agreed to this. It is unfortunate the previous utterances have not measured up to this standard of clarity – millions of dollars and words could have been saved, instead of spent on needless non-precedential, non-binding arbitrations. Even though this language is not regulatory, and not statutory, when seeking the meaning of the priority it provides persuasive language and clarity. As a result of the JR, Congress adopted its language in the language and in the context of the John Warner Act

. **THE JOHN WARNER ACT<sup>92</sup> (JWA) - CLARIFICATION AT LAST?**

The JWA, Section 856 (a) is set out in relevant part hereafter:

**SEC. 856. CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES.**

(a) **INAPPLICABILITY OF CERTAIN LAWS.**

(1) **INAPPLICABILITY OF THE RANDOLPH-SHEPPARD ACT TO CONTRACTS AND SUBCONTRACTS FOR MILITARY DINING FACILITY SUPPORT SERVICES COVERED BY JAVITS-WAGNER-O’DAY ACT**-The Randolph-Sheppard Act (20 U.S.C. 107 et seq.) does not apply to full food services, **mess attendant services, or services supporting the operation (emph added)** of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under section 2 of the Javits-Wagner-O’Day Act (41 U.S.C. 47).

(2) **INAPPLICABILITY OF THE JAVITS-WAGNER-O’DAY ACT TO CONTRACTS FOR THE OPERATION (emph added) OF A MILITARY DINING FACILITY** (A) The Javits-Wagner-O’Day Act (41 U.S.C. 46 et seq.) does not apply at the prime contract level to any contract entered into by the Department of Defense as of the date of the enactment of this Act with a State licensing agency under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) for the operation of a military dining facility.

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

(3) **REPEAL OF SUPERSEDED LAW**—Subsections (a) and (b) of section 853 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108–375; 118 Stat. 2021) are repealed.

(b) **REVIEW AND REPORT BY COMPTROLLER GENERAL OF RANDOLPH-SHEPPARD AND JAVITS-WAGNER-O’DAY CONTRACTS.**

(1) **IN GENERAL**—The Comptroller General shall conduct a review of a representative sample of food service contracts

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<sup>92</sup> Pub. L. 109-364, Oct 17, 2006, 120 Stat. 2347.

described in paragraph (2) and determine in writing the following:

- (A) Differences in operational procedures and administration of contracts awarded by the Department of Defense under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) on a State-by-State basis with regard to the relationship between State licensing agencies and blind vendors.
- (B) Differences in competition, source selection, and management processes awarded by the Department under the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act, including a review of the average total cost of contract awards and compensation packages to all beneficiaries.
- (C) Precise methods used to determine whether a price is fair and reasonable under contracts awarded by the Department under the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act, as required under the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.

(2) CONTRACTS COVERED. For purposes of the review under paragraph (1), a food service contract described in this paragraph is a contract—

- (A) for full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility;
- (B) that was awarded under either the Randolph-Sheppard Act or the Javits-Wagner-O'Day Act; and
- (C) that is in effect on the date of the enactment of this Act.

(3) REPORT—Not later than March 1, 2007, the Comptroller General shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the review conducted under this subsection, with such findings and recommendations as the Comptroller General considers Appropriate.”

The statute sets forth the dichotomy between the prime contract for mess hall operations in which case R-SA priority applies, and JWOD does not, and, also R-SA does not apply but JWOD does for “services supporting the operation of a military dining facility” which were extant as of the October 17, 2006 publication of the law. This is in essence a temporary freeze on contract competition between present R-SA/JWOD contractors for cafeteria services. Though not called a “no poaching” provision, that is what it is, for contracts as of the day of the passage of the law. However just as importantly, Section 856 requires a report by the Comptroller General of Randolph Sheppard and Javits-Wagner-O'Day Contracts to determine the broad outline of differences between JWA and JWOD.<sup>93</sup> That is, R-SA does not apply to contracts and

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<sup>93</sup> Id. Section 856(b). In Section 856(c) DOE/DOE Inspectors General were directed to submit a report concerning management procedures for R-SA and JWOD. This report, agreed by the respective IG,s should be read for a thorough understanding of what the IGs found. The DOE IG wrote: “The Randolph-

subcontracts for military dining facility support services, and JWOD does not apply to “contracts for the operation of a military dining facility.”<sup>94</sup> There is no hint of support for the argument made by some, that if R-SA does not apply, then JWOD occupies the field, and similarly if JWOD does not apply R-SA applies to all contracts, even supporting DFA contracts in the cafeteria. The JWA is a means of sorting out the difficulties between R-SA and JWOD contractors occasioned by the lack of proper guidance from DOE, and says nothing of those cases such as ours where the competition is not for operation of a dining facility but for DFA services. Some have argued that section (b)(2) of the JWA expands the coverage of R-SA to include DFA or similar service contracts. This appears to be incorrect, as (b)(2) is a directive from Congress to the Comptroller General as to which contracts are to be reviewed.<sup>95</sup>

The JWA recognizes the important distinction that JWOD contracts include support services for the operation, by someone else, of a dining facility, while R-SA contracts are for the operation of dining facilities. It is entirely feasible that an R-SA operational dining facility contractor could “hire” a JWOD contractor to perform DFA services.

In sum, with regard to the NDAA of 2007, the JWA confirms the coverage of the R-SA to SLA designees, for the purposes of the priority, to the operation and management of dining facilities (which may or may not *include* DFA services) and reserves to JWOD designees or other small business concerns, stand-alone contracts for support of dining facilities such as DFA services and other support contracts.

The dissent attempts to make the point that the JWA applies to all contracts “pertaining” to the operation of a cafeteria except certain poached by JWOD. (SEE dissent p. 5) This attempt to meld the dissent’s interpretation of the regulatory provision

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Sheppard program provides blind persons with opportunities for remunerative employment and self-support through the operation of vending facilities on federal and other properties. The Randolph-Sheppard Act gives priority to blind persons in the operation of vending facilities on federal property, to include cafeterias, snack bars, and automatic vending machines. The program is voluntary, with 49 of 50 states opting to operate the program. **Under the Randolph-Sheppard program, state licensing agencies (SLAs) recruit, train, license and place blind individuals as operators of these vending facilities.**” (emph added). See, **DOD IG Report No. IE 2008-004, April 15, 2008**; [http://www.dodig.mil/Inspections/IE/Reports/RS\\_JWOD\\_Report\\_0408.pdf](http://www.dodig.mil/Inspections/IE/Reports/RS_JWOD_Report_0408.pdf), p. 75.

<sup>94</sup> See, JWA Sections (a)(1) and (2)(A).

<sup>95</sup> Responding to this directive GAO wrote: **GAO, Report to Congressional Committees, October 2007**, entitled “Contracting for Military Food Services under the Randolph Sheppard and Javits Wagner O’Day Programs, <http://www.gao.gov/new.items/d083.pdf>. One insight from that report is illuminating: GAO Study, p. 20 “The blind vendors who participate in the Randolph-Sheppard program seek to become entrepreneurs by gaining experience **managing DOD dining facilities** (emph added). In this respect, although most of these vendors require the assistance of a private food service teaming partner, they are compensated for managing what can be **large, complicated food service operations**. By contrast, because the participants of the JWOD program perform work activities that require less skill and experience, and who might otherwise not be able to secure competitive employment, they are compensated at a much lower rate than the Randolph-Sheppard vendors. In this regard, it is apparent that the two programs are designed to provide very different populations with different types of assistance, and thus, it is difficult to directly compare them, particularly with respect to compensation.” See, pp. 3, 5, 8, 10 and 20 for clear GAO comparison of R-SA facility operations as management of facilities versus JWOD supporting services in facilities.

395.33(c) and the JWA seems incorrect. The words “pertains to” does not appear in the statute. The JWA establishes a dividing line between R-SA priority for full services (the actual phrase is used in the statute “full service”) and JWOD support efforts. As discussed herein the purpose of the JWA was not to expand rights or recognize rights to any party, but to outline for the Comptroller General the standards to be used in the Section (b) review of application by DOD of R-SA and JWOD.

**DID THE JWA END DISAGREEMENT AS TO R-SA PRIORITY? MORE LEGISLATION TO ENLIGHTEN AND INFORM THE DEBATE.** The legislative attempt, to end all legislative attempts at clarity for R-SA, is found in the National Defense Authorization Act of 2015.<sup>96</sup> In pertinent part, this NDAA, known as the **CARL LEVIN AND HOWARD P. “BUCK” MCKEON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015** (emph added) incorporates an explanatory statement<sup>97</sup> which is to “...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.”<sup>98</sup> At Section 5, the explanatory statement is made equal to a conference committee report:

“SEC. 5. EXPLANATORY STATEMENT.

“The explanatory statement regarding this Act, printed in the House section of the Congressional Record on or about December 3, 2014, (author’s note: actually Dec 4) by the Chairman of the Committee on Armed Services of the House of Representatives and the Chairman of the Committee on Armed Services of the Senate, *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.*” (emph added).

The intention of the Congress is clear. It was passed by the Congress and signed by the President on December 19, 2014. The explanatory statement is part of the law, not simply a stray, meaningless statement by two gadflies expressing their opinion. It is part of an analysis adopted by the Congress. Here is an extract of the explanatory statement agreed between Senator Levin and Congressman Mckeon:<sup>99</sup>

The agreement includes the House provision.  
This change to section 2942 of title 10 and  
the implementation of the food transformation  
program should not result in the

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<sup>96</sup> Pub. L. 113-291, Dec. 19, 2014. STAT. 3292 Page 128.

<sup>97</sup> Id. Section 5.

<sup>98</sup> Id. As mentioned, some have disparaged the explanatory statement because it was not the product of a conference committee. Yet, it was negotiated between the Senate and the House through the respective individuals named in the Act, Senator Carl Levin and Howard P. McKeon, MC, was voted on by the Congress and passed as an integral part of the law as a passed and signed piece of legislation of enduring effect.

<sup>99</sup> Congressional Record, House, Dec. 4, 2014, H 8691. Senate concurred, SEE, Daily Digest, Friday Dec. 12, 2014 at D 1125, Senate Concurring at S6701. LEGISLATIVE HISTORY—H.R. 3979: HOUSE REPORTS: No. 113–360 (Comm. on Ways and Means). CONGRESSIONAL RECORD, Vol. 160 (2014): Mar. 11, considered and passed House. Mar. 31, Apr. 1–3, 7, considered and passed Senate, amended. Dec. 4, House concurred in Senate amendment with an amendment. Dec. 12, Senate concurred in House amendment.

loss of employment pursuant to the Javits-Wagner-O'Day Act (41 U.S.C. 8501 et seq.). However, we are concerned with the lack of regulatory guidance on the application of the Javits-Wagner-O'Day Act (41 U.S.C. 8501 et seq.) and Randolph-Sheppard Act (20 U.S.C. 107 et seq.) to military dining facilities. We previously sought to resolve this long-standing issue by requiring a Joint Policy Statement in section 848 of Public Law 109-163 and enacting a permanent "no-poaching" provision in section 856 of Public Law 109-364. However, 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.

**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. (emph added) Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall 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.(emph added)**<sup>100</sup>

This is an expression of congressional intent - R-SA is for SLA contractors to operate a military dining facility. JWOD applies to dining support services or DFA services. The DOD promptly responded to the mandate from Congress to publish a proposed rule (regulation) capturing this intent.

## **DOD REGULATORY PROCUREMENT ACTIONS AFTER THE NDAA OF 2015**

NDAA of 2015 should have ended the debate. Yet, arbitrations continue to split

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<sup>100</sup> Exhibit 7 of Respondent Post-Arbitration Brief, Joint Explanatory Statement to Accompany 2015 National Defense Authorization Act of 2015

on the issue. The tumultuous din of disagreement continues, and DOE remains eerily silent. It must enjoy endless arbitrations, they can adopt as final agency actions. Disagreements continue as to SLA priority for DFA contracts, when the SLA appointee does not operate the facility. Thus, the dispute before us.

In February of 2016 DOD submitted a proposed regulation to the Office of Management and Budget (OMB) (OIRA) for coordination with federal agencies. Coordinating comments were received from the Department of Education, among others, and DOD responded to those comments, seeking concurrence. Then, conferences were held between OMB, DOD, DOE and AbilityOne to negotiate proposed changes to the proffered regulation. On May 16, 2016, the Department of Education concurred.<sup>101</sup> Concurrence by all resulted in publication of the proposed rule on June 7, 2016. As of mid-2017 the proposed regulation has not been finally published. It is like a Dolphin caught up in a Tuna net, in the moratorium on new regulations. Nevertheless, concurrence by DOE shows agreement with the proposed rule, which incorporates the interpretation set out in the Joint Statement. If DOE disagreed, they would have non-concurred. They did not. If the JS was nugatory, why did they not object? The proposed rule,<sup>102</sup> citing the Joint Policy Statement, would amend DFARS 237 among others, to say that R-SA does not apply to contracts for DFA services. It further provides that contracts for dining facility support services (including DFA) are subject to the CFP and not the R-SA. It defines “operation”, at 202.01: “(O)peration 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...” Though this regulation has no legal force and effect, it shows, through the concurrence process, that DOE concurs with the language proposed by DOD. Why shouldn’t they? The language simply captures the previous JR and analysis of that report agreed by DOE, and comports with JWA, 2015 NDAA Joint Explanatory Statement and the words of R-SA from the beginning. But there is more.

During the arbitration hearing, on February 9, 2017, one of the panel members asked Army counsel to clarify the meaning of “concurrence” in its post-hearing brief.<sup>103</sup> Based on that request, the Army obtained a copy of a Freedom of Information Act Request response showing in detail (34 pages) the concurrence process, to include changes DOE requested. The process was exhaustive, and involved many comments relative to the proposed DFARS rule.<sup>104</sup> In the end, DOE concurred. Not only does the record now include “concurrence”, but the memorandum, from DOE staff (including Deputy General

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<sup>101</sup> *Declaration of Amy G. Williams* in the United States District Court for the Western District of Kentucky, Paducah Division, in the case of Commonwealth of Kentucky v. United States of America, Case No. 5:12-cv-00132-TBR. See, TAB 9 of Defendant document submission. **What does *concur* mean?** **concur:** (kən'kɜː) *vb (intr)*, **-curs, -curring or -curred** **1.** to agree; be of the same mind; be in accord **2.** to combine, act together, or cooperate **3.** to occur simultaneously; coincide **4.** *rare* to converge **con'curingly** *adv* SOURCE: Collins English Dictionary – Complete and Unabridged, 12th Edition 2014 © HarperCollins Publishers 1991, 1994, 1998, 2003, 2006, 2007, 2009, 2011, 2014.

<sup>102</sup> Federal Register, Vol 81, No. 109, June 7, 2016 p. 36506, amending 48 CFR parts 202, 205, 212 237 and 252.

<sup>103</sup> Hearing Transcript at 93 et seq.

<sup>104</sup> *See*, Respondent’s Post-Hearing submission, paragraph 9, and attachments.

Counsel at the time) to OMB, March 7, 2016, states, relative to when a priority should apply:

“Based on the foregoing, we strongly believe that there is a vast array of services, including those listed in sections 395.33(b)...that could be included in the operation of a military dining facility and should not be considered beyond the scope of the R-S Act. **At a minimum, we propose that there must be at least one core service in a solicitation directly involving the handling of food - which is necessary to determine whether the food can be provided at a reasonable cost and quality, consistent with the R-S Act requirements - in order to ensure that the priority applies (emph added).** These core services include any tasks that involve preparing food, cooking the food, or serving of the food. **As long as at least one of these tasks is involved in a solicitation, the R-S Act priority should apply notwithstanding the existence of other services, such as cashiers or sanitation services (emph added).**”<sup>105</sup>

This, is a strong statement, reliably part of the record, that in order for R-SA to apply, the requirements must provide for at least some handling of food, preparing food, cooking food or serving food. This is corroborative of the interpretation of previous statutes, regulations and public issuances. In our case, there is no food handling, preparation, cooking or serving... none. The solicitation is solely for DFA services.

Some say that concurrence by DOE does not represent agreement with the rule. Again, referring to our dictionary, see, FN 64 **supra**, we see that concur means to have or express the same opinion. For once, a term is susceptible to easy interpretation. Concur means concur.

When implemented, DFARS will direct Army contracting officers to award DFA contracts without an SLA priority, because the solicitation is not for a contract to operate a dining facility. And, if there are no JWOD support contracts available, then Small Business set asides will be used.<sup>106</sup>

The concurrence by DOE sheds some light on the issues before us. The proposed regulations provide that R-SA contractors receive no priority under the DFARS rule. If DOE believes they should, they would have, or at least should have said so.

Final Thoughts and Concurring Decision Beginning in 2003 many Schofield units were deployed to the Gulf, along with their dining facility operational soldiers and warrant officers. To fill the need for operation of dining facilities, contracts were entered into under the auspices of Ho'opono/Mr Chinn. He performed well. Yet, as units redeployed, with their dining facility operators, there was no need for contractors to operate dining facilities. This case arose, because the Army no longer needs a contractor to operate dining facilities, as the Army operates them in-house. But, the Army needs DFA services. Since soldiers are prohibited<sup>107</sup> from performing DFA duties, it is necessary to contract out DFA services. Soliciting for these services, as opposed to soliciting for a

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<sup>105</sup> Id. At page 11.

<sup>106</sup> The Discussion and Analysis section of the proposed rule/regulation (Id), adopts the Joint Policy”

contractor to "operate" a dining facility (FFS), does not trigger the R-SA priority. After a false start, which would have allowed Ho'opono/Mr. Chinn the R-SA priority for DFA services, the Army contracting officer advertised for DFA services under the small business set aside program (8a) denying R-SA priority. Though the Army to temporarily delay the DFA award, proceeding under small business set aside is appropriate. The history of what it means to "operate" a dining facility leads to the 1930s, where vending stands were operated by blind entrepreneurs. The law, the regulations, court cases and other interpretive material, indicate that unless a solicitation requires a contractor to operate the dining facility, while serving food of a high quality, the priority is inapplicable. The interpretive aids relied upon herein clarify the intent of R-SA that it does not apply solely for DFA services.<sup>108</sup> Because R-SA does not apply, the contracting officer was correct in issuing a solicitation which did not provide for an R-SA priority. The contracting officer did not violate the law in so doing. I join the principal opinion in that conclusion.

**CONCUR Vincent J. Faggioli, July 28.2017**

## **DISSENTING DECISION**

**Case No. R-s/16-07**

**Rehabilitation Services Administration**

**United States Department of Education**

Statement on page 36507 of the proposed rule. It says at Paragraph 4: "Paragraph establishes rules for new contract awards that were not covered by the "no-poaching" rule. Pursuant to subparagraph 4a, new contracts will be competed under the R-S Act when "the DOD solicits a contractor to exercise management responsibility and day-to-day decision making for the overall functioning of a military dining facility..."

Later Subparagraph 4.b. provides that "in all other cases, the contracts will be set aside for JWOD performance (*or small businesses if there is no JWOD nonprofit agency capable or interest*) (emph added) when DOD needs dining support services..

<sup>107</sup> Army Regulation 30-22, paragraph 3-42 (c ) (2).

<sup>108</sup> These services are subject to the CFP (JWOD) requirement, and if there is not CFP contractor on the list, then to small business concerns as determined by the contracting officer.

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## **DISSENTING OPINION**

Hawaii Department of Human Services, Division of Vocational Rehabilitation

vs.

United States Department of the Army, Schofield Barracks

July 24, 2017

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The Arbitration Decision in this case is internally inconsistent, riddled with misstatements of the law, and arrives at its decision in defiance of well-established principles of statutory interpretation. Unaccountably, the majority places Conclusions of Law in a section entitled Findings of Fact; such a tactic cannot immunize against an effective review of erroneous conclusions of law by disguising them as findings of fact.

The Panel neglected to examine, or even recognize, the fact that Congress has consistently recognized that the Randolph-Sheppard Act<sup>107</sup> applies to Dining Facility Attendant (DFA) Contracts.<sup>108</sup> The Panel ignored four recent arbitrations decisions<sup>109</sup> and two federal court decisions<sup>110</sup> that provide that the R-S Act applies to DFA only contract. The Army's position ignores the April 2004 article published in the Army Lawyer that recognizes that:

Foremost, the NDAA [National Defense Authorization Act] for FY 2004 resolved whatever slim doubt remained about the direct application of the RSA to military mess halls. ... By creating an exemption from the RSA provision for mess hall contracts, Congress implied the premise that the RSA applies to such contracts.

...

Agencies that consider [Washington State Dep't of Serv. for the Blind v. United States, 58 Fed. Cl. 781 (2003)] as a green light to exclude DFA services contracts from the RSA, however, should proceed with caution. The case was only at the district court level, and the district narrowed its holding to the facts of the case.<sup>111</sup>

In our case, the Army violated the R-S Act when it issued a solicitation restricting competition to 8(a) eligible entities,<sup>112</sup> and when it did not seek the Secretary of

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<sup>107</sup> The Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107e is referred to as the R-S Act, so as to avoid confusion with the United States Department of Education's Rehabilitation Services Administration. Some passages quoted herein refer to the R-S Act as the RSA.

<sup>108</sup> The Army has instituted a practice of issuing solicitations for bids as either Full Food Service (FFS) or Dining Facility Attendant (DFA). The R-S Act does not distinguish between FFS or DFA contracts.

<sup>109</sup> Commonwealth of Kentucky Education and Workforce Development Cabinet Office of the Blind Business Enterprise Program v. United States Department of the Army Acting Through the Contracting Officer Mission & Installation Contracting Command, MCC Center, Fort Campbell, Kentucky, Case No. R-S/11-06, Feb. 4, 2014; Georgia Vocational Rehabilitation Agency v. United States Dep't of Defense, Dep't of the Army, Fort Stewart, Georgia, Case No. R/S 13-09, January 11, 2016, Oklahoma Dep't of Rehabilitation Servs. v. United States Dep't of the Army, Ft. Sill, Case No. R-S/15-10, December 23, 2016, State of Kansas, Dep't of Children & Family Servs. v. United States Department of the Army, Ft. Riley, R-S/13-08, April 10, 2017.

<sup>110</sup> Kansas v. United States, 171 F. Supp. 3d 1145 (D. Kan. 2016) and Johnson v. United States, WL 12540469 (E.D. Tex., 2016).

<sup>111</sup> The Army Lawyer, April 2004, The Applicability of the Randolph-Sheppard Act to Military Mess Halls, p. 13.

<sup>112</sup> See 15 U.S.C. § 631, et seq.

Education's determination limiting the contract to 8(a) eligible entities was justified under the standard that placement of a blind operator to operate the DFA contract would adversely affect the interests of the United States.<sup>113</sup>

## **I. CONCLUSIONS OF LAW MISLABELED AS FINDINGS OF FACT**

Section I of the Arbitration Decision is labeled Findings of Fact. Yet, it is, in the main, conclusions of law. The fact that a court labels determinations "Findings of Fact" does not make them so if they are in reality conclusions of law.<sup>114</sup> Accordingly, all Conclusions of Law contained in Section I of the Arbitration Decision are subject to plenary review.

### **A. Issuing a Solicitation for a Contract Pertaining to the Operation of a Cafeteria Limited to 8(a) Eligible Entities Violates the R-S Act Because the R-S Act Priority is Superior to the 8(a) Preference**

The R-S Act grants a priority to blind licensees to operate vending facilities on federal property.<sup>115</sup> Yet, the opinion misstates this prior right<sup>116</sup> as a "preference." Section I.C.2. The distinction is extremely important, and disregard of the distinction is troublesome, at best, given that the R-S Act priority is superior to the 8(a) priority.<sup>117</sup>

### **B. The Army Placed a Limitation on the Operation of the Blind Vendor's Facility Without First Obtaining the Secretary of Education's Determination that the Limitation was Justified**

In its Section I.C.1., the Panel's decision states:

107(a) further provides that "any limitation on the placement or operation of a vending facility" that adversely affects the interests of the United States will be reported to the Secretary of Education.

In fact, that section goes far beyond requiring "reporting" to the Secretary of Education. In order to ensure that blind licensees have a prior right to operate vending facilities

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<sup>113</sup> 20 U.S.C. § 107(b).

<sup>114</sup> Poyner v. Lear Siegler, Inc., 542 F.2d 955, 959 (6th Cir. 1976), cert. denied 430 U.S. 969, 97 S.Ct. 1653, 52 L.Ed.2d 361 (1977).

<sup>115</sup> 20 U.S.C. § 107(a).

<sup>116</sup> The term "prior right" comes from the legislative history of the 1974 amendments to the R-S Act, at page 15, where the Committee states that federal agencies, in establishing vending facilities, have an obligation to "assure that one or more blind vendors have a prior right to do business on such property, and furthermore that, to the extent that a minority business enterprise or non-blind operated vending machine competes with or otherwise economically injures a blind vendor, every effort must be made to eliminate such competition or injury." Sen. Rep. 93-937, p. 16 (1974).

<sup>117</sup> Automated Commc'n Sys., Inc. v. United States, 49 Fed. Cl. 570, 578 (2001), Department of the Air Force—Recon., B-250465.6 (Comp. Gen. June 4, 1993), In re Intermark, B-290925 (Comp. Gen. October 23, 2002).

(which include cafeterias<sup>118</sup> and contracts pertaining to the operation of cafeterias<sup>119</sup>), Congress required that any limitation on the placement or operation of a vending facility must be fully justified in writing to the Secretary of Education.<sup>120</sup> The justification must explain how the limitation would “adversely affect the interests of the United States.”<sup>121</sup> There is no dispute in this case Respondent limited the placement of the DFA contract at Schofield Barracks – it issued a contract that replaces the present blind contractor operating a DFA only contract (the FFS portion of the contract not having been exercised) with a small business non-blind contractor.

**C. The Panel’s Opinion that the R-S Act Applies Only to “Food Dispensing” Ignores the Fact that the R-S Act Defines Vending Facilities to Include Services Provided by a Blind Licensee; i.e.,**

**a DFA Contract**

At section I.C.3, the decision’s author states that the R-S Act’s regulation “functions are about food dispensing and not cleaning and busing.” The author then contradicts himself with fn. 18 where he recognizes that 34 C.F.R. § 395.33(b) references “sanitation practices.” At the end of that section, the author makes a vast analytical leap that the R-S Act and its implementing regulations simply cannot sustain:

an interpretative conclusion that all contracts relating to and even integral to the operation of a cafeteria ... would too greatly expand the intent of the RSA.

The regulation plainly states that all contracts *pertaining to* the operation of a cafeteria are to be renegotiated by the SLA being invited to submit a bid. The contract at issue is a DFA contract, it pertains to the operation of a cafeteria. The author *completely ignored* 20 U.S.C. § 107(b)(2):

wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

The author adopted Respondent’s constrained view of the R-S Act, that, for the Act to apply, that the blind vendor must operate the entire cafeteria.<sup>122</sup> Nothing in the R-S Act supports this view. As the Senate recognized in 1974: “Commanders of military installations are singularly insensitive to the need to develop the program.”<sup>123</sup>

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<sup>118</sup> See definition of vending facility at 20 U.S.C. § 107(e)(7) as including cafeterias.

<sup>119</sup> 34 C.F.R. § 395.33(c).

<sup>120</sup> 20 U.S.C. § 107b.

<sup>121</sup> Id.

<sup>122</sup> Arbitration Decision, fn. 9.

<sup>123</sup> Sen. Rep. 92-37 at 10.

“Commanders are either hostile or indifferent to the Randolph-Sheppard program. This attitude has severely curtailed the growth of the program within the Defense Department.”<sup>124</sup> In 2000, the United States District Court for the Eastern District of Virginia recognized that “the Army is currently pursuing legislative initiatives to exclude military dining facilities from the Act ... In both 1997 and 1998, the Defense unsuccessfully “sought legislation to exclude military dining facilities altogether” from the R-S Act. <sup>125</sup>It is indeed disheartening to see this attitude continue. The Concurrence of the Army’s Panel member blames the arbitrations and litigation on the Department of Education; yet with the weight of the cases holding that the R-S Act applies, it is the Department of Defense’s stubborn refusal to implement the R-S Act that causes the state licensing agencies to file cases in order to protect the priority and to provide employment opportunities for their states’ blind citizens. The Department of Education’s policies concerning arbitrations provide that a state’s complaint can be dismissed. The fact that Education authorizes the convening of arbitration panels overrides any argument made by the authors of the opinion and the concurring opinion concerning any position taken by any individual Education employee, even a Commissioner.

The R-S Act broadly defines vending facilities to include “services which may be provided by a blind licensee.”<sup>126</sup> In fact, the regulation specifies services dispensed manually.<sup>127</sup> Mr. Chinn is operating a contract which includes services: “janitorial and custodial functions within a dining facility including, but not limited to: sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pots and pan cleaning and related quality control.”<sup>128</sup> Cafeteria operations “shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.”<sup>129</sup> Obviously, if a blind vendor cannot be awarded a facility consisting of a DFA service contract, because the federal agency limits the award to 8(a) entities, then the regulation is violated.

**D. The John Warner Act Recognizes that the R-S Act Applies to all Contracts Pertaining to the Operation of a Cafeteria Except Certain Contracts “Poached” by JWOD**

In Section I.C.2, the decision’s author states that:

In the past, RSA entities competed for full food service contracts for cafeteria operations, including the DFA services under those contracts, and JWOD offered

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<sup>124</sup> Id. at 17.

<sup>125</sup> Nish & Goodwill Servs., Inc. v. Cohen, 191 F.R.D. 94, 97 (E.D. Va. 2000).

<sup>126</sup> 20 U.S.C. § 107e(7) and 20 U.S.C. § 107a(a)(5).

<sup>127</sup> 34 C.F.R. 395.1(x).

<sup>128</sup> Petitioner’s Exhibit 7, page 3.

<sup>129</sup> 34 C.F.R. § 395.33(a).

stand alone DFA contracts if on the CFP list, often as a subcontractor, but sometimes in competition with the RSA contractor.

The author does not provide us with any authority for this statement.

## **1. Background of the John Warner Act**

Before enactment of the John Warner Act, two separate Circuit Courts ruled that the R-S Act priority is superior to the JWOD<sup>130</sup> preference, i.e., the R-S Act priority must control over other socio-economic preferences.<sup>131</sup> Thus, blind vendors have a prior right to operate cafeterias on federal property, superior to the right of JWOD to operate such cafeterias. Moreover, the Rehabilitation Services Administration's regulation requiring that contracts pertaining to the operation of vending are to be renegotiated pursuant to its regulation is entitled to Chevron deference.<sup>132</sup> Accordingly, before the John Warner Act was enacted, when a SLA bid for FFS or DFA contract, it was entitled to priority when its bid fell within a competitive range.<sup>133</sup> The criteria in the solicitation "may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices."<sup>134</sup> Obviously, since sanitation practices are included in the criteria, and since 34 C.F.R. 395.33(c) includes contracts that pertain to the operation of cafeterias, the SLA has the prior right to FFS and DFA contracts.

## **2. The R-S Act's Term "Operate" Means that a Blind Vendor is Responsible for a Facility that is Defined by Contract or Permit**

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<sup>130</sup> The Javits-Wagner-O'Day Act (JWOD) establishes the Committee for Purchase (CFP), which places services and products to be provided to the Federal government on a Procurement List. 41 U.S.C. § 8502. Formerly known as NISH, JWOD was renamed the "Ability One Program" in the November 27, 2006 Federal Register. See also 41 U.S.C. § 8501, et seq. Purchase by a federal agency from the Procurement List is mandatory.

<sup>131</sup> NISH v. Cohen, 247 F.3d 197, 205 (4th Cir. 2001), NISH v. Rumsfeld, 348 F.3d 1263, 1272 (10th Cir. 2003).

<sup>132</sup> In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Court set forth a two-prong test for determining whether an agency interpretation is entitled to deference. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear that is the end of the matter... [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." NISH v. Rumsfeld, 348 F.3d 1263, 1266 (10th Cir. 2003).

<sup>133</sup> 34 C.F.R. § 395.33(b).

<sup>134</sup> Id.

In Section I. C.1, the Panel's Decision states:

Respondent argues and it appears to essentially apply to the "operation of a vending facility," not for various service contracts or other support contracts on federal installations.

What exactly is operation of a vending facility? The author's footnote numbered 9 concludes that for "blind vendors to obtain a priority, they must be operators of the facility." In our case, the "facility" is the DFA contract,<sup>135</sup> it is a contract for services,<sup>136</sup> and the individual who currently manages the contract, i.e., the operator, is blind vendor Ted Chinn.

The concurrence of the Army's panel member, at page 5, states that the "only 'vending' proposed is the vending of services by the contractor to the Army." Yet, ***whether a contract is FFS or DFA, the only "vending" is of "services."*** The vending of articles is not necessary for the R-S Act to apply. After all, in the 2001 and 2003 cases brought by NISH both courts ruled that the R-S Act priority controls over other socio-economic preferences. Both cases recognize that the contracts at issue were solely for services. In 2001, the Fourth Circuit affirmed a district court conclusion that the R-S Act applies to "mess hall services."<sup>137</sup> In 2003, the Eleventh Circuit stated that it simply did not "see the elephant in the mousehole,"<sup>138</sup> and refused to exempt mess hall services from the application of the R-S Act.<sup>139</sup>

Next, the concurrence's author claims that DFA services "have little to do with providing food of a high quality." Four arbitration panels have all found that DFA services are essential to the operation of a FFS, and that, without DFA services, a cafeteria could not function.<sup>140</sup>

The view that the term "operate" in the Randolph-Sheppard Act means that the R-S Act only applies when contractor makes decision-making for overall functioning of a military dining facility does not find textual support in the R-S Act.

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<sup>135</sup> See Page 20 of Petitioner's Exhibit 7, the Performance Work Statement for the contract at issue in this case, at paragraph 2.1:

This is a non-personnel services contract to provide DFA Services to the U.S. Army Garrison ... Government shall not exercise any supervision or control over the contract service providers[.]

<sup>136</sup> The R-S Act applies to any vending facilities that provide services dispensed manually. 20 U.S.C. § 107a(5).

<sup>137</sup> NISH v. Cohen, 247 F.3d 197, 199 (4th Cir. 2001)

<sup>138</sup> NISH v. Rumsfeld, 348 F.3d 1263, 1269 (10th Cir. 2003)

<sup>139</sup> Id.

<sup>140</sup> See fn. 3.

Likewise, the concurring opinion statement, at page 11 that 34 C.F.R. § 395.33(c) applies only in a “temporal sense” is illogical. This absurd result could not be the intention of Congress in expanding the application of the R-S Act or the Rehabilitation Services Administration in enacting the regulations. Rather, the intention has to be that all contracts that pertain to the operation of a cafeteria have to be renegotiated every time those contracts come up for renewal. The concurring opinion’s author ignores the fact that the regulation at 395.33(c) expressly recognizes that contracts pertaining to cafeterias have to be renegotiated. The thrust of the regulations is to improve economic opportunities for blind licensees on federal property.

In Section I.C.5., the author states:

The statute sets forth the dichotomy between the prime contract for mess hall operations in which case the RSA priority applies and JWOD does not, and also when RSA does not apply but JWOD does for “services supporting the operation of military dining facility” which were extant as of the October 17, 2006 publication of the law.

This Conclusion of Law (labeled as a Finding of Fact) is incorrect because the John Warner Act, at 856(a)(1) removed certain full food services, mess attendant services and services supporting the operation of a military dining hall from the R-S Act—those services “poached” by JWOD. If these services were not included in the R-S Act Congress would have explicitly stated that they never have been. Congress recognized that JWOD had poached R-S Act opportunities. Obviously, Congress was aware that the Department of Defense’s solicitations for bids differentiated between FFS and DFA contracts. Congress allowed JWOD to keep all contracts it had poached. These were contracts that were supposed to be R-S Act, but had been poached by JWOD entities.

Congress, in almost identical language, did the same thing in the 2004 NDAA, which provides, at 852(a), that the R-S Act “does not apply to any contract described in section (b) for so long as the contract is in effect[.]” The Army Lawyer unequivocally stated that “*Congress implied the premise that the RSA applies to such contracts,*”<sup>141</sup> Yet, now this Panel concludes that the John Warner Act means that the R-S Act only applies when the licensed vendor operates the entire cafeteria. The fact of the matter is that the John Warner Act amended the R-S Act, as did the 2004 NDAA, to allow JWOD to keep the “poached” contracts. To expand the reach of JWOD is not what Congress intended, with the exception of subcontracts; for example, if a licensed blind vendor operating a FFS chose to subcontract out DFA, JWOD would have to be offered the opportunity. If Congress had wanted to say that all DFA contracts go to JWOD it could have. It did not. It said JWOD could keep the contracts it has. The solicitation at issue here excluded the R-S Act in favor of small business. Congress has never said that the small business preference is greater than the R-S Act priority. Of course it is not.<sup>142</sup>

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<sup>141</sup> The Army Lawyer, April 2004, The Applicability of the Randolph-Sheppard Act to Military Mess Halls, p. 13.

<sup>142</sup> Automated Communications Sys., Inc., 49 Fed. Cl. at 577-78, In re Intermark, B-290925, 2002.

In Section I.C.6.c.i., the author wrongly states the finding of Washington State Dep't of Servs. for the Blind v. United States<sup>143</sup> (WSDSB) as stating the the R-S Act does not apply to contracts for DFA services. Even the Army Lawyer recognized that:

Agencies that consider WSDSB as a green light to exclude DFA service contracts from the RSA, however, should proceed with caution. The case was only at the district court level, and the district court narrowed it holding to the facts in the case.<sup>144</sup>

In fact, the WSDSB stated that “there is no legally required answer to the question of whether a DFA services contract” is covered by the R-S Act.<sup>145</sup> Because the opinion was issued in 2003, and because the John Warner Act, amending the R-S Act to remove contracts “poached” was enacted in 2006, WSDSB was essentially overruled.

## II. THE REFERENCES TO “NON-BINDING” POLICY GUIDANCE

The opinion’s author notes that items at I.C.6(a-g) are “likely not legally binding.” The concurring opinion likewise references many documents without legal significance, and even relies on the Competition in Contracting Act (CICA), a procurement act inapplicable to R-S Act procurements.<sup>146</sup> Contracting officers do not have discretion to determine that the R-S Act does not apply; when procuring cafeteria services, including services pertaining to the operation of a vending facility, contracting officers must follow the R-S Act, not the CICA and its implementing regulations. A contracting officer’s interpretation of the R-S Act is not entitled to deference because it is the Department of Education, not the Department of Defense, which is charged with interpreting the R-S Act.<sup>147</sup>

Any reference in the concurring opinion to the Joint Report of the Departments of Defense and Education, and the Committee for Purchase must be disregarded—Congress only enacted one recommendation of the Joint Report--the “no poaching” recommendation. By failing to adopt the other recommendations, Congress made it clear that it rejected those recommendations. Moreover, the Joint Report is not effective until both the Departments of Defense and Education issue implementing regulations.<sup>148</sup> This has not taken place.

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<sup>143</sup> 58 Fed.Cl. 781 (2003).

<sup>144</sup> The Army Lawyer, April 2004, The Applicability of the Randolph-Sheppard Act to Military Mess Halls, p. 13.

<sup>145</sup> 58 Fed. Cl. 781, 796 (2003).

<sup>146</sup> The CICA, 20 U.S.C. § 2304, by its terms, does not apply in the case of procurement procedures expressly authorized by statute. The R-S Act is such a statute. NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001), NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003).

<sup>147</sup> Miss. Dep't of Rehab. Servs. v. United States, 61 Fed. Cl. 20, 25 (2004).

<sup>148</sup> Moore's Cafeteria Servs. v. United States, 77 Fed. Cl. 180, 185 (2007), aff'd, 314



Likewise, the Department of Defense’s proposed rule cannot form a basis for a decision by this panel. The supposed authority for the regulations is a document called a Joint Explanatory Statement (JES). Yet, the Director of Legislative Operations of the House Committee on Armed Services explained: “there is no conference report and no formal ‘joint explanatory statement of the conference committee.’ for HR 3979. Instead, Chairman Howard P. Buck McKeon and Chairman Carl Levin submitted a Joint Explanatory Statement. <https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT92738/pdf/CPRT-113HPRT92738.pdf>, p. III. The writers of the Joint Explanatory Statement (JES) were only two individuals, and do not represent the will of Congress. Two members of Congress cannot adopt a law. Moreover, the JES provision that was enacted into law authorizes intra-governmental federal contracting, which has nothing to do with the application of the R-S Act. A JES does not have the force of law and is unpersuasive when it goes well beyond the statute it accompanies to interpret a previously enacted law.”<sup>149</sup>

Moreover Defense does not have authority to overrule the R-S Act by means of a regulation. It does not have exclusive authority to promulgate regulations concerning the R-S Act, only Education does. An “agency’s interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.”<sup>150</sup> While the Defense Department has authority to publish rules, it does not have authority to apply those rules in the case of the R-S Act where they contravene the R-S Act or its implementing regulations. Military procurement law applies “except in cases of other procurement procedures expressly authorized by statute.”<sup>151</sup> The R-S Act is such a statute.<sup>152</sup>

### III. THE “ANALYSIS” SECTION OF THE OPINION

A section of the Arbitration Decision beginning at page 11 is entitled Analysis, and contains three subsections. The third subsection, entitled “other non-binding policy guidance is addressed in Section II of this Dissent. The following addresses the Arbitration Decision’s author’s statements concerning (1) eligibility, and (2) whether DFA services pertain to the operation of a cafeteria.

#### A. Eligibility

Without citing to a single legal authority, the majority concludes that blind vendors do not get a priority “*in or at a cafeteria or other vending facility.*”

Without any analysis, the decision’s author states:

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F. App’x 277 (Fed. Cir. 2008).

<sup>149</sup> Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003).

<sup>150</sup> MPAA, 309 F.3d at 801 (citing Ry. Labor Executives, 29 F.3d at 671). Am. Library Ass’n. v. F.C.C., 406 F.3d 689, 699 (D.C. Cir. 2005) (emphasis in original).

<sup>151</sup> 10 USC § 2304(a)(1).

<sup>152</sup> NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001).

The Arbitration Panel notes that under the 2007JWA no-poaching provision, a “prime contract for operation of a military dining facility” (left for RSA) is distinguished from one that is “supporting the operation.”

The author makes it clear that he is more concerned with the Army’s “ability to operate” than with the correct application of the R-S Act.

To reach his conclusion, the author ignores established principles of statutory analysis: the John Warner Act, at Section 856(a)(1) states that the R-S Act does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility on the procurement list as of Oct. 17, 2006.

According to the legislative history of the John Warner Act, the Senate proposed that the status quo for continuation and completion of existing contracts awarded under JWOD and the R-S Act be extended for one year.<sup>153</sup> The House receded with a permanent policy “regarding the award of contracts and subcontracts for food services, mess attendant services, and other services supporting the operation of a military dining facility under” JWOD and R-S Act. Id.

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

***The contract at issue is a contract that is required to remain R-S Act, according to section 856(a)(1), as it was operated by a blind licensee pursuant to the R-S Act since 2005.*** Testimony at the hearing on this matter conclusively established that the blind licensee successfully operated the DFA portion throughout that period of time, receiving second place for excellence in dining facility operation nationwide and in Japan, the Phillip A. Connelly award.<sup>154</sup>

It is a standard principle of statutory interpretation that identical phrases appearing in the same statute ... ordinarily bear a consistent meaning.<sup>155</sup> Section 856(a)(1) and 856(b)<sup>156</sup>

<sup>153</sup> <https://www.congress.gov/congressional-report/109th-congress/house-report/702/1>

<sup>154</sup> Transcript, page. 23, lines 22-25, page 38, lines 1-15, page 39, lines 1-2.

<sup>155</sup> Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2545 (2013).

<sup>156</sup> 856(b) call for the Comptroller General to:

conduct a review of representational samples of food service contracts described in section (a)

...

(2) Contracts covered – For purposes of the review under paragraph (1), a food service contract described in this paragraph is a contract—

(A) for full services, mess attendant services, or services supporting the operation of all or any part of a military dining facility;

(B) that was awarded under either the Randolph-Sheppard Act or the Javits-Wagner O’Day Act; and

both contain the same phrase. Clearly, the phrase in 856(a)(1) means that, except for those “poached” contracts, the R-S Act applies to “mess attendant services or services supporting the operation of a military dining facility.” The definition of those contracts that were to be subject to the Comptroller General’s review cannot logically exclude the very same contracts “poached” from blind vendors by JWOD entities. To do so would fly “in the face of the well-established principle that every word, phrase, sentence, and part of a statutory enactment must be accorded significance and harmonized with every other part.”<sup>157</sup> Clearly, if the contracts covered by the Comptroller General’s review include mess attendant services, and services supporting the operation of a dining facility, **including those awarded under either the R-S Act or JWOD**,<sup>158</sup> then Congress recognized that DFA contracts are authorized to be awarded under the R-S Act. If Congress intended to remove those contracts from the R-S Act, it would have explicitly done so. It did not.<sup>159</sup>

## B. Whether DFA Services Pertain to the Operation of a Cafeteria

At page 12, the Arbitration Decision’s author states: “If it is a single contract for DFA, other non-profits are authorized to bid.” This is, in part, a correct statement:

The GAO has opined that a solicitation may include “a ‘cascading’ set of priorities or preferences whereby competition is limited to small business concerns and the SLA.” See GAO Opinion B–290925, October 23, 2002. Further, case law has contemplated that a solicitation may include a small business limitation and still allow a SLA to apply and be afforded priority under the RS Act. See *North Carolina Div. of Servs. for the Blind v. United States*, 53 Fed.Cl. 147 (2002) (NCDSB).<sup>160</sup>

What the author leaves out is the fact that, if the SLA’s bid is within the competitive range,<sup>161</sup> the SLA is awarded the bid. If the SLA does not receive the contract, then the non-profit (or as is the case with the solicitation at issue here, the 8(a) non-blind operated for-profit) is entitled to a preference in the award of the contract.

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

<sup>157</sup> McGraw v. City of Huntington Beach, 882 F.2d 384, 391 (9<sup>th</sup> Cir. 1989).

<sup>158</sup> John Warner Act, Section 856(b)(2)(B).

<sup>159</sup> What Congress did do was to explicitly state that subcontracts entered into by a prime contractor are to be JWOD. John Warner Act, Section 856(a)(2)(B). That provision covers all subcontracts (not just DFA) to be awarded to JWOD. That can only mean that where a blind vendor (or other prime contractor) seeks to employ a subcontractor, the opportunity must first be offered to JWOD.

<sup>160</sup> Mississippi Dep’t of Rehab. Servs. v. United States, 58 Fed. Cl. 371, 373 (2003).

<sup>161</sup> 34 C.F.R. § 395.33.

At page 13, the opinion’s author states: “The “no-poaching” language in 856(a)(2)(B) in the JWA doesn’t appear to explicitly preclude the Petitioner’s argument, but neither does it clearly support it.”

The author does not apply the statutory interpretation maxim that is essential when interpreting remedial legislation. The R-S Act is remedial legislation, and is to be liberally interpreted in conformance with Congress’ statement: “[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting.”<sup>162</sup> Such is the case with the Age Discrimination in Employment Act (ADEA): “The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment.”<sup>163</sup> It is the case with the interpretation of the Employee Retirement Income Security Act, which “must be guided by the familiar canon of statutory construction that remedial legislation must be construed broadly to effectuate its purposes.”<sup>164</sup> Likewise, when interpreting the Bituminous Coal Act, “remedial legislation is entitled to a broad interpretation so that its public purposes may be fully effectuated.”<sup>165</sup> The broad remedial purpose of the Comprehensive Environmental Response, Compensation, and Liability Act means that its terms must be liberally interpreted, to carry out its purpose.<sup>166</sup>

The R-S Act’s broad, remedial purpose should not be ignored. Yet, the Arbitration Decision has ignored the purposes of the R-S Act as well as the express language of the R-S Act and the John Warner Act.

### **DISSENTING DECISION**

Dated July 24, 2017.

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Susan Rockwood Gashel  
Attorney at Law

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<sup>162</sup> 20 U.S.C. § 107(a).

<sup>163</sup> Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), aff’d, 434 U.S. 99, 98 S. Ct. 600, 54 L. Ed. 2d 270 (1977).

<sup>164</sup> Belland v. Pension Ben. Guar. Corp., 726 F.2d 839, 849 (D.C. Cir. 1984).

<sup>165</sup> Binkley Mining Co. of Missouri v. Wheeler, 133 F.2d 863, 871 (8th Cir. 1943).

<sup>166</sup> United States v. 718 W. Wilson Ave., Glendale, Cal., 91203, Lot 17 of Tract No. 4531, 778 F. Supp. 2d 1067, 1070 (C.D. Cal. 2011)

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