

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

RANDOLPH-SHEPPARD ARBITRATION

**ILLINOIS DEPARTMENT OF HUMAN
SERVICES, Division of Rehabilitative
Services, Petitioner,**

No. R-S/16-12

DECISION AND AWARD

vs.

**UNITED STATES DEPARTMENT OF ENERGY-
FERMI NATIONAL ACCELERATOR
LABORATORY, Respondent.**

DECISION AND AWARD

Pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107f (R-S Act), an arbitration was convened in the above-captioned matter, as authorized by 20 U.S.C. § 107d-2. Petitioner Illinois Department of Human Services, Division of Rehabilitative Services (IDHS), the designated State Licensing Agency¹ (SLA) pursuant to the R-S Act, appointed Susan Rockwood Gashel as arbitrator, and the United States Department of Energy-Fermi National Accelerator Laboratory (Fermi Lab) appointed Alan Handwerker as its Panel Member. Mr. Michael H. LeRoy was jointly appointed by Arbitrators Gashel and Handwerker as Panel Chair. The hearing took place on November 13, 2019 at the Fermi National Accelerator Laboratory. IDHS was represented by Maggie Jones and Diane Mosham. Fermi Lab was represented by Steven M. Thiede.

I. ISSUE:

In its convening letter, the United States Department of Education authorized:

the convening of an arbitration panel to hear and render a decision on the issues raised in the complaint. The central issue to be addressed is whether Energy violated the Act and implementing regulations by failing to apply the Act's priority to solicitation No. 06884-SAE and rejecting the SLA's bid as not falling within the competitive range and having a reasonable chance of being selected for a final award.²

II. STANDARD OF REVIEW

This Panel must, "in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision[.]" 20 U.S.C. § 107d-2(a). That subchapter,

¹ The State Licensing Agency (SLA) is the agency in each state charged with training, licensing, and supervision of blind persons licensed to operate vending facilities on Federal property. 20 U.S.C. § 107b.

² Letter from Carol L. Dobak, Acting Deputy Commissioner and Commissioner, Department of Education (July 20, 2017).

provides, at 5 U.S.C. § 556(d), that the proponent of an order has the burden of proof, and an order may issue “in accordance with the reliable, probative, and substantial evidence.” Id. Accordingly, the SLA has the burden of proof to prove by substantial evidence that Fermi Lab violated the Act. “This is something more than a mere scintilla but something less than the weight of the evidence.” Pennaco Energy v. U.S. Dep’t of Interior, 377 F.3d 2247, 1156 (10th Cir. 2004).

III. FINDINGS OF FACT

1. The Department of Energy is an agency of the United States. Fermi National Accelerator Laboratory (Fermi Lab) is a 6,800-acre parcel of land located in DuPage and Kane County Illinois. This land is owned by the United States, and is under the control of the Department of Energy.
2. Fermi Research Alliance, LLC, d/b/a Fermilab (FRA) is a non-profit limited liability corporation organized under the laws of the State of Illinois. This entity manages and operates Fermilab.
3. IDHS is the SLA for the State of Illinois and is authorized to administer Illinois’ vending facility program under the Illinois Blind Vendors Act, 20 ILCS, 2421, et seq.
4. On or about April 18, 2016, FRA issued a Request for Proposal for Food Service Management (RFP) at Fermilab (Solicitation). The RFP was for the management and operation of food services at the Wilson Hall Cafeteria and the User’s Center Bar, including preparing and dispensing food, alcoholic and nonalcoholic beverages, supporting catering events as requested, and such other work as authorized by Fermilab pursuant to contract. The period of the contract was two years, with extensions thereafter, up to a total of 15 years.
5. Southern Foodservice has provided cafeteria services at Fermilab since approximately 2004. In 2011, Southern Foodservice successfully rebid for the cafeteria contract. Southern Foodservice had an excellent relationship with Fermilab and FRA, and received positive feedback.
6. In 2016, Southern Foodservice responded to the Solicitation. Southern Foodservice subsequently was contacted by IDHS. IDHS obtained a brief extension of the deadline to respond to the Solicitation, and submitted a proposal with IDHS in response to the Solicitation. Mr. Walter Berry, president of Southern Foodservice Management, testified that the work requirements in the RFP were identical to the work requirements in place at the time of the submission of the proposal in response to the Solicitation.³

³ T. 17-19.

Q. And between 2004 and 2016, how would you describe Southern Foodservice Management's relationship with Fermilab?

A. I would describe it as excellent. We were always— seemed to have a great relationship with our client. We had the same client the entire time. And he was one of our biggest cheer leaders, as far as we used him almost

The awardee of the RFP was required to remit payment .75% of net revenue to FRA as a concessionaire fee.

7. By letter dated July 13, 2016, Fermilab informed IDHS that it was awarding the contract to Taher, Inc., stating that the award to Taher, Inc. was in the “best interest for Fermilab.”
8. According to the Department of Energy, FRA did not award the contract to IDHS because its proposal was not in the competitive range.
9. On September 14, 2016 IDHS filed its request for arbitration with the United States Department of Education, and thereafter filed its Amended Complaint on December 1, 2016.
12. By correspondence dated July 20, 2017, the Department of Education authorized the convening of an arbitration panel to hear and render a decision on the issues raised in the SLA’s complaint letter.

exclusively in almost every proposal as a reference, because we knew we could count on him to give us a good reference.

Q. And what, if any, sort of feedback has Southern Foodservice received from Fermilab?

A. Do you mean while we operated?

Q. Yes.

A. We, you know, we received positive feedback. I mean, they liked us. We were always well received. We got good feedback from every aspect of our operation.

Q. And how many times has Southern Foodservice Management had to rebid for this contract between 2004 and 2016?

A. To my knowledge, there was just one time.

Q. And when was this?

A. 2011. Well, then there was, of course, the 2006 that's at issue here. But the 2011 was the only other time from the original solicitation that I recall.

Q. And during the 2011 rebid, what type of proposal did Southern Foodservice Management submit?

A. A written. A written proposal. Is that what you mean, what type of proposal?

Q. Right.

A. It was a written response to a solicitation.

Q. And when did Southern Foodservice partner with the Illinois Department of Human Services?

A. Okay. So, we submitted a proposal based on a deadline. Subsequent to us submitting a proposal, we were approached by the State of Illinois blind who had not been made aware of by the Department of Energy that the contract was being solicited. And they were able to get a brief extension of the deadline. So, we submitted a proposal with the blind at that time.

Q. I’m sorry. For clarification, are you talking about in 2011 or 2016?

A. 2011.

Q. Okay. And—

A. So, we actually had submitted two proposals to the Department of Energy at that time.

Q. And in 2011 how did those two proposals that you submitted compare to one another?

A. They were identical. We just basically took our proposal we had already submit, and where appropriate substituted the name BEP team for Southern.

Q. And how did this 2011 rebid process end? What was the result of it?

A. They selected the bid with Southern without the BEP.

13. Two years later— on July 22, 2019— Michael H. LeRoy was contacted via email by Jesse Hartle, Program Specialist, United States Department of Education, Office of Special Education and Rehabilitative Services, notifying him of his appointment as Chair of this Panel. Chair LeRoy, a professor at the University of Illinois at Urbana-Champaign, replied by noting a potential appearance of a conflict of interest, insofar as his large university conducts research projects on this property. Chair LeRoy did not have, nor does he have, any research projects at Fermi Lab, nor any federally-funded research; nor does he supervise or know anyone who has research at Fermi Lab. On July 26, 2019, Mr. Hartle replied that there was no objection to the Chair’s appointment.
14. With notice to, and concurrence by, all interested Parties, Chair LeRoy convened a formal hearing for November 13, 2019.
15. The R-S Act grants a priority to licensed blind persons to operate vending facilities, such as the food service management contract at Fermilab, on Federal property. 20 U.S.C. § 107.
16. The R-S Act broadly defines “vending facility”:

“vending facility” means 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 20 U.S.C. § 107e(7).
17. The R-S Act broadly defines “Federal property”:

“Federal property” means any building, land, or other real property **owned**, leased, or occupied **by any department**, agency, or instrumentality **of the United States** (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States 20 U.S.C. § 107e(3) (emphasis added).
18. The purpose of the R-S Act is to provide blind persons with remunerative employment, enlarge the economic opportunities of the blind, and to stimulate the blind to greater efforts in striving to make themselves self-supporting. Id. The R-S Act requires that, “wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.” 20 U.S.C. § 107(b)(2).
19. To justify “any limitation on the placement or operation” of a vending facility (including a cafeteria), the R-S Act requires a full justification to the Department of Education’s Secretary, who determines whether such a limitation is justified. The only grounds permitted for a limitation on the placement or operation of a vending facility are

whether the interests of the United States would be adversely affected. There was no evidence that the Department of Energy submitted a request to the Department of Education's Secretary for a limitation on the placement or operation of a vending facility.

20. The regulation at 34 C.F.R. § 395.30(a) requires that each Federal department is to:

take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on all Federal property provided that the location or operation of such facility or facilities would not adversely affect the interests of the United States. Blind persons licensed by State licensing agencies shall be given priority in the operation of vending facilities on any Federal property. (emphasis added).

21. The regulation at 34 C.F.R. § 395.33 governs the award of contracts for cafeterias. Section (a) thereof provides that the priority shall be afforded when the Secretary determines, on an individual basis, after consultation with the Federal agency, that the "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." Id.

22. Section (b) requires that the appropriate SLA be invited to respond to solicitations for offers when a cafeteria contract is contemplated. The solicitation "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 Section 395.37."

23. Section (d) authorizes an award of a cafeteria contract through direct negotiations. Ms. Whitney Begner, contract specialist and contracting officer employed by the Department of Energy, testified that "(i)n performing work under this contract, the contractor shall comply with the requirements of applicable federal, state and local laws and regulations, including DOE regulations, unless relief has been granted in writing by the appropriate regulatory agency."⁴

⁴ T. 107.

24. The RFP stated, in relevant part:

25.

- Proposals will be evaluated in accordance with applicable regulations including the procedures contained within this RFP.
- Negotiations may be conducted with those Offerors submitting technically acceptable proposals. Fermilab shall evaluate proposals for award purposes without considering any conditions or contingencies.
- This Subcontract is a Food Services and Management Subcontract requiring payment of 0.75 percent of net revenue to Fermilab as a concessionaire fee.
- This is a best value procurement.
- Fermilab will evaluate and rank Offerors' ability to successfully provide the overall best long term value to Fermilab based on the technical proposal submitted.⁵

26. Terry Smith testified for IDHS as an expert witness on the R-S Act.⁶ Mr. Smith testified that if the standard employed to evaluate a bid made by an SLA on behalf of a blind vendor were the best interests of Fermilab, rather than the standards articulated in 34 C.F.R. § 395.33, that would be a violation of the R-S Act, in that the only way to use the "best interest" criteria is to seek a Department of Education ruling that the blind vending facility would "adversely affect the interests of the United States."⁷

⁵ Plaintiff's Exhibit No. 2.

⁶ See T. 59-60, as reproduced here:

Q. And I note specifically in your resume when you worked from 2011 to 2016 at the Mississippi State University Research Center and Training Center for the Blind, you indicate you were a Randolph-Sheppard subject matter expert on U.S. Department of Energy grant. Can you just explain what that grant was about from the Department of Energy? I'm sorry, Education. Excuse me.

A. Yes. That was a grant that was awarded to the Mississippi State University. I was the Randolph-Sheppard expert when we applied for the grant. And the purpose of that— the primary purpose for the part that I was working on was to develop on-line training modules for Randolph-Sheppard staff who were working the state agencies across the country. That was intended primarily for new hires. And so, we created an on-line training module on the on-line training courses. I think there's 14 modules. Don't hold me to that. And I wrote eight or nine of those, including the modules on the Randolph-Sheppard Act. Prior to that I was— I chaired the National Council of State Agencies for the Blind, the Randolph-Sheppard committee for ten years. So, that's really why I started getting really involved nationally with— other than just statewide for working through the National Council State Agency for the blind from 2001 to 2011. That's where I really began to get involved with all the stuff happening on the state program.

⁷ See T. 75-76, reproduced here:

Q. Based on your experience with the Randolph-Sheppard Act, under what situation would a blind vendor bid not be considered in the best interests of the United States?

A. I can't think of a circumstance where you could make that claim, but, you know, I'm sure that somebody could try. But you— because basically the argument would be that it's not in the best interests to give a contract to a blind person and instead give it to another company, and that's a hard case to make. In fact, never in the history

IV. CONCLUSIONS OF LAW

1. Because Fermilab is located on Federal property, the Department of Energy has a responsibility to take all steps necessary to ensure, in light of appropriate space and potential patronage, that one or more vending facilities for operation by blind licensees shall be located on all Federal property.
2. The Competition in Contracting Act (CICA), the Federal Acquisition Regulation (FAR), and the Department of Energy Acquisition Regulation (DEAR) apply "except in case of other procurement procedures expressly authorized by statute." 10 U.S.C. § 2304(a)(1), 41 U.S.C. § 3301. The R-S Act is such a procurement procedure. Automated Comm. Syst v. U.S., 49 Fed. Cl. 570, 577-78 (2001), NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001). Accordingly, ~~the~~ Department of Energy regulations at 48 C.F.R. § 901, et seq. do not apply to R-S Act procurements, insofar as they conflict with the regulations implementing the R-S Act.
3. The regulation at 34 C.F.R. § 395.33(a) that a cafeteria contract be awarded to the SLA provided that the SLA can operate the cafeteria at comparable cost and comparable high quality as that currently provided to employees was violated when the SLA's bid with Southern Foodservice was not accepted. Southern Foodservice had provided satisfactory service at Fermilab since 2004. It is self-evident that Southern Foodservice's bid provided for food service at a reasonable cost with high quality comparable to that currently provided employees. There was no evidence submitted by the Department of Energy to contravene the testimony of Mr. Berry of Southern Foodservice that it had an excellent relationship with FRA and received positive feedback.
4. The regulation at 34 CFR 395.33(a) provides for an individualized determination by the Secretary of Education, after consultation with the Federal agency, to ensure that the operation provides maximum employment opportunities to blind vendors to the full extent possible. The Department of Energy failed to consult with the Secretary of Education as required by 34 C.F.R. § 395.33. Accordingly, the Panel concludes that the Department of Energy violated the R-S Act when it failed seek a determination from the Department of Education's secretary that the cafeteria operation "can be provided at a reasonable cost, with food of a high quality comparable to that currently provided." 34 C.F.R. § 395.33(a).
5. Only the Secretary of Education has ~~the~~ authority to impose a limitation on the placement or operation of a vending facility. 20 U.S.C. § 107. By providing for a 0.75% concessionaire fee, the RFP placed a limitation on the operation/placement of a vending facility in violation of the R-S Act without following the procedures set out in 20 U.S.C. § 107.

of the Randolph-Sheppard program has the Secretary of Education made a determination that awarding a contract to an FLA (phonetic) would adversely effect (sic) the interests of the United States.

V. ANALYSIS

A. The Department of Energy's Defense that the United States is Not Liable for Acts or Omissions of its Contractors Has No Basis in the Randolph-Sheppard Act or Precedent

The Department of Energy cites two cases for the proposition that the United States is not liable for the acts or omissions of its subcontractors, Logue v. U.S., 412 U.S. 521 (1973) and Severin v. U.S., 99 Ct Cl. 435 (1943). In Logue, a federal prisoner hanged himself while confined in a county jail pending trial.⁸ His mother and adoptive father sued the United States for damages under the Federal Tort Claims Act, claiming that negligence by county agents and employees acting as a federal contractor proximately caused the death of their son.⁹ Severin, decided by the U.S. Court of Claims nearly 80 years to resolve a contract dispute over construction of a post office, stated the issue in these terms: "We have, then, a case in which plaintiffs are suing for damages sustained by themselves as a result of the Government's breach of contract and also for damages sustained by another person, a subcontractor. Plaintiffs may, of course, recover for their own loss, which so far as proved, was \$73.71."¹⁰ Due to facts and underlying legal claims that differ from the issue here, neither case furnishes a meaningful precedent for addressing the liability of the U.S. government for the contracting violations of one of its sub-contractors who ignored legal requirements under the Randolph-Sheppard Act.

Additionally, the two cases cited by the Department of Energy for the fact that Fermilab is not an instrumentality of the United States, U.S. v. Boyd, 378 U.S. 39 (1964), and U.S. v. New Mexico, 455 U.S. 720 (1981), makes Federal agencies responsible to ensure compliance with the R-S Act.

In Boyd, the Atomic Energy Commission and two of its contractors sued to recover Tennessee sales and use taxes imposed upon purchases made by the contractors under their contracts with the AEC. The Supreme Court held that cost-plus contractors for profit— one who managed, operated and maintained Atomic Energy Commission plant, and the other who performed construction services for AEC— were not so incorporated into governmental structure as to become instrumentalities of the United States. Thus, these contracts did not enjoy governmental immunity from taxation, and therefore, Tennessee had lawful authority to impose a use tax upon property which was purchased by the federal contractors.¹¹

⁸ *Id.* at 522.

⁹ *Id.*

¹⁰ *Id.* at 442.

¹¹ *Id.* at 49-50, stating:

It is undoubtedly true, as the Government points out, that subjection of government property used by AEC contractors to state use taxes will result in a substantial future tax liability. But this result was brought to the attention of Congress in the debates on the repeal of §9(b), which exempted the activities of AEC contractors from state taxation; indeed the AEC argued that the repeal would substantially increase the cost of the atomic energy program by subjecting AEC contractors to state 'sales and use taxes' and 'business and occupation' taxes. Nonetheless, Congress, well aware of the principle that 'constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States,' S.Rep. No. 694, 83d Cong., 1st Sess. 2, U.S.Code Congressional and Administrative News 1953, pp. 2379,

In New Mexico, the Supreme Court ruled that corporations that contract with the federal Government to manage certain government-owned atomic laboratories in New Mexico were not constituent parts of federal Government, and imposition of state use tax upon property purchased by them under that contract did not infringe upon federal immunity from state taxation, even when contractors procured materials and paid for goods with government funds under advanced funding arrangement.¹²

In sum, while it is true that a federal contractor is an independent entity of the U.S. government, these two cases only mean that a state may levy taxes on the contractor who performs in connection with a cost-plus contract. Whether or not the Department of Energy directs or supervises the activities of Fermilab is not dispositive of whether the Department of Energy has complied with the R-S Act. The plain language of the R-S Act is that it applies to all Federal property.

B. The R-S Act was Violated by the Use of a Best Value to Fermi Lab Standard to Evaluate the Proposals

The correct standard is whether the SLA can provide high quality at a reasonable cost comparable to the service currently provided. The uncontroverted evidence is that the proposal of the SLA with Southern Food Service met the standard in the R-S Act. The Department of Energy provided no testimony to the contrary, and provided no justification as to why the SLA's bid was not within the competitive range. Accordingly, the Panel finds that the solicitation was improperly evaluated under the "best value procurement" standard, in violation of the R-S Act.

C. A Requirement to Pay a Percentage of Net Revenue to Fermilab Violates the R-S Act

The requirement in the Solicitation that the awardee pay 0.75 percent of net revenue to Fermilab as a concessionaire fee violates the R-S Act. See *Minnesota Dep't of Jobs Training v. Riley*, 18 F.3d 606 (8th Cir. 1994) holding that the R-S Act applies to the Veterans Canteen Service (VCS), and that commission payments, like any limitation on a blind vendor's operation, are unlawful unless approved by the Secretary of Education. The Eighth Circuit Court of Appeals' reasoning bears repeating here because it directly applies to the present dispute:

We also agree with the district court that in prohibiting "[a]ny limitation on the ... operation of a vending facility" unless justified by the Secretary of the DOE, 20 U.S.C. §

2380, repealed the statutory exemption for the declared purpose of placing AEC contractors in the same position as all other government contractors.

¹² *Id.* at 735, explaining:

What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling "clashing sovereignty," *McCulloch v. Maryland*, 4 Wheat., at 430, 4 L.Ed. 579, by preventing the States from laying demands directly on the Federal Government.

107(b), the Randolph–Sheppard Act precludes the VCS [Veterans’ Canteen Service] from requiring blind vendors to pay commissions on vending sales without the Secretary’s approval. Although we need not resort to other tools of statutory construction because the statute is clear, *Robertson*, 978 F.2d at 1486, the Act’s legislative history and the Act’s related provisions support our conclusion. When Congress amended the Act in 1974, Congress was concerned with federal agency abuses of blind vendor’s operations, like forcing blind vendors to pay commissions. See S.Rep. No. 93–937, 93d Cong., 2d Sess. (1974).¹³

See also, *Minn. Dep’t of Economic Sec. v. Riley*, 107 F.3d 648 (8th Cir. 1997). Again, the federal appeals court’s crystal clear analysis bears repeating here because it is directly on-point:

In truth, the VCS has done far more than merely limit the blind vendor’s operation at the VA Medical Center. Congress assumed federal agencies would respect a blind person’s vending enterprise and willingly comply with the Act. See 20 U.S.C. § 107d–2(b)(2). Instead, the VCS has tried to drive the blind vendor out of its domain.¹⁴

The Veterans Canteen Service was no different from any other steward of federal property; if it wanted to impose limitations on a blind vendor’s operation, it was required to get permission from the Secretary of Education. The same principle applies in the present matter.

- D. The R-S Act Vests Exclusive Authority in the Secretary of Education to Make the Decision that the Blind Licensee Can Provide Cafeteria Services at a Reasonable Cost with High Quality.

The statutory and regulatory scheme make clear that an SLA’s bid cannot be rejected without the on-site official consulting with the Secretary of Education, who makes the final decision. 34 C.F.R. § 395.33(a). See *Colo. Dep’t of Human Serv. v. U.S.*, R-S/10-6 (May 30, 2012) (“the fact that a blind vendor’s bid was not within a competitive range set by a contracting agency does not preclude the Secretary of Education from concluding that the blind vendor is entitled to the priority when the blind vendor can nonetheless provide services at a reasonable cost.”); *Randolph-Sheppard Vendors of America, Inc. v. Harris*, 628 F.2d 1364, 1367 (D.C. Cir. 1980) (“the bidding system allows the Secretary to determine whether the blind operator’s cost is ‘reasonable,’ and the bidding regulation provides that if the blind vendor’s bid falls within a reasonable and competitive range, even if it is higher than some others, it will be given priority.”)

Here, given that the SLA’s bid met the standards for selection set by the R-S Act, it is self-evident that the SLA’s bid was ranked among those bids that had a reasonable chance of being selected for award. Pertinent authority in 20 U.S.C. § 107d-3(e) provides with respect to regulations governing the award of cafeteria contracts:

¹³ *Id.* at 609.

¹⁴ *Id.* at 650.

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 basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

The R-S Act provides for deference to the Secretary of Education's authority to resolve questions about the SLA and its ability to provide services at a reasonable price. For example, 20 U.S.C. § 107(b) expressly provides that "any limitation on the placement or operation of vending facility" is within the exclusive purview of the Secretary. The Panel therefore concludes that any interpretation of 34 C.F.R. § 395.33 that eliminates the Secretary of Education from being the ultimate decision maker is inconsistent with the R-S Act's intent to have the Secretary of Education act as the final arbiter. Accordingly, the Panel concludes that the Department of Energy's failure to properly consult with the Secretary of Education as required by 34 C.F.R. § 395.33(a) violated the R-S Act.

By awarding a contract to Taher, Inc., stating that the award to Taher, Inc. was in the "best interest for Fermilab," the Department of Energy eviscerated the R-S Act. This disregarded Congressional intent that the blind have a statutory priority to operate vending facilities on all Federal property. The Panel concludes that the SLA has established by substantial evidence that the R-S Act was violated.

VI. DECISION AND AWARD

- A. The Department of Energy violated the R-S Act by failing to ensure that its contractor, FRA, comply with the R-S Act's standard of providing food service comparable to that currently provided employees.
- B. The Department of Energy violated the R-S Act and its implementing regulations by failing to ensure that employment opportunities for blind vendors were maximized.
- C. The Department of Energy shall terminate the acts or practices found by this Panel to be in violation of the R-S Act and its implementing regulations, and shall take all actions as may be necessary to effectuate this decision.
- D. To these ends, the Panel finds as a matter of law that the Department of Energy was obligated under the R-S Act and its implementing regulations to evaluate the proposals as required by 34 C.F.R. § 395.33 and to award to the SLA based on the R-S Act priority so long as the operation of the cafeteria can be provided at a reasonable cost with food of a high quality comparable to that currently provided employees.

Dated April 30, 2020.

Michael H. LeRoy, Panel Chair (Concur)

Susan Rockwood Gashel, Panel Member (Concur)

Alan Handwerker, Panel Member (Dissent)

DISSENT

On September 14, 2016 the Illinois Attorney General, on behalf of the SLA filed a Complaint and Request For Arbitration against the US Department of Energy (DOE) in which it requested the convening of an arbitration panel under the R-SA 20 U.S.C. 107 d-1 (b) and 107d-2 and implementing regulations found at 34 CFR 395.37. The Illinois Attorney General charged that DOE, by awarding of the contract for cafeteria services at Fermilab under RFP No.06884-SAE to a non-blind vendor over the SLA blind vendor, violated the R-SA priority afforded blind vendors. Janet L. LaBreck, US Department of Education (DoEd) requested the Parties to attempt to settle this matter. On November 30, 2016 the Illinois Attorney General notified DoEd, Jesse Hartle, that it was necessary for the SLA to name Fermi Research Alliance (FRA) as a defendant, and to serve DOE in order for settlement discussions to proceed. The Illinois Attorney General filed an amended Complaint on December 1, 2016 naming FRA LLC as a defendant and serving DOE. Subsequently, and at the request of the FRA General Counsel, the Arbitration Panel removed FRA as a Party to this case as the United States is the owner of the Federal property comprising Fermilab. Therefore, FRA was not a Party to, or represented in, this Arbitration.

On July 20, 2017 Carol L. Dobak, Acting Deputy Commissioner and Commissioner at DoEd authorized the R-SA arbitration in this matter. In her authorization letter Ms. Dobak, directed that the central issue to be addressed is:

Whether Energy violated the Act and implementing regulations by failing to apply the Act's priority to Solicitation No. 06884-SAE and rejecting the SLA's bid as not falling within the competitive range and having a reasonable chance of being selected for a final award?

For the reasons more fully discussed below I find that the DOE fully complied with the R-SA and its implementing regulations.

BACKGROUND FACTS

1. The United States government, acting through the DOE, is responsible for conducting, inter alia, research in the field of high - energy physics. DOE is a department, agency or instrumentality of the United States.
2. On November 21, 1962 DOE (then the Atomic Energy Commission) established the Fermi National Accelerator Laboratory (hereinafter Fermilab or FNAL) in Batavia, Illinois.
3. Fermilab is located on a 6800 acre site in Batavia, Illinois and is entirely owned by the United States government.
4. Fermilab is a government owned- contractor operated site. The current contractor operating Fermilab is FRA, which is a joint venture consisting of the University of Chicago and the Universities Research Association, Inc. (hereinafter U of C and URA,

respectively). URA is an association of 89 United States educational research institutions.

5. FRA operates Fermilab under the terms of Management and Operating Contract DE-AC02-07CH11359. (the Prime contract). The Prime contract is valued at over one billion dollars for a 5 year term, with options to extend performance based on FRA's performance.
6. FRA is an independent contractor and is not a purchasing agent of the Government.
7. FRA employs approximately 3000 private sector employees at Fermilab. Fourteen Federal employees are stationed at the DOE Fermi Site Office, which is the only permanent Government personnel presence on the Fermilab site.
8. Many of the Fermilab employees, and all of the government employees are located in Wilson Hall, which is also the location of the Fermilab cafeteria. The Fermilab cafeteria is operated pursuant to a food services subcontract with FRA. Fermilab also houses numerous vending machine facilities, which are operated under the R-SA.
9. The Fermilab Prime contract does not expressly mention the R-SA. It does contain provisions requiring FRA to comply with the DOE approved purchasing policies and procedures and the provisions of the Prime contract including the Laws, Regulations and DOE Directives clause (Clause I-90). Clause I-90 requires FRA to comply with all applicable laws, regulations and DOE directives.
10. A decision was made by FRA to conduct a competitive selection process to select a food service management subcontractor. A Fermilab Request for Proposals No.06884-SAE (RFP) was issued on April 18, 2016 by FRA Procurement Administrator Mr. Scott Engel. A pre-proposal conference was held at Fermilab on April 28, 2016 and afforded potential offerors the opportunity to tour the cafeteria site and ask Fermilab employees questions regarding the RFP. The SLA after reviewing the solicitation did not object to the terms of the solicitation or to the evaluation criteria contained therein which would be used to evaluate proposals (transcript pg43, line 6-9).
11. RFP Section 13.2 states: "This is a best value procurement". The RFP contemplated a two-year subcontract term with options for additional years.
12. RFP Section 13.3 states: "Fermilab will evaluate and rank offerors ability to provide the overall best value to Fermilab based on the Technical proposal submitted".
13. On May 11, 2016 Mr. Raven A. Pulliam, Program Administrator, Illinois Business Enterprise Program for the Blind (BEP) submitted a joint proposal to Fermilab, partnering with Southern Foodservice - Management Incorporated (Southern). Southern was the incumbent cafeteria food service management subcontractor at Fermilab and

had served in that capacity since approximately 2004. Complainant's, Closing brief, page 3.

14. By letter dated July 13, 2016, Fermilab Procurement Administrator, Scott Engel advised Mr. Raven Pulliam that the BEP /Southern proposal was not selected for award. This letter advised that the Taher proposal was selected as in the best interest of Fermilab-Defense Exhibit D.
15. On July 28, 2016 Mr. Freeman, an Attorney for the Illinois Business Enterprise Program for the Blind and the Illinois Committee For Blind Vendors sent a letter to the Fermilab Procurement Administrator, Scott Engel, advising him that the R-SA applied to the procurement and that "...if the state licensing agency and its blind vendor can operate a cafeteria at a reasonable cost with food of a high quality comparable to that currently provided employees" then the Federal property manager must award the contract to the state licensing agency. Moreover, if there is any doubt as to whether that is so the Secretary of Education is to make that determination. Citing (34 C.F.R 395.33a); - Defense Exhibit E.
16. On August 5, 2016 Mr. John Myer, the Fermilab General Counsel, responded to Mr. Freeman's letter. Mr. Myer stated:

FRA understands and respects that the Randolph -Sheppard Act applies to vending and cafeteria operations on federal property. Accordingly, the FRA procurements for vending and cafeteria operations, including the recent Foodservice Management Services solicitation are conducted in accordance with the Act and regulations. (In fact, the Illinois BEPB has held vending subcontracts at Fermilab for a number of years.) In this instance, FRA conducted the solicitation and determined that the Illinois BEPB was not in the competitive range and did not have a reasonable chance of being awarded the contract... Under the regulations the potential of priority for a blind vendor is triggered if a proposal by the State licensing agency for blind vendors 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" 34 CFR 395.33(b).

Mr. Myer also stated that the Illinois BEPB attended the pre-proposal meeting and did not ask questions about the "best value" basis of award. Mr. Myer advised the BEPB that its proposal was the lowest ranked of the three proposals received. It was disclosed that there were three Offerors, the first being Taher, the second being an unknown entity and the third being the SLA/Southern proposal. The Taher proposal was graded at 100 and the SLA/Southern proposal was rated with a score of 90. The score of the middle proposal was not disclosed.

17. The solicitation for Cafeteria Food Services Management Services was entirely conducted by FRA contractor employees. DOE and its Federal employees did not participate in any way in the preparation, solicitation, evaluation, selection and award of the Cafeteria Food Services Management subcontract.

Discussion

As previously stated the charge to be addressed by the Arbitration panel is as follows:

Did DOE violate the R-SA by:

1. Failing to apply the Act's Priority to Solicitation No.06884 - SAE?

And

2. Rejecting the SLA's bid as not falling in the competitive range and having a reasonable chance of being selected for award?

The threshold question to be addressed in answering the charge is whether the R-SA and its priority apply at all to a Government contractor procurement of a food services management subcontract, if the cafeteria is located on Federal property?

The proponent of the order has the burden of proof based on reliable, probative and substantial evidence. (See, 34 CFR 395.37(b) requiring the Arbitration Panel to be conducted in accordance with 5 U.S.C. Chapter 5); see also 5 U.S.C. 556(d).

The Complainant in its Complaint, briefs and at the hearing do not present legal cases which directly address this issue. They presume in their arguments that DOE has failed to comply with R-SA even while recognizing that the actual procurement process was not conducted by the Federal government, but instead by FRA, a government contractor. The Complainant's position is that Fermilab is located on Federal property and therefore the R-SA and its regulations apply to the procurement of cafeteria services, whether the solicitation is issued by the Federal government, or a government prime contractor.

The totality of Respondent's legal argument in its Answer, at the arbitration hearing, and in its briefs is that the terms of the R-SA including its priority do not apply to a Federal prime contractor's, (FRA) procurement of a food services management subcontractor on Federal property. The Respondent asserts that R-SA only applies to Federal procurements and since DOE did not issue, participate in, evaluate or award a contract for cafeteria management services, R-SA, does not apply. No case law was provided to directly support this position. All of these actions were taken by DOE's management contractor FRA and not by DOE.

Based on the evidence presented I find the Complainant's arguments more persuasive.

The R-SA defines Federal property as ... "any building, land or other real property owned, leased or occupied by any department, agency, or instrumentality of the United States..." 20 U.S.C. 107e. The definition of "vending facilities" includes "cafeterias".20 U.S.C. 107e(7). The R-SA regulations at 34 CFR 395.33 require that:

Priority in the operation of cafeterias by blind vendors on **Federal Property** (emphasis added) shall be afforded when the Secretary (of Education) determines, on an individual

basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees whether by Contract or otherwise.

It is uncontested that Fermilab is located on Federal property. The DOE is required to assure that the statutory intent of the R-SA is complied with whether performed directly by DOE Federal employees or by its site management contractor. To rule otherwise would allow a Federal property management agency to avoid its responsibility for compliance with the R-SA merely by the act of subcontracting the responsibility. The weight of the evidence shows that FRA believed its procurement of a cafeteria services subcontractor was subject to the R-SA. See letter from John Myer - Statement of Fact number 16. in which Mr. Myer states "... The FRA procurements for vending and cafeteria operations, including the recent Foodservice Management Services solicitation are conducted in accordance with the Act and regulations".

The FRA procurement was structured to comply with the R-SA, the SLA was invited to participate and the evaluation criteria generally conform to the R-SA regulations. More to the point, the FRA General Counsel, John Myer, expressly acknowledged the applicability of the R-SA to the FRA procurement of the cafeteria services management subcontract.

However, finding that the intent of the R-SA and its implementing regulations apply to this procurement by an Agency contractor for cafeteria management services on Federal property does not end the required analysis. The issues which remains to be addressed to resolve the DoED's charge in this matter is whether DOE's Prime contractor, FRA, actually complied with the intent of the R-SA in establishing the competitive range and by doing so determining that the SLA's proposal had no reasonable chance for award. This analysis follows.

34 CFR 395.33 expressly addresses the requirements applicable to solicitation and award of cafeterias management services on Federal property. The regulation states:

- 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.

27.

- 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 management 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 Section 395.37.

34 CFR 395.33(b) is clear and unambiguous. To determine in a competitive procurement whether blind vendors can operate a cafeteria in a manner to provide food service at comparable cost and high quality as that available from other providers of cafeteria services the following steps must be followed:

1. The SLA must be invited to respond to the solicitation when a cafeteria contract is contemplated. In the case at hand, the SLA did receive the solicitation and submitted a joint proposal with Southern.

28.

2. The solicitation 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. In the case at hand, the FRA solicitation contained the following criteria—Corporate capability, management controls and accountability; Resources and staffing; Food programs and concepts; Nutrition program; Price and portion policies; Sustainability; and Corporate durability and financial resources. These criteria fall within the scope of the criteria envisioned by 34 CFR 395.33(b).

29.

3. Finally, if and only if, the SLA proposal is judged to be in the competitive range and has been ranked among those proposals having a reasonable chance of being selected for final award, the property management agency shall consult with the Secretary under 34 CFR 395.33(a). Here the SLA proposal was not included in the competitive range and was not ranked as having a reasonable chance of award. The term competitive range is defined in the Federal Acquisition Regulation Part 15.306(c) as follows:

Agencies shall evaluate all proposals in accordance with 15.305(a), and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated

proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section.

In the case at hand, the SLA/Southern proposal was excluded from the competitive range. The burden of proof is on the Complainant to prove its case by substantial evidence. The Complainant totally failed to meet its burden of proof to provide substantial evidence that it was erroneously excluded from the competitive range and could provide high quality food service at a reasonable cost. The only evidence it did provide addressed the food service provided by Southern at Fermilab from 2004-2016. Complainant provided the following testimony by Mr. Berry, Southern's President: "it had an excellent relationship with FRA and had received positive feedback". This could hardly be called substantial evidence of the quality performance of Southern at Fermilab demonstrating that it should be included in the competitive range. It is pure conjecture to find that the SLA/Southern proposal provided for food at a reasonable cost and a high quality. The FRA evaluation and evaluator ratings of the SLA/Southern proposal are not in the record nor is the FRA cost analysis of the SLA/Southern proposal. Complainant's other witness, Mr. Smith, provided no testimony as to how FRA's evaluation methodology was flawed or adversely impacted the Complainant. Complainant has produced no witness who participated in the preparation of the SLA/Southern proposal in response to FRA solicitation No. 06884-SAE. Complainant has also produced no witnesses who participated in the debriefing conducted by FRA. It is clear that FRA, in conducting this solicitation, complied with each element of 34 CFR 395.33.

Complainant presented the following additional legal arguments at the Arbitration hearing and in its briefs regarding provisions contained in the Fermilab RFP:

1. DOE violated the R-SA by imposing an improper limitation on the selection process without justification or determination by the Secretary; and
2. DOE violated the R-SA by failing to seek a determination from the Secretary regarding this limitation.

34 CFR 395.30 provides that:

- a) Each Federal department, agency or instrumentality shall take all steps necessary to assure that; whenever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on Federal property. Provided that the location or operation of such facilities would not adversely affect the interest of the United States.
- 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 would adversely affect the United States shall be fully justified in writing to the Secretary who shall determine whether such limitation is warranted.

FRA did not establish a limitation on the location or operation of a vending facility based on a finding that such location or operation would adversely affect the United States. To the contrary, DOE has located R-SA vending facilities on the Fermilab site in the form of vending machines. It has also conducted a competitive procurement to select an operator of the Fermilab cafeteria pursuant to R-SA regulation 34 CFR 395.33.

Complainant contends that using a “best value” standard of award is such a limitation, which must be justified to the Secretary of Education and determined by the Secretary to be warranted. Complainant’s argument is without merit as use of a “best value” standard of source selection is not a “limitation based on a finding that the operation of a cafeteria would adversely affect the interest of the Government”. The best value procurement standard is however a well-established method of Federal procurement source selection. The Federal Acquisition Regulation, (FAR) Part 15 governs the Federal government’s contracting by negotiation process. There are two major types of negotiated procurement 1) best value and 2) lowest price technically acceptable source selection. The best value process requires an Agency to list evaluation criteria and make a tradeoff between price and technical factors in selecting a Contractor. Fermilab is not strictly bound by the FAR but is bound by its DOE approved procurement policies and procedures and the terms of its Prime contract. Adopting Complainant’s argument would require each property managing Federal agency to justify its use of a FAR approved source selection approach to the Secretary of Education for competitively selected cafeteria contracts. This would make no sense when the procedure in 34 CFR 395.33 to select a cafeteria contractor is adhered to.

Regardless, the Complainant’s argument also fails pursuant to the legal doctrine of waiver.

The FRA solicitation clearly and unambiguously advised all offerors that the selection basis for the cafeteria services management subcontract would be a “best value “procurement. See RFP Section 13.2; Statement of Fact 11. Evaluation criteria were listed and are similar in content to the criteria represented in 34 CFR 395.33 (b). The evaluation criteria are recited on page 6 above. At the hearing, Mr. Berry of Southern, testified that Southern had reviewed the FRA Solicitation and responded in the negative when asked if the SLA/Southern had objected to FRA regarding the inclusion of a best value standard of award. The Complainant first objected to inclusion of the best value standard for award as part of its Complaint and after the subcontract in question had been awarded. The FRA held a pre-proposal conference to allow potential offerors to raise concerns regarding the procurement before proposals were due. No concerns were raised by the SLA/Southern. This is precisely the type of situation the waiver doctrine is meant to address

The waiver doctrine has been applied to various cases including R-SA arbitration cases. In the Court’s decision in *Blue & Gold Fleet L.P. v. United States*, 492 F.3d 1308 (Fed.Cir. 2007) the Court relied on the decision in *North Carolina Division of Service for the Blind*, which recognized that 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’s the successful offeror before deciding whether to

challenge the procurement, but rather to raise the objection in a timely fashion". Blue and Gold Fleet at page 70.

In Blue & Gold Fleet the Court further stated:

Similarly, we have recognized the doctrine of patent ambiguity where the party challenging the government is a party to the government contract. "The doctrine of patent ambiguity is an exception to the general rule of contra proferentem, which courts use to construe ambiguities against the drafter." *E.L.Hamm & Assoc., Inc. v. England*, 379 F.3d 1334, 1342 (Fed. Cir.2004). We have applied the doctrine of patent ambiguity in cases where, as here, a disappointed bidder challenges the terms of a solicitation after the selection of another contractor. *Stratos, Mobile Networks USA, LLC v United States*, 213 F. 3d 1375, 1381 (Fed.Cir. 2000); *Statistic, Inc. v. Christopher*, 102 F. 3d 1577, 1582 (Fed. Cir.2000); 1582 (Fed.Cir. 1996).

Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has " a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation" in a subsequent action against the government. *Stratos*, 213 F.3d at 1381 (quoting *Statistica*, 102 F.3d at 1582). This doctrine was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact. *Cmty. Heating & Plumbing Co. v Kelso*, 987 F.2d 1575, 1580 (Fed.Cir.1993).

In the case of *Comint Systems Corporation and Eyeit.Com, Inc., Joint Venture and Netservices & Associates, LLC, v. United States*, and *Netcentrics Corporation, and Digital Management, Inc., and Powertek Corporation*, the Court of Appeals for the Federal Circuit No. 2012-5039 extended the applicability of Blue and Gold to all pre-award situations. The Court stated:

In the absence of a waiver rule a contractor with knowledge of a solicitation defect could choose to stay silent.... If its proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoid costly after-the-fact litigation *Comint* at 9.

Importantly, and as previously mentioned, the waiver principle has also been applied in the R-SA context. In *North Carolina Div. of Svcs. for the Blind v, U.S.* 53 Fed. CL 147 (Fed. Cl. 2002) the Court of Federal Claims stated:

(The SLA) could not wait to see whether or not it won the contract before challenging the perceived problems with the solicitation. Acceptance of such a practice would be disruptive, unfair to the other offerors, and would serve to undermine the soundness of

the federal procurement system (Citations omitted.) Accordingly, where an offeror declines to raise an objection and obtain a determination on the matter, the court may find that the offeror has waived its right to protest. (Id.at 165)

In the RSA Arbitration case of State of Texas v. United States, RS16-09 the Arbitration panel cited Moore v. Cafeteria Services 77 Fed Ct at 185 in which the Court held: "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." The fact that the FRA solicitation was going to be a "best value" procurement and how the evaluation was going to be conducted was clear on the face of the solicitation and cannot be objected to after award.

Finally, use of a "best value" procurement would be a harmless error as the SLA/Southern proposal was appropriately excluded from the competitive range. Only proposals in the competitive range would be evaluated for "best value."