

BEFORE AN ARBITRATION PANEL CONVENED BY THE SECRETARY OF  
EDUCATION PURSUANT TO 20 U.S.C. § 107d-2

In the Matter of:

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THE STATE OF TEXAS, by and through THE TEXAS WORKFORCE  
COMMISSION, BUSINESS ENTERPRISES OF TEXAS

and

THE UNITED STATES OF AMERICA, by and through  
THE UNITED STATES DEPARTMENT OF THE AIR FORCE

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Appearances:

For the Complainant:

Peter A. Nolan, Esq.  
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For the Respondent:

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#### DECISION AND AWARD

Fredric R. Dichter was selected by the parties as the Neutral Chair of a three-member Arbitration Panel. Susan Gashel and Steven Fuscher are the other two panel members. The matter comes before the Panel pursuant to 20 USC 107d-1 (b) and CFR 395.37. A hearing was held in the above matter on December 13, 2016 at Joint Base Sam Houston in San Antonio, Texas. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The Panel has considered the testimony, exhibits and arguments in reaching its decision.

## ISSUES

The parties did not agree on the issues to be decided by the panel. The panel finds the following issues:

1. Did the SLA waive its right to object to the criteria contained in the solicitation?
2. Did the Air Force violate the RSA by excluding the SLA from the competitive range?
3. Did the Air Force violate the RSA when it failed to consult with the Secretary of Education to determine if the operation can be provided at a reasonable cost.
4. Did the Air Force violate the RSA by not affording the Secretary of Education the opportunity to determine whether the SLA could provide services under the contract at a “reasonable cost?”
5. Does the Arbitration panel have authority to determine whether the Department of the Air Force properly applied the criteria listed in the solicitation? If so, were those criteria applied correctly?
6. If the Panel determines there was a violation of the RSA, what is the appropriate remedy?

## STATEMENT OF FACTS

The Parties agreed to certain facts and signed a Stipulation of Facts prior to the start of the hearing. Paragraph 18 of the Stipulation indicates there were five contracts with the State Licensing Agency, SLA. Subsequent to signing the stipulation the Department of the Air Force entered into a sixth agreement with the SLA that began on November 1, 2016 and was to end on February 28, 2017.

The Stipulated Facts are:

1. The United States Department of the Air Force is a department, agency, or instrumentality of the United States that is in control of the maintenance, operation, and protection of certain dining facilities located on federal property at Joint Base San Antonio (JBSA), Fort Sam Houston (FSH) and Camp Bullis.

2. The State of Texas, by and through the Texas Workforce Commission, Business Enterprise of Texas (Texas) is a Texas state agency and the State Licensing Agency (SLA) under the Randolph- Sheppard Act (RSA), 20 U.S.C. §§ 107 *et. seq.* and the RSA's implementing regulations.
3. Roland Marshall is a legally blind individual residing in Bexar County, Texas and is the incumbent Licensed Manager under the RSA who is 100% responsible for the management and operation of dining facilities under the current (and prior) full food service at JBSA, FSH, and Camp Bullis.
4. On or about December 30, 2014, the United States government, by and through the Department of the Air Force issued Solicitation No. FA3016-14-R-0003 (Solicitation) for follow on full food services at JBSA, Fort Sam Houston (FSH) and Camp Bullis.
5. The Solicitation was issued by the Air Force' 502 Contracting Squadron. Mr. Charles "Derrick" Rhea, a Contracting Officer with the 502 Contracting Squadron is currently the Contracting Officer responsible for the solicitation.
6. Mr. Rhea had the authority to issue the Solicitation on behalf of the United States and the Department of the Air Force.
7. The Solicitation was issued pursuant to the Randolph Sheppard Act, 20 U.S.C. §§107 *et seq.*, and announced that priority would be given to blind vendors under the RSA if the SLA was in the competitive range, found to be technically acceptable, had a performance confidence assessment rating of Satisfactory, and demonstrated through its proposal that it can provide such operation at a fair and reasonable price as determined by the Government after applying its source selection contained in the solicitation.
8. The Solicitation contemplates award of a new contract to include a base period and four (4) one (1) year option periods.
9. Texas, by and through its SLA, timely submitted a proposal under the Solicitation. At all times during the solicitation phase Texas was represented by its Department of Assistive and Rehabilitative Services (DARs) which was subsequently changed by the State to the Texas Work Force Commission.
10. By letter dated April 12, 2016, the Air Force informed Texas that its proposal was excluded from the competitive range and therefore eliminated from the competition.
11. In the Air Force's April 12, 2016, letter, Texas was informed its proposal had been rated Technically Acceptable and had been assigned a Performance Confidence Assessment rating of "Substantial Confidence".
12. Texas was also informed by the Air Force that the only reason its proposal was removed from the competitive range was because it had proposed

“unreasonably high pricing compared to competitively received pricing and comparison of proposed prices with independent Government cost estimates.”

13. In the evaluation leading to the competitive range determination, the government did not compare proposed prices of the offerors to historical prices paid under the predecessor contracts of which the Air Force awarded two as sole-source contracts to Texas without competitive pricing.

14. Prior to excluding Texas from the competitive range, the Air Force did not confer with the Secretary of Education for the Secretary’s determination of whether Texas was entitled to a priority in awarding this contract pursuant to the RSA and its implementing regulations.

15. By letter dated May 2, 2016, Texas, by and through Marshall, filed an agency level protest pursuant to FAR §33.103, challenging the Air Force’s decision to exclude Texas from the competitive range. No protest was made by Texas about the solicitation prior to May 2, 2016.

16. On May 9, 2016, Texas submitted a demand for arbitration under the RSA to the Commissioner of the Rehabilitation Services Administration, United States Department of Education.

17. By correspondence dated June 8, 2016, the Air Force denied the agency level protest in a written response.

18. Since June 1, 2001, and under five prior contracts, DARS has been responsible for performing the full food service requirement at what is now known as JBSA, FSH and Camp Bullis. The first three contracts listed were awarded by the Department of the Army. These five contracts are listed below:

<u>Contract No.</u>	<u>Award Date</u>	<u>Contract Number</u>
1	June 1, 2001	DADA10-00-D-0077
2	February 1, 2005	W9124J-05-D-0004
3	May 29, 2009	W9124J-09-D-0005
4	January 22, 2015	FA3016-15-C-0004
5	February 1, 2016	FA3016-16-C-0003

19. As required by the RSA, and prior to awarding Air Force contracts, FA3016-15-C-0004 FA3016-16-C-0003, the Air Force determined Texas could provide full food service at JBSA, FSH and Camp Bullis at a reasonable cost, with food of a high quality comparable to that provided at the time of the award.

20 Building 1287, the Slagel Dining Facility, was built and became operational during the Third Contract.

21 Building 1287 is the largest multiple level military dining facility in the United States with a design capacity of 4800, serving an average of 8,000 – 10,000 meals per day, with surges as high as 13,000 meals per day.

22 Building 1287 primarily feeds military personnel in medical training who are in the Army, Air Force, Marines and Coast Guard.

23 On or about January 12, 2010, Texas received the government's request for proposal seeking full food services in Building 1287.

24 On or about May 2, 2010, Texas timely submitted a proposal to add Building 1287 to the Third Contract through a negotiated contract modification.

25 For nearly 5 months, beginning May 2, 2010, and ending September 23, 2010, Texas and the United States government negotiated the final terms of the contract modification, including a fair and reasonable price.

26 On or about September 23, 2010, the United States government issued Modification P00009 to the Third Contract which finalized the terms and conditions of the modification, including the price for the inclusion of Building 1287 into the Third Contract.

27 Prior to an agreement on price for Building 1287, the government determined that Texas' pricing for Building 1287 was fair and reasonable.

28 On January 22, 2015, and effective February 1, 2015, Contract No. FA3016-15-C-0004 (Fourth Contract) was awarded to Texas under the RSA. The Fourth Contract was the result of sole source negotiations of the parties.

29 Prior to making this award, the government determined that the pricing for this Fourth Contract, which includes Building 1287, was fair and reasonable.

30 The Fourth Contract expired on January 31, 2016.

31 The Fifth Contract, No. FA3016-16-C-0003 for full food service was awarded on February 1, 2016, and expired on October 31, 2016. Prior to making this award, the government determined that the pricing for the Fifth Contract, which includes Building 1287, was fair and reasonable.

The Panel finds the following additional facts:

1. Each time the Department of the Army or the Department of the Air Force sought to negotiate with the SLA over the rate, they reached agreement on price.
2. Contracts 1, 2 and 3 were competitively bid. Contracts 4-6 were sole source bridge contracts pending the award of the current solicitation.

3. The contract price agreed upon for contracts 4 and 5 was lower than the price originally proposed by the SLA for those contracts.
4. The parties had face to face negotiations over the price in the current contract, contract 6. The Department of Air Force questioned \$45,000 of the price proposed. The final price agreed upon by the parties was \$600,00 or 12% lower than the original price.
5. In negotiations with the Department of the Army in contract 3, the SLA reduced its proposal by 29% from its original proposal.
6. The SLA submitted its proposal under the current solicitation on February 17, 2015. It had been awarded contract 4 on January 22, 2015.
7. The Department of the Air Force received eight proposals. Four of the proposals were found to be within the competitive range. The proposal received from the SLA was the third highest of the eight. It was 12% over the competitive range determination and 31% higher than the IGCE.
8. Proposals were evaluated not just on price, but also on technical criteria and a performance confidence assessment. Technical criteria consist of four elements; mobilization plan, staffing plan, quality control, and contingency plan. Each element is rated acceptable or unacceptable. Performance confidence is rated as substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. A minimum score of Satisfactory was required.
9. The SLA was rated as acceptable in all four technical categories and was given a rating of "Substantial Confidence" as to Performance.
10. Two of the four bids that were found to be within the competitive range received an unacceptable rating in one of the four technical ratings. The Air Force required that "to be acceptable, all technical sub factors must be rated technically acceptable." (Exhibit 17, p.5)
11. One of the other two offerors found to be in the competitive range received a rating of "unknown confidence" under the Performance Confidence assessment. The other three received a rating of "Satisfactory Confidence."
12. The Contracting Officer concluded that the areas of deficiency noted in the preceding paragraphs could be rectified during negotiations. He did not believe negotiations with the SLA would result in a competitive price.
13. The SLA after reviewing the solicitation did not object to the terms of the solicitation or to the criteria set forth which would be used to evaluate proposals.
14. After setting the competitive range, the Air Force did not inform the Secretary of Education that the SLA had been excluded. It at no time contacted the Secretary.

14. Prior to making a finding as to the competitive range the contracting officer contacted one of the bidders to obtain clarification on the price it had proposed. It had the lowest price proposed. He contacted a second bidder for questions on one of the other criteria. It did not engage in negotiations with either of those bidders at the time they were contacted.

## DISCUSSION

### Establishment of Criteria

The Air Force had the option of going back to the SLA and offering it another sole source contract as it did with the bridge contracts, or to seek competitive bids. It chose the latter route and was within its rights to do so.

Section 395.33 is entitled "Operation of cafeterias by blind vendors." It discusses the priority to be given to blind vendors and sets forth what a government agency must do to comply with the RSA. The Section provides:

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

(b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at a competitive cost and of comparative high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to a solicitation for offers when a cafeteria contract is contemplated by the appropriate property managing department agency or instrumentality. Such criteria may include sanitation practices personnel, staffing, menu pricing and portion sizes and menu variety, budget and accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State

Licensing Agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of Section 395.37.

The Air Force, to comply with the Regulations, had to develop criteria by which it would evaluate each offer. The Regulations give the agency seeking bids some leeway in what is included, but whatever is established as the criteria must be akin to those described in the Regulation. Here, the Air Force did establish criteria. It would examine each proposal based on its technical merit, Performance assessment and the proposed price. These criteria were listed in the solicitation. With that backdrop, the Panel will address the issues presented by the parties.

#### Waiver

The Air Force first argues that the SLA has “waived its right to complain or challenge the evaluation criteria language set forth in Request for Proposal (RFP) FA-3016-15-R-0003 by failing to make any protest or complaint about those criteria within the required time of the solicitation as the law and regulations require.”<sup>1</sup> The solicitation occurred in December of 2014. The SLA along with seven others offered a bid for the contract. The solicitation set forth the criteria that would be used by the Air Force to determine the competitive range and the successful bidder. It should be noted that the SLA did not challenge the criteria that were established by the Air Force.

In North Carolina Division of Services for the Blind, the Court held where there is a "deficiency or problem in a solicitation . . . the proper procedure for the offeror to follow is not to wait to see if it is the successful offeror before deciding

<sup>1</sup> Air Force prehearing brief.

whether to challenge the procurement, but rather to raise the objection in a timely fashion."<sup>2</sup> Similarly, the Court in Moore v. Cafeteria Services, 77 Fed Ct. at p. 185 concluded that: "Moore had the opportunity to object to the terms of the solicitation during the bidding process, and in not doing so waived its right to do so before this Court." This Panel agrees with that holding. The SLA cannot contest the criteria set out in the solicitation, which it did not. Any attempt to have done so would have been waived by the SLA. As will be discussed later, that does not mean it cannot challenge how those criteria were applied. It only means it cannot argue different criteria should have been used

#### Secretary of Education

The SLA maintains that the Air Force violated the Regulations by failing to notify the Secretary of Education it had determined the SLA bid was not within the competitive range. The briefing held by the Air Force after it established the competitive range noted under the title "Recommendations" that under the Randolph Sheppard Act it "must notify the Secretary of Education if SLA is not in Competitive Range." This was not done.<sup>3</sup> The Air Force never contacted the Secretary. However, that error alone is not sufficient to find the Contracting Officer ultimate decision was wrong. That is a separate issue altogether.

The SLA next maintains the terms of the solicitation required the Air Force to contact the Secretary independent of any Statutory mandate to do so. It refers to p. 117 of the solicitation. It says "Evaluations will be conducted in the following manner." Paragraph (a) states the evaluation team will evaluate all proposals

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<sup>2</sup> North Carolina Division of Services for the Blind v. United States, 53 Fed. Cl. 147 (Fed. Cl. 2002); Moore's Cafeteria Services v. United States, 77 Fed. Cl. 180 (Fed Cl. 2007).

<sup>3</sup> Tx Exhibit 19

against all factors in the solicitation using the same evaluation criteria in the Addendum to FAR 52.212.2...” After it does its evaluation of all the factors the Air Force is to establish the competitive range. It can make that determination with or without discussions with the bidders. Section (b) then says the Air Force can have discussions with “all offerors in the competitive range.” Under section (c) the Air Force is to receive the “final proposed revisions” and from those make a “best value determination.” The Section goes on to say: “If the technically acceptable offeror with the lowest evaluated reasonable price has an overall satisfactory Confidence performance rating that offeror represents the best value for the government.” Section (d) says if the offeror does not have such a rating then the next lowest bid with a satisfactory rating is selected. It is Section (f) that the SLA believes now comes into play. That Section states:

f. If the best value offeror as determined under Paragraph c or d is not the SLA, the Government will determine if award to the SLA shall preempt the best value offeror using the following criteria:

1) If the SLA is within the competitive range, is found to be technically acceptable, has a performance confidence assessment rating equal to or higher than the best value offeror, and demonstrates through its proposal that it can provide such operation at a fair and reasonable price as determined by the Government after applying its source selection criteria contained in the solicitation; then priority/award will be given/made to the SLA subject to a determination of contractor responsibility. If the SLA proposal does not meet all criteria listed above, award to the SLA will not preempt the best value offeror and award will then be made to the best value offeror subject to a determination of contractor responsibility subject to consultations with the Department of Education.

The SLA contends this was violated. However, there are prerequisites before the Secretary can get involved. Section (f) says if the SLA is not the best value “as determined by sections (c) and (d) a determination is made as to whether it still should be awarded the contract.” Those two sections only apply to offerors who

were eligible to submit a final proposal and were thus within the competitive range. That does not apply to the SLA. Subsection 1 then begins with the words “if the SLA is within the competitive range.” If it is within that range and is not selected, it goes to the Secretary. The Panel finds there was no requirement under this provision to notify the Secretary of its decision. In reaching this conclusion, it is not passing on whether the Regulations pose an independent requirement. It shall address that question now.

The SLA contends the Air Force was obligated to defer to the Secretary of Education for a determination as to whether the SLA could provide the services “at a reasonable cost,” It refers to 395.33. It maintains this requirement applied no matter whether the SLA is determined to be within the competitive range or outside. It points to Section (a) of 395.33. The Air Force disagrees with the SLA interpretation of that Section. It believes Section (a) does not apply here since it sought competitive bids and that Section only applies to direct negotiations. It contends only Section (b) applies. That Section says the Secretary is to be contacted when the proposal “has been judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award.” Here, it was not found to be within the competitive range and thus there was no requirement to contact the Secretary. It maintains Subsection (a) has no applicability when competitive bids are sought.

The Panel in trying to resolve this disagreement notes there are varying interpretations that can be given to this language. One method would be to see if there are other sub-sections of 395 that might aid in understanding Sections (a) and (b). Subsection d. says:

Notwithstanding the requirements of paragraphs (a) and (b) of this section, the Federal Property managing departments, agencies and instrumentalities may afford priority in the operation of cafeterias by blind vendors on Federal property through direct negotiations with State licensing agencies whenever such department, agency, or instrumentality determines on an individual basis, that such operation can be provided at a reasonable cost...

This language in many respects parallels the language in Subsection (a). The agency may make the determination on an individual basis that the SLA can provide services at a reasonable cost and award the contract to the SLA without bidding. If it determines the SLA cannot do it at a reasonable cost, then subsection (a) says it must go to the Secretary to determine on an individual basis if the price of the SLA was reasonable. In that way, Subsections (d) and (a) would be read together. It could be argued under such an interpretation that this method gives every section of this Regulation meaning. It could also be argued that such an interpretation alleviates the SLA's concern that the Secretary is being cut out of the loop. The last sentence of (b) which says: "If the State Licensing Agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of Section 395.3." It is through this sentence that this Panel was convened.

This last sentence of (b) could provide the safeguard to ensure that the Secretary's role is not abridged. The Secretary through this Panel would be exercising her role to make certain that the RSA was followed, instead of the Secretary making that determination. As soon as the SLA cries foul, the SLA can file a complaint and there is then an automatic review of the process. The

standard for that review will be discussed later, but suffice it to say here the final determination on whether the Air Force complied with the SLA will rest with the Secretary through this Panel's final ruling on that question as the Statute and Regulations require.

As noted, however, the above is but one interpretation of this Regulation. The SLA points out there may be a better interpretation, The Panel should not confine itself to this Regulation, but instead it should look at the entire Statute and its supporting Regulations. The RSA throughout puts the Secretary of Education in the prominent role. In each instance, deference is given to the Secretary to resolve questions about the SLA and its ability to provide services at a reasonable price. 20 U.S.C. 107(b) says: "any limitation on the placement or operation of a vending facility" is within the exclusive purview of the Secretary. The Agency must show that selecting the SLA: "adversely affect the interests of the United States" to by-pass awarding the contract to the SLA. Thus, it argues, any interpretation of these regulations that takes away that power is inconsistent with the basic intent of the Act and its Regulation. It is axiomatic in interpreting language, be it in a contract or a statute, that the document in question must be looked at as a whole. Any interpretation of 395.33 that eliminates the Secretary from being the ultimate decider is consequently inconsistent with the basic intent to put the Secretary as the final arbiter. Thus, it believes this interpretation is the one that should be adopted.

The Panel finds merit to each position. However, it will not decide this

issue at this juncture. It wants to review the criteria and how they were applied before addressing this question. The findings there could impact the need for the panel to resolve this contentious issue.

### Application of Criteria

The question now before the Panel is whether the contracting officer failed to apply the criteria in the solicitation he agreed to apply. The Panel finds contrary to the arguments of the Air Force that it has jurisdiction to make that determination. The RSA requires the Air Force to establish criteria. It would be fruitless to find that once it establishes criteria that the panel is powerless to review whether those statutorily required criteria were followed. It is not enough to establish them. It must then utilize them or the entire requirement for there to be criteria would be meaningless. Since it is the RSA that requires there be criteria it necessarily follows that a panel convened under the RSA has authority to ensure those criteria were properly applied. The panel will first take each of the criteria and weigh the proposals against each one. After that, it will get to the next issue argued by the parties. How much deference is due the contracting officer's findings?

The Solicitation provides:

Evaluations will be conducted in the following manner:

- a. The Government evaluation team will evaluate all proposals against all factors in the solicitation using the same evaluation criteria in the Addendum to FAR 52.212-2 applied to each proposal. After the evaluation of each proposal is complete, each proposal will receive a technical rating, a performance confidence rating, and a total evaluation price. Based on these ratings and the total evaluated price, the Government will then establish the competitive range comprised of the most highly rated proposals at a fair and reasonable price. Even if it is determined discussions are not required to address specific evaluation

issues, a competitive range determination will be completed.

The SLA maintains the Contracting Officer ignored two of the three factors and considered only price, and, thereby failed to properly apply the criteria as set forth in the solicitation.

The Panel cannot list the actual amount proposed for all the offerees as that is protected material. It is known that the SLA proposal was the third highest. One of the offerors that was included had a proposal substantially less than any other and that fact caused the contracting officer to contact it for clarification. It was included as one of the four offerors within the competitive range. One of the offerors was almost five times greater than the ICGE and almost four times greater than the SLA price. It was excluded. The other three offerors that were included were relatively close in price. The next lowest proposal that was excluded was only slightly higher than the highest price of the four included. The SLA was slightly higher than that proposal. The seventh highest proposal was somewhat higher than the SLA, but scored poorly on the other criteria.

The Panel can list how the offerors fared against the other criteria. Below is the list of bidders and how they rated:

OFFEROR	PROPOSED PRICE	PERFORMANCE ASSESSMENT	Technical Ratings
IGCE	\$58,209,251.61	N/A	N/A
Bidder		Satisfactory	Unacceptable
Bidder		Satisfactory	Unacceptable
Bidder		Satisfactory	Acceptable
Bidder		Unknown	Acceptable
Bidder		Satisfactory	Acceptable
DARS (Texas)	\$76,316,755.10	Substantial	Acceptable
Bidder		Unknown	Unacceptable

Bidder		Unknown	Unacceptable
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Two of the bidders were rated as unacceptable on one of the four technical criteria. A third received a rating of “unknown confidence” on its performance assessment. The fourth received a rating of Satisfactory on its assessment and the SLA was listed as having substantial confidence in its ability to do the job well. The solicitation states:

The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the government, price and other factors considered. The following factors should be used to evaluate proposals:

1. Technical Acceptability
2. Price
3. Past Performance

Past Performance is approximately equal to cost or price

The Contracting Officer excluded the SLA based solely on its price. It included a bidder even though its Performance Assessment was unknown. The solicitation states that criteria shall be given equal weight to price. The Contracting Officer assumed it could fix that bidder’s deficiency with discussions. It had not dealt with this offeror in the past so it was unclear how he knew it could be corrected. It had dealt with the SLA in the past as to its price and had corrected any issues through discussion. Thus, there was history between the SLA and the Air Force that would indicate adjustment could have been made and there was no history between the Air Force and the bidder, yet the Air Force concluded this issue could be rectified and the other could not. It should be noted that the differential in price between AEPS and the SLA was not so great as to explain why the Contracting Officer would believe negotiations with one would be fruitful and negotiations with the SLA would not.

One bidder rated as acceptable in all four technical categories. It was rated as Satisfactory on its Performance Assessment. The solicitation required a rating of

satisfactory or better. The SLA argues that it was rated as Substantial Confidence and should be given credit for that higher rating. Since the solicitation only required a rating of Satisfactory, that is all that was needed.

The Contracting Officer by including a bidder as being within the competitive range despite its Unknown Confidence Rating and excluding the SLA whose bid was only slightly higher failed to follow the requirement that equal weight be given to both criteria. He clearly gave more weight to price than performance and that is contrary to the solicitation.

The SLA and one bidder were the only bidders who had no deficiency in their technical scores and whose performance assessment was positive. Again, the Contracting Officer assumed he could correct the technical flaws for two other bidders with no history with them. He had no way of knowing whether discussions would be fruitful. Conversely, its history with the SLA would have and should have led him to believe their deficiency, i.e. their price, could have been resolved.

The Panel does not know how severe the deficiencies were of each of the bidders that had an area of weakness. Whether the deficiency could be corrected easily or required more action on the part of the bidder is unknown. What is known is that the SLA with its unblemished record had negotiated in the past with the Contracting Officer and at times reduced its price significantly. In one case, the reduction was as much as the reduction that would have been needed here to have its price of the SLA to be well within the competitive range.

There is one other factor to consider in evaluating the Contracting Officer's conclusion. He said he referred to the FAR in doing his evaluation. Was he

permitted to do so and to what extent?

### Applicability of Federal Acquisition Regulations (FAR)

. The Contracting Officer said he utilized several provisions of the FAR. The Air Force contends the Regulations promulgated under the RSA give broad guidance on how solicitations are conducted and lists some possible criteria to use, but does not list all of them. It believes since there are gaps in the RSA Regulations, the contracting officer may look to FAR.<sup>4</sup> It argues that is what the contracting officer did. It also maintains that FAR 15.308 states that the contracting officer is the one to evaluate proposals and determine who is within the competitive range based on the set criteria. The facts here indicate he did.

The SLA maintains the FAR does not apply here at all as this is a RSA solicitation and that the FAR applies except in cases of procurement procedures otherwise authorized by statute. 10 USC 2304(a)(1). The RSA is such a procurement statute. NISH v. Rumsfeld, 348 F.3d 1263 (10<sup>th</sup> Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4<sup>th</sup> Cir. 2001).

As noted, there is no question that the Contracting Officer looked to the FAR in determining the competitive range. The solicitation did reference FAR Sup. 52-212.2. That states:

(a)The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

The Contracting Officer then fills in the blanks, which was done. Given the inclusion of this Section of the FAR in the solicitation its usage was clearly permitted. However,

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<sup>4</sup> It cited Chevron U.S.A. 467 U.S. 837 (1984).

there is nothing in this FAR that would change the Panel's findings. It says to select the offeror based on "price and other factors." It does not just say price, but price plus other factors.

The Air Force in its brief also referenced FAR 15-306, which referred to 15-304. While the Panel does not believe this Section applies here, it is worthwhile to point to some of that FAR's provisions. It reads:

15.304 -- Evaluation Factors and Significant Subfactors.

- (a) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.
- (b) Evaluation factors and significant subfactors must --
  - (1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and
  - (2) Support meaningful comparison and discrimination between and among competing proposals.
- (c) The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to the following requirements:
  - (1) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A) (ii) and 41 U.S.C. 3306(c)(1)(B)) (also see [Part 36](#) for architect-engineer contracts).
  - (2) The quality of the product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience (10 U.S.C. 2305(a)(3)(A)(i) and 3306(c)(1)(A)).
  - (3)
    - (i) Past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.

Interestingly, this FAR requires past performance, price and quality be considered. It also says the contracting officer shall "support meaningful comparisons... between and among competing proposals." As the Panel has noted, this was not done. There was no evidence the Contracting Officer made "meaningful comparisons." The SLA was not meaningfully compared except as to

price. In all other respects, no meaningful comparison was made. Thus, even the FAR which has no applicability it would not support the decision even if it had applied.

Nevertheless, the Panel in evaluating the parties' arguments agrees with the SLA. The criteria are created pursuant to the requirements of the RSA and Regulations. While it leaves room for additional criteria, as it is not meant to be inclusive, it is the SLA that required them in the first place. As such, they must be evaluated in accordance with the that Act.

#### Weight to be Given to Contracting Officer's Conclusion

The Panel has made fit own actual findings. The question now before the Panel is whether these findings are enough for the Panel to set aside the Contracting Officer's determination. What is the appropriate standard for the Panel to use? Under what circumstances can the Panel substitute its judgment for that of the contracting officer?

The Air Force argues the Contracting Officer is given wide discretion in making its determination as to which contractors are included within the competitive range and which are not. His decision it contends can only be overturned if it was arbitrarily made. Unless that threshold is reached, the Air Force contends, the Arbitration Panel is without authority to overturn it. The SLA conversely argues that where there is substantial evidence that the criteria were applied erroneously or put another way there was substantial evidence the SLA should have been included in the competitive range the panel should set aside the Contracting Officers conclusion. It believes the Panel approaches the matter as a de novo review.

The prime argument of the Air Force for the proposition that the panel should defer to the Contracting Officer is that the FAR gives him wide authority. It specifically refers to sub-part 1.1 of FAR. The problem with this argument is that the Panel has already found the FAR does not apply except where noted in the solicitation. This Section was not referenced.

The Air Force also references 5 U.S.C. 706 (2)(A). That Section applies to reviewing courts. This Panel is not akin to an appellate court. We are the trier of the fact. Thus, the Panel finds this Section inapplicable.

The SLA references 20 U.S.C, 107(B). This Statute delegates to the Secretary of Education authority to assure the RSA is applied properly. The Statute then has a mechanism for a SLA to resolve any disputes over the application of the Act, The Panel decision is then considered a final agency determination. The Panel is acting in the stead of the Secretary, but with the same final authority.

The Panel must once again agree with the SLA. It is the alter ego of the Secretary and performs the final role in deciding whether the RSA was followed correctly. It is free to set aside the Contracting Officer's conclusion if it finds he failed to apply the criteria properly. Its determination is made based on the evidence and while it respects the Contracting Officer's determination, it is not bound by it if the Panel finds it is not supported by the evidence.

### Conclusion

This Panel was properly convened to address a complaint filed by the SLA. The SLA felt the Air Force decision to exclude it from consideration violated the RSA. The Panel has the authority to answer that question. In performing that role, it finds it has the authority to determine whether the

criteria established in the solicitation pursuant to the RSA were followed. While its review may not be de novo, it is not limited to situations where the contracting officer acted arbitrarily. The Panel finds there was significant evidence the Contracting officer here failed to properly apply the criteria set forth in the solicitation. By so doing, the Contracting Officer improperly denied the SLA an opportunity to obtain the contract and, thereby, violated the RSA.

There is one final point to address. The Panel earlier spent a good deal of time discussing two different interpretations of 395.33. Given this finding, the Panel finds it is unnecessary to decide which interpretation of that regulation is the correct one. It would have no effect on the findings the Panel has made here.

### Remedy

The Rules governing this Arbitration Panel state:

If the decision of the arbitration panel is that the acts or practices of the Federal agency are in violation of the Act or the regulations, the head of the Federal agency shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

The Panel has found there was a violation. The Agency head or in this case the Contracting Officer, must take action to “carry out the decision of the Panel.” He shall include the SLA in the competitive range and commence negotiations with it.

Dated: February 28, 2017

  
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Fredric R. Dichter, Panel Chair

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Steven R. Fuscher, Panel Member  
Fuscher Group, LLC

*Susan Rockwood Gashel*

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Susan Rockwood Gashel, Panel Member

## Statement of Panel Member Fuscher Concurring in part and Dissenting in part

1. In my opinion, the majority has failed to give proper deference to the decision of the contracting officer to exclude the SLA from the competitive range. The following analysis will address my understanding of relationship between the RSA and the FAR as implemented by the Air Force (Procuring Agency) in this arbitration action.

### The Order is Not Enforceable by the Secretary

2. The majority opinion concludes with an order for the Agency to take action consistent with the decision of the panel. 34 CFR §395.37(d) states the following:

If the panel finds that the acts or practices of any department, agency, or instrumentality are in violation of the Act or of this part, the head of any such department, agency, or instrumentality (subject to any appeal under paragraph (b) of this section) shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

3. However, the Secretary has no authority to enforce the order of the panel, direct the contracting officer to terminate the contractor, or order the contracting officer to obligate funds consistent with the order. The 11<sup>th</sup> Circuit Court of Appeals in *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482 (11th Cir. 1990) found that an arbitration panel convened under the authority of the RSA "has no remedial powers whatsoever," concluding that "[i]t may determine that certain of the federal entity's acts violate the RSA, but the RSA leaves responsibility for remedying the violation to the federal entity itself." *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1492 (11<sup>th</sup> Cir. 1990).

4. In a subsequent court review of an RSA arbitration decision, the *Georgia Dep't of Human Resources* case was cited with approval in *Commonwealth of Kentucky v. United States*, 1229 14 KYWDC, 5:12-CV-00132-TBR, where Judge Russell noted that

"the Eleventh Circuit has concluded that an arbitration panel considering such a conflict may determine whether or not the *federal* entity has complied with the RSA but may not order a specific remedy." Judge Russell agreed that "although the arbitration panel's decision constitutes the [DOE]'s final agency action, the Secretary of Education has no authority to order another federal entity to act one way or another." *Commonwealth of Kentucky v. United States*, 122914 KYWDC, 5:12-CV-00132-TBR.

5. Finally, in *Maryland State Dep't of Education v. US Dep 'r of Veterans Affairs*, 98 F.3d 165 (4<sup>th</sup> Cir. 1996), the Fourth Circuit Court of Appeals agreed that a Section 107d-1(b) arbitration panel lacks authority to award a specific remedy for a violation of the RSA. That Court acknowledged that a federal entity could "simply refuse" to remedy the violations found by an arbitration panel, which comes close to a wrong without a remedy, something usually disdained by the courts. Therefore, while the majority may identify acts of the Air Force that are in violation of the RSA, it has no authority to order remedies for such violations. That responsibility lies with the head of the procuring agency.

6. This limitation on the authority of the Secretary is important to the overall interpretation of the interaction of the RSA and the procurement agency that is represented by the contracting officer.

### Sole Source versus Competitive Source Selections

7. The RSA makes a distinction between sole source and competitive source selections. The panel majority is ignoring this distinction. The Procuring Agency could have opted to negotiate a sole source award, but it chose to seek competitive bids. I concur with the majority that the Air Force had the right to conduct a competitive source selection under the RSA.

8. 34 C.F.R. § 395.33 is entitled "Operation of cafeterias by blind vendors."<sup>1</sup> It is the DoE regulation that implements the RSA and defines the priority to be given to blind vendors when the government is contracting for the provision of dining hall services under the RSA. Section (a) authorizes the award of a contract to the RSA on either a sole source or a competitive basis "when the Secretary determines, on an individual basis and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise."<sup>2</sup> Paragraph (b) addresses when the SLA is entitled to a priority in award of a contract when the SLA is competing for a contract for dining hall services and the RSA

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<sup>1</sup>**§395.33 Operation of cafeterias by blind vendors.** (a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.

(b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. Such solicitations for offers shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of §395.37.

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

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

<sup>2</sup> *fd.*

applies to the source selection.<sup>3</sup> This priority authorizes the procuring agency to pay a "premium" for dining hall services; i.e., a price greater than the price offered by the low responsive, responsible offerer. Paragraph (d) authorizes a sole source award of a contract to the SLA through direct negotiations.<sup>4</sup>

9. As authorized by 34 C.F.R. § 395.33(b), the Air Force competed this acquisition under the Federal Acquisition Regulation. The Air Force in accordance with the RSA Regulations developed criteria by which it would evaluate each offer. The criteria were included in the solicitation for the award of these dining hall services and all potential offerers, including the SLA were put on notice of the process that would be used to award this contract. The published source selection criteria stated that each proposal would be evaluated based on the technical acceptability of the proposal, the performance confidence rating and the total evaluated price. Past Performance was relatively equal to price. The Air Force put all the parties on notice of the terms of the solicitation, the source selection criteria and the process to be used to determine award. These criteria were listed in the solicitation. The competition was conducted using the FAR as a legal basis for conducting this award with special tentacles in the solicitation that addressed the priority to be granted the SLA if the SLA was found to be within the competitive range. The SLA raised no objections to the use of the FAR as a basis for conducting the source selection.

### SLA Waiver of Objections to Source Selection Process

10. I concur with the majority decision that the SLA waived its rights to object to the terms of the solicitation<sup>5</sup> but do not concur with the majority's position that SLA's proposal was not evaluated in a manner consistent with the solicitation and the RSA implementing regulations. The majority opines that the contracting officer was not

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<sup>3</sup> *Ibid.*

<sup>4</sup> *See fn 1.*

<sup>5</sup> The two cases cited as authority for this position were: *North Carolina Division of Services for the Blind v. United States*, 53 Fed. Cl. 147 (Fed. Cl. 2002); *Moore's Cafeteria Services v. United States*, 77 Fed. Cl. 180 (Fed Cl. 2007).

authorized to use FAR supplements in support of the contracting officer's competitive range determination. The SLA could have objected to the source selection process used by the Air Force by requesting the Secretary convene an arbitration panel prior to the competitive source selection but did not. This finding supports a position that the RSA authorizes FAR based competitive source selections. However, the majority opines that the RSA not the FAR controls the source selection criteria to be used to determine the eventual awardee for the contract. This interpretation is problematic since the SLA did not object to the use of the solicitation as the basis for award, the solicitation included references to the FAR, and the RSA application was limited to the provision that if the SLA's proposal was found to be within the competitive range, the SLA would be granted a priority. No other accommodation for the RSA was included within the solicitation.

### Interaction of FAR and the RSA

11. The SLA argues that only the Secretary can determine if the SLA's proposal is providing for the operation of dining hall services at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise.<sup>6</sup> The Air Force's position is that the priority authorized by 34 C.F.R. § 395.33(a) only applies if the SLA's proposal "has been judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award" under 34 C.F.R. § 395.33(b). The argument follows that if the contracting officer determines the SLA's proposal is not within the competitive range the priority does not apply and the source selection is limited to offerors within the competitive range.

12. The majority argues that the sole source authority of 34 C.F.R. § 395.33(d)<sup>7</sup> trumps the competitive authority of 34 C.F.R. § 395.33(b)<sup>8</sup>. I do not concur with this position since the competitive authority of 34 C.F.R. § 395.33(b) becomes meaningless.

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<sup>6</sup> See §395.33A(a) Operation of cafeterias by blind vendors at Fn.1.

<sup>7</sup> See §395.33A(d) Operation of cafeterias by blind vendors at Fn.1.

<sup>8</sup> See §395.33A(b) Operation of cafeterias by blind vendors at Fn. I .

If, as in this case, the government is in receipt of multiple offers at a price significantly lower than the SLA's offer and the government is only authorized to negotiate a price with the SLA, what is the purpose of the solicitation? The majority position is that regardless of the price level of the SLA's proposal, the contracting officer is obligated to attempt to negotiate a fair and reasonable price with the SLA prior to evaluating the proposals of the offerors within the competitive range. This two-step negotiation is not authorized by the terms of the solicitation. Since the majority has ruled that the SLA waived its rights to object to the terms of the solicitation, this two-step negotiation is problematic since it is outside the scope of the published solicitation.

13. If the SLA had requested arbitration prior to the initiation of the competitive source selection and the parties had held a sole source negotiation, the panel would have a different set of facts. But these facts are not before the panel. The majority emphasizes that the government and the SLA have been able to negotiate a fair and reasonable price for the bridge contracts and therefore should be able to negotiate a fair and reasonable price for this five-year contract. However, the panel ignores the testimony of the SLA pricing analyst who stated that the bridge contract was negotiated for a time of reduced services and an annual contract needed to address surges in service and would be more expensive.<sup>9</sup> The analyst also stated that the PWS for the bridge contract and the solicitation were the same.<sup>10</sup>

14. The majority also fails to consider the testimony of the contracting officer who testified regarding his analysis of the proposals and his opinion that the SLA's pricing was unreasonable.<sup>11</sup> This testimony clearly states that the contracting officer determined there was no reasonable probability of negotiating a fair and reasonable price based on the proposal submitted by the SLA. In addition, there is nothing in the record to suggest that the SLA's proposal would match the price offered by the low responsive, responsible offeror. Since the pricing data is covered by a non-disclosure agreement, the numbers cannot be included in this opinion. However, this opinion can state that the

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<sup>9</sup> Testimony of JENNINE GARCIA at page 155 and following of arbitration record.

<sup>10</sup> *id.*

<sup>11</sup> Testimony of the contracting officer starting at page 186 and following of the arbitration record.

price difference is several million dollars. It would be cheaper for the Air Force to pay the blind vendor a salary of several thousand dollars and award to the low responsive, responsible offerer rather than award to the SLA.

### Role of the Contracting Officer

14. The conflict in this case focuses on the role of the Secretary versus the role of the contracting officer. A contracting officer is a person with authority to enter into, administer, and/or terminate contracts and make related determinations and findings.<sup>12</sup> A contracting officer is not authorized to enter into a contract "unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met."<sup>13</sup> Any Department of Defense (DoD) employee who violates any provision or limitation imposed by any law may violate the Antideficiency Act (ADA) and shall be subject to discipline and/or criminal penalties. The ADA and related funding statutes consist of certain provisions of law prescribed in *Title 31, United States Code (U.S.C.)*. The ADA, prescribed in sections 1341, 1342, and 1517 of title 31, U.S.C., prohibits obligations and expenditures in excess of or before an appropriation and is the primary foundation for the administrative control of funds the obligation of funds appropriated by Congress. Noncompliance with sections 1301, 1502(a), and 3302(b) of title 31, U.S.C., which are additional funding statutes, may lead to an ADA violation and the disciplinary and/or criminal penalties authorized by the statute. As a result, contracting officers take great care when awarding contracts that obligation appropriated funds.

15. The FAR further defines the responsibilities of a contracting officer to include responsibility for "ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business

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<sup>12</sup> FAR 1.602-1(a) Defining the authority of a contracting officer.

<sup>13</sup> FAR 1.602-1(b)

judgment.<sup>14</sup> Additionally, a contracting officer has "no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions."<sup>15</sup>

16. As stated above, the parties agree that the Federal Acquisitions Regulations were applied to this acquisition. The solicitation included provisions to put offerors on notice that the SLA would be granted a priority in award of the contract if it was found to be in the competitive range and the Secretary determined the price was reasonable. The contracting officer did not include the SLA in the competitive range although its proposal was technically acceptable and had a substantial performance confidence rating because its total evaluated price was not fair and reasonable when compared to the other offerors and the Independent Government Estimate. *Transcript Testimony of Mr. Rhea at 185*. The government notified the SLA by a letter dated April 12, 2016, that it was not included in the competitive range because of "unreasonably high pricing compared to competitively received pricing and comparison of proposed prices with the independent government cost estimates". *Stipulation of Fact at 2 and 3*. During this arbitration, the State did not object to the use of the FAR to control the process for source selection under this acquisition and the majority determined that the State waived its right to object to the terms of the solicitation. While the DoE has the authority under its enabling statute to issue implementing regulations that define the process for the award of a dining hall services contract subject to the RSA, the DoE has not implemented FAR type regulations that instruct a contracting officer on the process to be used to make an award determination.<sup>16</sup>

17. Since the DoE has no appropriated funds to pay contractors who are providing dining hall service contracts, contracting officers of the procuring agency are tasked to

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<sup>14</sup> FAR 1.602-2 Expands on the responsibilities of a contracting officer.

<sup>15</sup> FAR 1.602-2 (5)

<sup>16</sup> Title 34 CFR Part 395 VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL AND OTHER PROPERTY is the implementing regulations for the RSA. While the regulations include specific instructions for the issuance and management of a permit for the operation of vending machines on federal property, they do not include similar FAR type instructions and regulations for the obligation of federal funds.

obligate funds to pay for dining hall services under the solicitation in question. Since the local procuring agency must use its contracting officer to award dining hall service contracts with local agency funds appropriated by Congress for that purpose, the decision on the means and process for award directly impacts the procuring agency's budget. The award of these contracts does not impact DoE's budget.

18. Contracting officers are issued warrants by their agency.<sup>17</sup> This warrant grants a contracting office the delegated authority to obligate appropriated funds and award contracts funded by agency appropriations. Since their agency head issue these warrants, contracting officers are obligated to follow their agency procurement regulations or be in violation of their warrant. Absent DoE FAR type procurement regulations that authorize the obligation of agency funds for a specific purpose authorized by Congress, the agency contracting officer is required to use the FAR as its source selection process. The DoE does not issue warrants to contracting officers that authorize the obligation of appropriated funds for this purpose and has no process to carry out the acquisition for these services. In addition, the DoE has no budget against which a DoE contracting officer may obligate funds to award a contract for a contractor to provide dining hall services under the RSA.

19. The FAR is a system of administrative regulations that authorize the contracting officer to award a contract.<sup>18</sup> The FAR is a codification of acquisition policy

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<sup>17</sup> FAR 1.601 -- General.(a) Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under J.,603.

(b) Agency heads may mutually agree to -- (1) Assign contracting functions and responsibilities from one agency to another; and (2) Create joint or combined offices to exercise acquisition functions and responsibilities.

<sup>18</sup> FAR 1.000 -- Scope of Part. This part sets forth basic policies and general information about the Federal Acquisition Regulations System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2, 1.3, and 1.4 prescribe administrative procedures for maintaining the FAR System.

that applies to ALL executive agencies.<sup>19</sup> The RSA and its implementing regulations are not part of the FAR system and as a result, procuring contracting officers must attempt to determine if the RSA applies to a particular procurement and if so, how that interaction with the FAR impacts the legal authorities necessary to award a contract for dining hall services. The application of the RSA to this acquisition is not an issue before the panel and the solicitation specifically provides for the application of the priority to award a contract to the SLA "[I]f the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section."<sup>20</sup>

20. The procuring agency, not the Secretary of Education, has the authority and responsibility to obligate appropriated funds consistent with the United States constitution and the appropriate acts passed by Congress. The DoE can issue detailed procurement acquisition regulations and enter into interagency agreements to manage the award of RSA dining hall service contracts, but has not. Nor, has the DoE opted to adopt the FAR as its implementing regulation with appropriate modifications to implement its statutory mandate. As a result, procuring agencies through their contracting officers are required by law and regulation to use the FAR to manage the acquisition.

21. The question before the panel is whether or not the contracting officer has violated the RSA when it excluded the SLA from the competitive range. The United States Court of Claims in *Washington State Department of Services for the Blind and Robert Ott v. U S.*, No. 03-2017C, December 17, 2003) specifically addressed the scope

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<sup>19</sup> FAR Subpart 1.1 – Purpose, Authority, Issuance. 1.101 -- Purpose. The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

<sup>20</sup> See §395.33A(b) Operation of cafeterias by blind vendors at Fn.1.

of the RSA and deferred to the agency's interpretation of the RSA, refusing to substitute its judgment for that of the contracting officer. The court stated:

Having considered the language of the statute and the regulations, the legislative history, the policy pronouncements by DOE and several decisions by arbitration panels convened in accordance with RSA, and in the absence of any other guidance by DOE, the court finds that the basis for defendant's interpretation of the term "operation of a cafeteria" is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Within the limited scope of this court's review, the court does not substitute its judgment for that of the agency, see *Bannum* 56 Fed. Cl. at 457 ("A reviewing court cannot substitute its judgment for that of the agency . . ."), and upholds the decision of an agency if there is a reasonable basis for the agency's action. See *MCS Mgmt., Inc. v. United States*, 48 Fed. Cl. 506, 510-11 (2000) ("[I]f the Court finds a reasonable basis for the agency's action, the Court should stay its hand . . .").<sup>21</sup>

22. As a result of the contracting officer's decision, the agency did not grant the SLA a priority for the award of the contract and did not consult with the Secretary of the Department of Education. The SLA argues that even though it was excluded from the competitive range, the agency is still required to consult with the Secretary under 34 C.F.R. § 395.33(a) and (b).<sup>22</sup> 34 C.F.R. § 395.33(b) states: "If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the properly managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section."<sup>23</sup> Based on the plain language of the statute, the RSA does not require this notification since the SLA's offer was not within the competitive range.

23. The relationship between 34 C.F.R. § 395.33(a) and (b) has been interpreted by the procuring agency to not require notification when the SLA's proposal is determined to not be within the competitive range. While a federal agency must comply

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<sup>21</sup> *Washington* at 23.

<sup>22</sup> § 395.33 Operation of cafeterias by blind vendors see fn. 1.

<sup>23</sup> *Id.*

with the clear congressional intent, the DoE has not resolved the relationship between 34 C.F.R §395.33(a) and (b). The DoE has not updated or clarified its regulations regarding this issue. If DoE had amended its regulations to specifically address this issue, the contracting officer would be bound by that decision, but absent that direction, the contracting officer's decision is entitled deference absent a finding that the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As agents for their agency, contracting officers do not have the discretion to ignore their agency procurement regulations when awarding procurement contracts that obligate funds subject to Congressional funding statutes and are exposed to both civil and criminal charges if an award is made in violation of law.

### Role of the Secretary

24. The question remaining is whether or not the Secretary can direct the award of a contract for dining hall services, or, if that authority is limited to "certifying" that the award of the contract will be a reasonable use of tax payer dollars. As stated at the beginning of this analysis, the courts have ruled that the Secretary has no authority to direct the implementation of a remedy proposed by the panel.

25. The priority under §395.33(a)<sup>24</sup> authorizes the procuring agency to pay a "premium . . . price for the operation of dining hall services. The RSA priority means the SLA can be awarded a contract for a price that "exceeds" the price of the low, responsible, responsible offerer. Therefore, the requirement §395.33(a) that the Secretary consult with "the appropriate property managing department, agency, or instrumentality" must be meaningful.<sup>25</sup> Without input from the procuring agency, the Secretary has no data upon which to make a determination that the SLA can provide for the operation of a dining hall "at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise."<sup>26</sup>

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<sup>24</sup> See fn. 1.

<sup>25</sup> *Id.*

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

26. Since the RSA does not grant the Secretary the authority "dictate" an award by the contracting officer, the Secretary does not have the authority to "order" the contracting officer to award a contract to the SLA. This suggests that the procuring agency has no authority to award a priority for the award of a dining hall services contract absent the Secretary's certification that the dining hall services are being provided at a reasonable cost, with food of a high quality comparable to that currently provided employees. Under this interpretation of the statute, the procuring agency, through its contracting officer, has the final decision as to whether or not award is appropriate.

27. The SLA argues that if the Secretary certifies that the dining hall services are being provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, the contracting officer is "required to award the contract to the SLA. In like of the Secretary's limited authority to enforce remedies directed by the panel, this position is problematic. While 34 CFR §395.33(a) ends with statement that "[s]uch operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible," that does not overrule the obligation of the contracting officer to make award decisions consistent with procuring agency procurement regulations such as the FAR.

28. In addition, the RSA does not authorize the contracting officer to make awards adverse to the interests of the United States. If the contracting officer determines that an award of a contract using the RSA priority is adverse to the interests of the United States, the RSA provides a remedy. The RSA provides that "[t]he procuring agency may submit justification to the Secretary that the award of this contract is adverse to the interests of the United States who is to determine if the limitation is warranted.<sup>27</sup> However, no such justification has been submitted to the panel

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<sup>27</sup> 34 CFR §395.30 The location and operation of vending facilities for blind vendors on Federal property. (b) Any limitation on the location or operation of a vending facility for blind vendors by a department, agency or instrumentality of the United States based on a finding that such location or operation or type of location or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary who shall determine whether such limitation is warranted. A determination made by the Secretary concerning such limitation shall be binding on any department,

for consideration and is not under review by the panel. This limitation on the use of the RSA priority does demonstrate there are limits to the application of the priority and the cost associated with the use of the priority to award a RSA contract.

### Summary Position

28. Based on the above analysis, the following summarizes my position:

1- The SLA had a long history of providing quality dining hall services for F01t Sam Houston.

2- The SLA and the procuring agency, the Air Force, have had extensive cost and pricing negotiations where the parties were able to agree to a contract value based on cost and price analysis.

3- The procuring agency could have opted to attempt to negotiate a sole source contract under 34 CRF §395.33(d) but elected to compete for the award of a contract under 34 CRF §395.33(b).

4- The SLA did not seek arbitration under the RSA to challenge the procuring agency's decision to compete for the award of the contract.

5- The SLA did not object to the terms of the solicitation and the panel ruled that the SLA waived its rights to object to the terms of the solicitation.

6- The terms of the solicitation stated that the SLA would be granted a priority if the government determined the SLA's proposal was in the competitive range.

7- The procuring agency determined the SLA's proposal was not in the competitive range because the price was unreasonable.

8- The procuring agency had no obligation under the RSA to negotiate with the SLA once the contracting officer determined the SLA's proposal was not within the competitive range.

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agency or instrumentality of the United States affected by such determination. The Secretary shall publish such determination in the Federal Register along with supporting documents directly relating to the determination.

9- The procuring agency's decision to exclude the SLA from the competitive range was reasonable and in accord with the terms of the solicitation.

10- No correction action is required by the procuring agency.



Steven R Fuscher  
Panel Member

6 March 2017