

**BEFORE AN ARBITRATION PANEL CONVENED BY THE SECRETARY OF EDUCATION PURSUANT TO THE RANDOLPH-SHEPPARD ACT**

**Case No. R-S/16-13**

**MISSOURI DEPARTMENT OF SOCIAL SERVICES, State Licensing Agency,**

**Complainant,**

**v.**

**UNITED STATES DEPARTMENT OF THE ARMY,**

**Respondent**

Appearances:

For Complainant: Keith L. Baker of Baker, Cronogue, Tolle & Werfel, McLean, VA

For Respondent: Douglas R. Smith, Robin Bunch, & Jeffrey H. Rohrer, Ft. Leonard Wood, MO

**DECISION OF THE ARBITRATION PANEL**

**I. Background & Issue**

This case involves a dispute over the award of a contract for dining services at Fort Leonard Wood, Missouri. In a letter dated December 7, 2016, the Missouri Department of Social Services (MDSS) – the designated as the State Licensing Agency (SLA) for the State of Missouri for purposes of the Randolph-Sheppard Act (RSA) – demanded arbitration regarding the Army’s decision to exclude MDSS from the competitive range with regard to the dining facilities contract at Fort Leonard Wood. In a letter dated January 31, 2017, the Army objected to the MDSS’s request for arbitration and asked that the Secretary of Education dismiss the complaint. While the complaint was pending before the Secretary, the MDSS filed suit in federal court seeking a preliminary injunction, which the court granted. Missouri Dept. of Social Serv., Family Support Div. v. United States, Case No. 2:16-CV-04321-BCW, slip op. at 9 (W.D. Mo., May 25, 2017).

In a letter dated February 21, 2018, the Secretary of 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 [MDSS] complaint.” According to that letter, the central issue for resolution at arbitration is as follows:

[W]hether the Army violated the Act and implementing regulations by failing to judge the proposal received from the SLA “to be within the competitive range” on solicitation W911S7-

14-R-0002 for services at Fort Leonard Wood and to be “ranked among those proposals which have a reasonable chance of being selected for final award” pursuant to CFR § 395.33(b).

After the Secretary convened the arbitration, the parties each selected an arbitrator in accordance with the RSA’s arbitration procedures. 20 U.S.C. § 107d-2(b)(1)(A & B). The MDSS selected Arbitrator Robert G. Bailey, and the Army selected Arbitrator Steven Fuscher. As required by the RSA, those party arbitrators then jointly designated Stephen D. Bonney to act as Chair of the Arbitration Panel. 20 U.S.C. § 107d-2(b)(1)(C). On January 7, 2019, the arbitration panel held a hearing in Kansas City, Missouri, at which the parties had a full and fair opportunity to present documentary evidence and to call and question witnesses. The hearing was transcribed by a court reporter, and the parties received the transcript of the hearing on or about March 5, 2019. The parties then submitted post-hearing briefs, and the record was closed on April 19, 2019, with the filing of MDSS’s responsive brief.

## **II. Stipulations**

After the hearing, the parties agreed to the following stipulations:

1. The United States Department of the Army (Army) is a department, agency, or instrumentality of the United States that is responsible for the maintenance, operation and protection of certain dining facilities located at Fort Leonard Wood, Missouri.
2. The State of Missouri by and through Missouri Department of Social Services (MDSS) is a Missouri state agency, and the state licensing agency, also known as the SLA, under the Randolph-Sheppard Act, also known as the RSA, 20 United States Code Sections 107 et seq., and the RSA’s implementing regulations.
3. The Randolph-Sheppard Act (RSA) was enacted by Congress to provide blind persons with gainful employment and to enlarge their economic opportunities. 20 U.S.C. §107 et seq. The RSA program is administered in each state by a State Licensing Agency (SLA). The Missouri DSS is the designated SLA for Missouri under the RSA.
4. In accordance with the provisions of the RSA, the Army has contracted with MDSS to provide food services at Fort Leonard Wood since February 2000. The Army has frequently modified contracts with MDSS to extend the period of performance.
5. On or about February 10, 2016, the United States Government by and through the Department of the Army issued Solicitation No. W911S&-14-R-0002 (“Solicitation”), requesting proposals for a full food service dining facility contract at Fort Leonard Wood, Missouri.
6. Section L.1. PROPOSAL SUBMITTALS AND INQUIRIES of the Army Solicitation states: “This acquisition is for Full Food Service on an Army installation and as such, pursuant to the Randolph Sheppard Act, the State License Agency Blind Vendor has priority for award. What this essentially means is that if the SLA is included in the competitive

range, the SLA will be offered the award first. The current SLA has expressed an interest. The SLA has been performing satisfactorily for 10 years and therefore are a viable competitor. In the unlikely event that the Government does not reach an agreement with the SLA after all remedies under the RSA procedures including Arbitration by the Department of Education, an award will be made to the LPTA small business HUBZone contractor.”

7. Mr. David Westall was the contracting officer (KO) for the Solicitation at Mission Installation Contracting Command (MICC), Fort Leonard Wood, Missouri.
8. The Solicitation stated that it was subject to the RSA.
9. MDSS submitted a proposal to the Army on March 11, 2016.
10. By a determination digitally signed on October 31, 2016, the Source Selection Authority eliminated the MDSS proposal from the competitive range.
11. By letter dated November 15, 2016, the Army notified MDSS that its proposal in response to the February 10, 2016 Solicitation was excluded from the competitive range because it was evaluated as technically unacceptable in three of five areas and not among the most highly rated proposals.
12. The Army provided MDSS with a timely debriefing that stated the reasons for the unacceptable rating.
13. The Army provided further clarification in a letter to the MDSS, dated 6 December 2016.
14. In a letter dated December 7, 2016, MDSS requested the United States Department of Education to arbitrate this matter.
15. On February 21, 2018, by letter, the Department of Education granted arbitration to MDSS.
16. On 7 January 2019,<sup>1</sup> an arbitration hearing was conducted at Kansas City, Missouri.

### **III. Additional Findings of Fact**

1. MDSS submitted an Executive Summary in Volume I of its proposal in accordance with the Solicitation, and that Executive Summary contained specific and relevant information regarding technical factors listed in the solicitation. MDSS Exhibit 7a, pp. 1-4. For instance, the Executive Summary included information on MDSS’s contractor

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<sup>1</sup> The Stipulation incorrectly listed the year as “2018,” which is an understandable typographical error early in the new year. The hearing was held in 2019.

team and proposal submission, including a list of its team members, subcontractors, and their task areas and other required information concerning the proposal.

2. The contracting officer testified that “each acquisition has to be taken at face value in accordance with the four corners of the document.” Tr. 208:15-17; see also Tr. 176:5 & 186:19-22 (additional references to “four corners”). In other words, the contracting officer responsible for determining the competitive range for the solicitation at issue in this case determined that each proposal submitted by a bidder must be evaluated based only on the “four corners” of the bid documentation. The contracting officer admitted that his approach was “very picky.” Tr. 189:16-190:7.
3. The contracting officer did not review the Executive Summary submitted by MDSS and did not provide it to the Army’s technical evaluators because it was not included in Volume II of MDSS’s proposal. Thus, the information in MDSS’s Executive Summary was never considered by the Army in determining the competitive range.
4. The Army rated the MDSS’s proposal as acceptable with respect to Factor 2: Past Performance. MDSS Exhibit 10, Competitive Range Determination, p. 3.
5. The Army excluded the MDSS’s proposal from the competitive range because “[t]he SLA Technical Proposal received an ‘unacceptable’ Rating in three (3) out of the five (5) Factor 1 Areas.” Id., p. 10.
6. The Army concluded that the MDSS’s proposal was unacceptable in the areas of Management Approach, Staffing Approach, and Training Approach. Id., pp. 10, 11, & 13.
7. The Army rated the MDSS’s technical proposal as acceptable in the areas on Quality Control Approach (Area 4) and Property Management Approach (Area 5). Id., p. 15.
8. Section M, Area 1 of the solicitation provided that “[a]s a minimum, an acceptable management approach will include an organization chart clearly identifying the management structure and lines of authority both internally and for interfacing with the government.” Id., p. 10.
9. The Competitive Range Determination states that “[t]he SLA’s Management Approach, Organizational Chart, was determined unacceptable based on the failure of the proposal to include an organizational chart clearly identifying the lines of authority for interfacing with the government.” Id.
10. The Army found that the MDSS’s “Management Approach acceptably identifies key personnel and demonstrates their qualifications” and “acceptably demonstrates the offeror’s understanding of the skills needed to execute the contract and how they are to be implemented and utilized in contract performance[.]” Id., pp. 10-11.

11. MDSS's proposal included a seven page explanation of its management approach along with a detailed organizational chart. MDSS Exhibit 7b, MDSS Proposal Vol. II, Technical Acceptability, pp. 14-20. In addition, MDSS's Executive Summary stated that "The Contract Manager will be the government interface to meet contract requirements and achieve program goals." MDSS Exhibit 7a, p. 2.
12. Section M, Area 2 of the solicitation provided that "[a]s a minimum, an acceptable staffing approach demonstrates adequate numbers of personnel necessary to successfully perform the required services in each building listed at Technical Exhibit 3 of the solicitation." MDSS Exhibit 10, Competitive Range Determination, p. 11.
13. The Army concluded that the MDSS's Staffing Approach was unacceptable because "[t]he proposal's staffing approach reflects excessive numbers of personnel over-and-above that necessary to successfully perform the required services in each Dining Facility listed in Technical Exhibit 3 of the solicitation" and because "the SLA's staffing approach does not acceptably demonstrate the SLA's methodology for accommodating fluctuating workloads, neither for minimizing personnel turnover, nor for retaining qualified personnel." Id., p. 12.
14. MDSS's proposal included a detailed explanation of its staffing approach including staffing charts and descriptions of its proposed labor categories, the qualifications of its staff, and its plans for recruiting and retaining personnel in the local labor market. MDSS Exhibit 7b, pp. 21-24, & MDSS Exhibit 7a, pp. 62-74 (staffing charts). In addition, the Executive Summary submitted by MDSS described its methodology for accommodating fluctuating workloads, minimizing personnel turnover, and retaining qualified personnel. MDSS Exhibit 7a, p. 3 (describing maintenance of a "part-time standby work force").
15. Section M, Area 3 of the solicitation provided that "[a]s a minimum, an acceptable training approach will demonstrate the offeror's ability to meet the training requirement listed in the PWS [Performance Work Statement] to include certification and re-certification of all personnel." MDSS Exhibit 10, Competitive Range Determination, p. 13.
16. The Army concluded the MDSS's Training Approach was unacceptable because "[t]he proposal's training approach does not acceptably demonstrate the offeror's ability to meet the training requirements listed in the [PWS], to include certification and re-certification of all personnel." Id. Specifically, the Army found the SLA's Training Approach did not adequately address training in sanitation certification and food safety. Id., pp. 13-14.
17. MDSS's proposal included a basic explanation of its training approach. MDSS Exhibit 7b, pp. 25-29. In addition, the Executive Summary submitted by MDSS indicated that all of

the employees would attend training classes before beginning work. MDSS Exhibit 7a, p. 3, 6.

18. Several of the Army's technical evaluators were directly aware of the MDSS's past, fully-acceptable performance in the technical areas of Management Approach, Staffing Approach, and Training Approach because those evaluators had worked directly with the SLA's contractor in performing the DFA contract at Fort Leonard Wood for many years and over many previous DFA contracts MDSS had held since February 2000.
19. In addition, the Army's staff at Fort Leonard Wood was intimately familiar with MDSS's past and fully-acceptable performance in the technical areas of Management Approach, Staffing Approach, and Training Approach based on MDSS's past performance as the DFA contractor at Fort Leonard Wood over many years.

#### **IV. Opinion & Analysis**

##### **Applicability of the RSA's Arbitration Provision**

Normally, bidders on federal contracts must file bid protests in the Federal Court of Claims under the bid protest provisions of the Tucker Act, 28 U.S.C. § 1491. But, "when a complaint alleges a violation of the RSA, the Court of Federal Claims lacks Tucker Act jurisdiction to hear the case until the RSA's administrative remedy – arbitration – is exhausted." *State of Kansas v. United States*, 192 F. Supp. 3d 1184, 1193 (D. Kan. 2016), citing *Kentucky v. United States*, 424 F.3d 1222, 1225-29 (Fed. Cir. 2005). The facts of this case are largely parallel to the facts in *Kentucky*.

In *Kentucky*, the Army solicited bids for a DFA services contract under the RSA. And, when the Kentucky state licensing agency's contract was not deemed within a "competitive range," the state licensing agency filed a post-award bid protest action in the Court of Federal Claims asserting jurisdiction under the Tucker Act. The Court of Federal Claims, however, held that the state licensing agency was "required to exhaust its administrative remedies . . . by asking the Secretary of Education to convene an arbitration panel to resolve the dispute" because the state licensing agency's claim arose under the RSA. And *Kentucky* concluded that it lacked jurisdiction over the state licensing agency's claim until that RSA remedy was exhausted.

*State of Kansas*, 192 F. Supp. 3d at 1193 (citations omitted).

In its December 7, 2016 letter, MDSS set forth its "complaint for arbitration" under the RSA. There, MDSS specifically asserted that "[t]he Army is in violation of the Randolph-Sheppard Act by improperly excluding Missouri DSS from the competitive range under the solicitation." *Id.*, p. 4. MDSS further claimed that "[t]he Army is in violation of the Randolph-Sheppard Act by failing to award the dining facilities contract to Missouri DSS." *Id.* Because the MDSS's complaint in arbitration specifically alleges violations of the RSA, the parties must exhaust the RSA's arbitration procedures before proceeding with other legal options. This finding is

consistent with the holding in Kentucky, where the Federal Circuit found an allegation of improper exclusion from the competitive range constituted a claim of a violation of the RSA. 424 F.3d at 1227. It is also consistent with the preliminary injunction decision issued by the Western District of Missouri with respect to this proceeding. Missouri Dept. of Social Serv., Family Support Div. v. United States, Case No. 2:16-CV-04321-BCW, slip op. at 4-5 (W.D. Mo., May 25, 2017).

#### **A. Standard of Proof**

Although its brief on this point is somewhat vague in that it never expressly states the standard of review applicable to this case, MDSS seems to argue that Respondent's determination of the competitive range is subject to de novo review in order to make certain that the Agency's decision-making complied with the RSA. MDSS Post-Hearing Brief, pp. 24-26. MDSS relies heavily on a prior RSA arbitration decision, Texas v. Air Force, Case No. R-S/16-09 (Feb. 28, 2017), in which the arbitration panel noted that "[i]ts 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." Id. at 21. The Panel in Texas specifically rejected the notion that it should apply the arbitrary and capricious standard of review. Id. at 22.

In its brief, the Army notes that, in 20 U.S.C. § 107d-2(a), the RSA requires the arbitration panel to comply with the Federal Administrative Procedure Act (APA) and that "an order may issue 'in accordance with the reliable, probative, and substantial evidence.'" Respondent's Post-Hearing Brief, p. 4, citing 5 U.S.C. § 556(d). The Army then argues that MDSS "has the burden to establish that . . . the Army abused its discretion by eliminating MDSS's proposal from the competitive range." Id., p. 5.

Respondent also contends that "courts have repeatedly held that the [contracting officer] has the sole right of determination of inclusion and exclusion within the competitive range." Respondent's Post-Hearing brief, p. 4, ¶ 23. In support of that proposition, Respondent cites Southfork Sys., Inc. v. United States, 141 F.3d 1124 (Fed. Cir. 1998), but it provides no pinpoint cite. Later in its brief, Respondent again cites Southfork for the proposition that "[t]he standard of review for a [contracting officer's] competitive range determination is 'abuse of discretion'." Respondent's Post-Hearing brief, p. 7. In fact, Southfork provides little support Respondent's sweeping claims.

In that case, the Air Force included the SLA's bid within the competitive range and awarded the dining facilities contract to the SLA. Southfork, a non-RSA bidder, protested the award and claimed that, for a whole host of reasons, the Agency had erred by including the SLA within the competitive range. Although the Federal Circuit never expressly stated the standard of review it applied to Southfork's claims, it noted that "[t]he ultimate standard for determining whether an unsuccessful bidder is entitled to relief on the ground that the government breached the implied-in-fact contract to consider all bids fairly and honestly is whether the government's conduct was arbitrary and capricious." 141 F.3d at 1132. Among the factors courts consider in determining whether the government's conduct was arbitrary and capricious is the "absence of

a reasonable basis for the administrative decision.” Id. Later, the court indicated that “[a] contracting officer has broad discretion in determining competitive range, and such decisions are not disturbed unless clearly unreasonable.” 141 F.3d at 1136, quoting *Birch & Davis Int’l, Inc. v. Christopher*, 4 F.3d 970, 973 (Fed.Cir.1993). Although the court also stated that it had “no difficulty in concluding that the contracting officer did not abuse her discretion by including the Commission’s proposal within the competitive range,” id., the court seems to have applied a reasonableness standard of review to the Agency’s decision to include the SLA within the competitive range.

In any event, Southfork is not parallel to this case because it did not involve the exclusion of an SLA’s bid proposal from the competitive range. In order to make certain that the RSA achieves its central purpose of increasing employment opportunities for blind people, a federal agency’s decision to exclude the bid of an SLA from the competitive range is reviewable under a more rigorous standard because excluding a blind vendor from the competitive range undermines the remedial purposes of the RSA, and subjecting such exclusion decisions to a deferential standard of review such as abuse of discretion would make it far too easy for federal agencies to evade the RSA’s requirements.

Neither the RSA nor the implementing federal regulations establish a clear standard of proof for arbitration panels to apply in cases like this one. However, other RSA arbitration panels have closely scrutinized the contracting decisions of federal agencies and have focused on the question of whether the facts demonstrate a violation of the RSA. In *South Carolina Comm. for the Blind v. United States Dept. of the Army*, Case Nos. R-S/12-09 & R-S/15-07 (Sept. 2, 2016), for instance, the arbitration panel noted that “[t]he burden is on the SLA to show by substantial evidence that the Army violated the Act.” Slip op. at 13. See also *State of Texas v. United States, Dept. of Air Force*, Case No. R-S/ (Feb. 27, 2017), slip op. at 21 (RSA arbitration panel may set aside government’s decision to exclude SLA from the competitive range “if the Panel finds [the decision] is not supported by the evidence”).

In considering Complainant’s claims, this Arbitration Panel will apply the well-established administrative law standard of “substantial evidence on the record as a whole” to determine the legal issues in this case. Other standards of review, including “arbitrary and capricious” and “abuse of discretion,” are too deferential to the deciding authority and are thus inconsistent with the remedial purposes of the RSA. The meaning of “substantial evidence” has been well-established for more than sixty years. “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 292, 300 (1951). “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Thus, in order to prevail in this case, Complainant has the burden to show by substantial evidence that the Army’s decision to exclude MDSS from the competitive range was unreasonable and in violation of the RSA.

## **B. The Army Improperly Excluded MDSS from the Competitive Range.**

Congress passed the RSA to provide employment opportunities for the blind by granting priority to blind persons licensed by a State agency who wish to operate vending and cafeteria facilities in government buildings. 20 U.S.C. § 107(b). The Act divides responsibility for the “blind vendor” program between state and federal agencies. At the federal level, the Secretary of Education interprets and enforces the provisions of the Act and designates SLAs. 20 U.S.C. §§ 107a(a)(5) & 107b; 34 C.F.R. §§ 395.5 & 395.8.

The Department of Education regulation regarding the operation of cafeterias by blind vendors provides in pertinent part as follows:

- 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.

34 C.F.R. § 395.33. Because this regulation refers to the Agency’s competitive range determination, that issue is properly reviewable by the Secretary to make certain that the Agency complies with the RSA in letting contracts for cafeteria facilities. As the Secretary’s designee, the Arbitration Panel has the authority to conduct that review and determine whether the Army here acted reasonably in reviewing the MDSS’s proposal and in setting the competitive range.

Now, therefore, we must turn to the issue of whether there is substantial evidence to support the MDSS’s claim that Respondent unreasonably evaluated its proposal with respect to the three technical areas found to be unacceptable by the Army’s technical evaluators, specifically Management Approach, Staffing Approach, and Training Approach.

Management Approach: Section M, Area 1 of the solicitation provided that “[a]s a minimum, an acceptable management approach will include an organization chart clearly identifying the management structure and lines of authority both internally and for interfacing with the government.” MDSS Exhibit 10, Competitive Range Determination, p. 10. The Army found that the MDSS’s “Management Approach acceptably identifies key personnel and demonstrates their qualifications” and “acceptably demonstrates the offeror’s understanding of the skills needed to execute the contract and how they are to be implemented and utilized in contract performance[.]” Id., pp. 10-11. But it ultimately concluded that “[t]he SLA’s Management Approach, Organizational Chart, was determined unacceptable based on the failure of the proposal to include an organizational chart clearly identifying the lines of authority for interfacing with the government.” Id.

In fact, MDSS’s proposal included a seven page explanation of its management approach, which included a detailed organizational chart. MDSS Exhibit 7b, MDSS Proposal Vol. II, Technical Acceptability, pp. 14-20. In addition, MDSS’s Executive Summary stated that “The Contract Manager will be the government interface to meet contract requirements and achieve program goals.” MDSS Exhibit 7a, p. 2. Furthermore, the Army was well-aware of the facts of the MDSS’s subcontractor’s management approach and organization because that organization had been the incumbent contractor at Fort Leonard Wood for more than fifteen years.

In finding the MDSS’s proposal unacceptable with respect to Management Approach, the Army ignored facts known to it and in plain sight, even if some of those facts were not included in exactly the right volume of the MDSS’s proposal. “An agency is not bound by the ‘four corners’ of an offeror’s proposal in the evaluation of proposals and may use other information of which it is aware.” Park Tower Mgt. Ltd., B-295589.2 at 4 (GAO, Mar. 22, 2005). Although in Park Tower the GAO approved of an agency’s exercise of discretion in deciding to look beyond the four corners of a bidder’s proposal in evaluating that proposal, an agency cannot rigidly refuse to consider facts of which it is aware or could easily learn by reviewing a bidder’s entire submission, including – in this case – the Executive Summary. Such willful ignorance of known and available facts is clearly unreasonable. Here, it is obvious that, viewed in light of all the available facts, MDSS’s bid included an appropriately detailed organization chart and all of the other information called for under Technical Factor, Area 1, Management Approach. Thus, the Army clearly acted unreasonably when it found MDSS’s proposal unacceptable in that area.

Staffing Approach: Section M, Area 2 of the solicitation provided that “[a]s a minimum, an acceptable staffing approach demonstrates adequate numbers of personnel necessary to successfully perform the required services in each building listed at Technical Exhibit 3 of the solicitation.” MDSS Exhibit 10, Competitive Range Determination, p. 11. The Army concluded the MDSS’s Staffing Approach was unacceptable because “[t]he proposal’s staffing approach reflects excessive numbers of personnel over-and-above that necessary to successfully perform the required services in each Dining Facility listed in Technical Exhibit 3 of the solicitation” and because “the SLA’s staffing approach does not acceptably demonstrate the SLA’s methodology for accommodating fluctuating workloads, neither for minimizing personnel turnover, nor for retaining qualified personnel.” Id., p. 12.

MDSS's proposal included a detailed explanation of its staffing approach including staffing charts and descriptions of its proposed labor categories, the qualifications of its staff, and its plans for recruiting and retaining personnel in the local labor market. MDSS Exhibit 7b, pp. 21-24, & MDSS Exhibit 7a, pp. 62-74 (staffing charts). In addition, the Executive Summary submitted by MDSS described its methodology for accommodating fluctuating workloads, minimizing personnel turnover, and retaining qualified personnel, by – for instance – maintaining a standby workforce. MDSS Exhibit 7a, p. 3. Finally, based on their years of experience working with MDSS's subcontractor as the incumbent at Fort Leonard Wood, a majority of the Army's evaluators had direct knowledge of the bidder's Staffing Approach.

Once again, the Army evaluated the MDSS proposal on Staffing Approach in a hyper-technical manner and ignored well-known facts within the proposal. More importantly with respect to staffing, however, the Army based its finding of unacceptability on the proposal's allocation of too many staff. This makes no sense. The solicitation required bidders to demonstrate "adequate staffing" to perform the contract. Judging this technical factor unacceptable based on too many staff is patently unreasonable since the number of staff listed in MDSS's proposal is clearly "adequate" to perform the required services. Thus, the Army clearly acted unreasonably when it found MDSS's proposal unacceptable in the area of Staffing Approach.

Training Approach: Section M, Area 3 of the solicitation provided that "[a]s a minimum, an acceptable training approach will demonstrate the offeror's ability to meet the training requirement listed in the PWS [Performance Work Statement] to include certification and re-certification of all personnel." MDSS Exhibit 10, Competitive Range Determination, p. 13. The Army concluded the MDSS's Training Approach was unacceptable because "[t]he proposal's training approach does not acceptably demonstrate the offeror's ability to meet the training requirements listed in the [PWS], to include certification and re-certification of all personnel." *Id.* Specifically, the Army found the SLA's Training Approach did not adequately address training in sanitation certification and food safety. *Id.*, pp. 13-14.

MDSS's proposal included a basic explanation of its training approach. MDSS Exhibit 7b, pp. 25-29. In addition, the Executive Summary submitted by MDSS indicated that all of the employees would "attend training and indoctrination classes prior to commencing work." MDSS Exhibit 7a, p. 3, ¶ 6. Although MDSS's proposal gave the topic of training relatively short shrift, the proposal adequately described MDSS's training approach in a way that met the basic requirements of the solicitation, especially when viewed in conjunction with the Army's long experience with the performance of MDSS as the incumbent on the dining facilities contract at Fort Leonard Wood. Thus, although this particular area presents a closer question, the Army acted unreasonably when it found MDSS's Training Approach proposal unacceptable.<sup>2</sup>

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<sup>2</sup> There is a substantial question whether an unacceptable finding on only one of five areas of the technical factor would justify an agency in excluding a bidder from the competitive range in an RSA-governed solicitation. It is plausible that excluding an SLA based on only one such area of unacceptability would still violate the RSA. But,

## **V. Conclusion & Remedy**

For the foregoing reasons, a majority of the Panel finds that there was significant evidence the contracting officer here failed to evaluate the MDSS's bid proposal properly with respect to the criteria set forth in the solicitation. By failing to evaluate the MDSS's bid proposal properly, the contracting officer improperly denied the SLA an opportunity to obtain the contract and, thereby, violated the RSA.

The Rules governing arbitration under the RSA state as follows:

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 of the RSA. Respondent must take action to "carry out the decision of the Panel." Respondent shall include the SLA in the competitive range and commence negotiations with it.

Dated May 1, 2019.

Stephen Douglas Bonney, Chair

Robert Bailey, Member, Concur

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since a majority of the panel finds that all three of the Army's determinations of unacceptability were clearly unreasonable, we need not consider this difficult question.

## **DISSENT**

This 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 January 7, 2019 at Suite 625, Conference Room A, 2345 Grand Boulevard, Kansas City, Missouri. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file post hearing briefs. The Panel has considered the testimony, exhibits and arguments in reaching its decision.

## **ISSUES**

I concur that the issue before the panel is:

[W]hether the Army violated the Act and implementing regulations by failing to judge the proposal received from the SLA “to be within the competitive range” on solicitation W911S7-14-R-0002 for services at Fort Leonard Wood and to be “ranked among those proposals which have a reasonable chance of being selected for final award” pursuant to CFR § 395.33(b).

## **Statement of Facts**

I concur with the majority’s Statement of Facts that include stipulations and additional Findings of Fact. In addition to these facts, I will reference additional facts from the record. These facts will be included in the following Analysis.

## **Analysis**

1. Congress passed the Randolph-Sheppard Act in 1936 to provide blind persons with increased employment opportunities through the operation of vending facilities on federal property.<sup>3</sup> Military dining facilities are considered vending facilities under the RSA. The RSA was substantially amended in 1974 and implementing regulations were enacted in 1977 at 34 C.F.R. 395.1 et seq. The United States Department of Education administers the RSA, and the Secretary of Education designates “state licensing agencies” (SLAs) to license blind persons to operate vending facilities.
2. Solicitation W911S7-14-R-00 Section M – Evaluation Factors for Award Paragraph A. Basis for Award states:
  - A. Basis for Award
    - 1) This is a Lowest Price Technically Acceptable (LTPA) best-value source selection conducted in accordance with Federal Acquisition Regulation (FAR) 15.3, Source Selection, as supplemented by the Defense Federal Acquisition Regulation Supplement (DFARS), and the Army Federal Acquisition Regulation Supplement (AFARS). Award will be made to a single offeror who is deemed responsible in accordance with the FAR,

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<sup>3</sup> 20 U.S.C. §107, *et seq.*

whose proposal conforms to the solicitation requirements (to include all stated terms, conditions, representations, and certifications), and whose proposal, judged by an overall assessment of the evaluation criteria and other considerations specified in this solicitation, represents the Lowest Priced Technically Acceptable offer. Priority will be given to the State Licensing Agencies (SLA) and their blind vendors, under the terms of the Randolph-Shepard Act (R-SA).<sup>4</sup>

3. The Army put the SLA on notice that the FAR applies to this acquisition and the SLA did not object to the use of the FAR to control the process for source selection under this acquisition. The Army also crafted specific language to address the application of the R-SA to this procurement action. 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 R-SA, 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>5</sup>
4. The FAR is a system of administrative regulations that authorize the contracting officer to award a contract.<sup>6</sup> The FAR is a codification of acquisition policy that applies to ALL executive agencies.<sup>7</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 for a federal contracting officer to award a contract for dining hall services using agency appropriated funds.
5. The DoE has not defined the term “competitive range” nor has the DoE established regulations to require the establishment of a competitive range that includes the SLA. The Army put the SLA on notice that the FAR and its supplements applied to this acquisition. The SLA never objected to this source selection process. The SLA has therefore, in my opinion waived any objection it may have had to the use of these source selection terms in making an award decision. The waiver rule has been applied to

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<sup>4</sup> Solicitation W911S7-14-R-00 at 84.

<sup>5</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.

<sup>6</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.

<sup>7</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\(a\)\(2\)](#).

cases involving the RSA.<sup>8</sup> In support of the Court's decision in *Blue & Gold Fleet*<sup>9</sup>, the Court relied on the decision in *North Carolina Division of Services for the Blind*<sup>10</sup> which 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 whether to challenge the procurement, but rather to raise the objection in a timely fashion."<sup>11</sup>

6. The rationale of United States Court of Appeals, Federal Circuit in *Blue & Gold Fleet*, is compelling. The court stated the following:

Similarly, we have recognized the doctrine of patent ambiguity where the party challenging the government is a party to the government contract. "The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter." *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1342 (Fed.Cir.2004). We have applied the doctrine of patent ambiguity in cases where, as here, a disappointed bidder challenges the terms of a solicitation after the selection of another contractor. See *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed.Cir.2000); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed.Cir.1996). Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has "a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation" in a subsequent action against the government. *Stratos*, 213 F.3d at 1381 (quoting *Statistica*, 102 F.3d at 1582). This doctrine was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact. *Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1580 (Fed.Cir.1993).<sup>12</sup>

### **Solicitation Analysis**

7. The terms of Solicitation W911S7-14-R-0002 (solicitation) inform all offerors of the requirements of a technically acceptable proposal. Section L.3. PROPOSAL PREPARATION INSTRUCTIONS – VOLUMN II – TECHNICAL ACCEPTABILITY<sup>13</sup> states:

The technical Acceptability Volume shall be clear, concise, and include sufficient detail for effective evaluation and for substantiating the validity of stated claims. Legibility, clarity and coherence are very important. Your responses will be evaluated against the

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<sup>8</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>9</sup> *Blue & Gold Fleet L.P. v. U.S.*, 492 F.3d 1308 (2007).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1315 (quoting *North Carolina Division of Services for the Blind*, 53 Fed. Cl. at 165).

<sup>12</sup> *Id.* at 492 F.3d 1314.

<sup>13</sup> Solicitation at 70.

Technical Acceptability Factor as defined in Section M, Evaluation Factors for Award. The proposal should not simply rephrase or restate the Government's requirements; the proposal shall provide convincing rationale to address how the Offeror intends to meet these requirements. Statements that the Offeror understands, can or will comply with the PWS (including referenced publications, technical data, etc.); statements paraphrasing the PWS or parts thereof (including applicable publications, technical data, etc.); and phrases such as "standard procedures will be employed" or well known techniques will be used, " etc., will be considered unacceptable and will negatively impact the Offerors rating under the Technical Acceptability factor. Offerors shall assume that the Government has no prior knowledge of their facilities and experience, and will base its evaluation on the information presented in the Offeror's proposal. Elaborate brochures and documentation, binding, detailed art work, or other embellishments are unnecessary and are not desired. The Technical Acceptability Volume shall be organized according to the following general outline:

TAB A – Table of Contents

TAB B – Technical Acceptability:

- TAB B1 – Management Approach
- TAB B2 – Staffing Approach
- TAB B3 – Training Approach
- TAB B4 - Quality Control Approach
- TAB B5 – Property Management Approach

8. The solicitation sets forth the minimum requirements for an acceptable technical proposal. Section L.3. PROPOSAL PREPARATION INSTRUCTIONS – COLUMN II TECHNICAL ACCEPTABILITY states:

TAB B1 – MANAGEMENT APPROACH. At a minimum the management approach shall include the following: an organizational chart clearly identifying the management structure and lines of authority both internally and for interfacing with the government; identification of key personnel and demonstration of their qualifications as required by the PWS; and the offeror's approach to subcontractor management.<sup>14</sup>

9. The Army's source selection decision document dated 24 March 2017 determined that the SLA's management approach, as set forth in their offer, was "unacceptable," stating the following:

Organizational Chart, identified the SLA's management structure and internal lines of authority. Neither the SLA's Management approach, organization Chart nor any of the other parts of the Technical Proposal acceptably address in any way the lines of authority for interfacing with the government as required by Section M, Factor 1, Technical Acceptability Area 1: Management

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<sup>14</sup> *Id.* at 71.

Approach. The SLA's Proposal did not include the required organizational chart clearly identifying the management structure and lines of authority both internally and for interfacing with the government. The lone statement of "satisfying clientele" was not an acceptable indication or explanation of a management approach for lines of authority between the contractor and the government. The SLA's Management Approach, Organizational Chart, was determined unacceptable based on the failure of the proposal to include an organization chart clearly identifying the lines of authority for interfacing with the government.<sup>15</sup>

10. The SLA argues that their proposal did include information regarding the SLA's management approach as part of its Executive Summary but agreed that it was not included in Tab B1as required by Section L.3. PROPOSAL PREPARATION INSTRUCTIONS – VOLUMN II TECHNICALACCEPTABILITY of the solicitation. The SLA argues that the technical evaluation team should have been provided this information as part of its review process. The contracting officer (KO) opined that even if the executive summary had been provided to the evaluation team, that contents of the executive summary would not have made the SLA's proposal responsive. The KO testified stating:

In my opinion, no, simply because . . . the organizational chart and the solicitation instructions were very specific about showing lines of authority in that chart, not writing it in some other document somewhere else. It's very specific. And the reason that we are so very picky about what does where is to make sure we have uniformity and efficiency and fairness in the evaluation process.<sup>16</sup>

11. The minimum acceptable standards for the offeror's staffing approach were set forth in Section L.3. PROPOSAL PREPARATION INSTRUCTIONS – VOLUMN II – TECHNICAL ACCEPTABILITY. The solicitation states:

TAB B2 – STAFFING APPROACH. At a minimum, the staffing approach shall include the following: proposed staffing and labor categories to perform the required services in each building listed in Technical Exhibit 3 and the offeror's methodology for accommodating fluctuation workloads, minimizing personnel turnover, and recruiting and retaining qualified personnel.

12. The Army's source selection decision document dated 24 March 2017 determined that the SLA's staffing approach, as set forth in their offer, was "unacceptable," concluding with the following:

The SSEB concluded, based on the referenced evaluation criteria set forth in the solicitation, that SLA's Area 2: Staffing Approach, is unacceptable based on the excessive number of direct labor man-hours proposed over that considered the minimum number of man-hours required to meet the staffing requirements of the solicitation. In addition,

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<sup>15</sup> MEMORANDUM FOR RECORD dated 24 March 2017, from Department of the Army, U.S. Army Mission and Installation Contracting Command, MICC – Fort Leavenworth. Subject: Source Selection Decision Document, Solicitation Number W911S7-14-R-0002, Full Food Services at Fort Leonard Wood, Missouri, pg 3.

<sup>16</sup> Tr. 190

the SLA's Proposal did not provide an acceptable demonstration of the methodology to be used for accommodating fluctuating workloads, minimizing personnel turnover, or for retaining qualified personnel.<sup>17</sup>

13. The SLA asked the KO about the issue of staffing and how proposing, in the opinion of the technical team, to much staff is a risk. The KO responded:

When we see a contractor proposing what we consider to be an overabundance of labor, it casts doubt upon their understanding of the actual requirement. Therefore, in our mind, it raises the risk – well, maybe to an unacceptable level, but it does raise it.<sup>18</sup>

14. When the KO was asked the extent to which the SLA should have relied on information specific to their prior contract, the KO responded “no” and continued stating:

Simply because each acquisition has to be taken at face value in accordance with the four corners of the paper. And, furthermore, Federal acquisition regulation prohibits us from allowing any other information, other than that in the solicitation and the contractor proposal, from entering into the evaluation and the source selection equation. So, it is not uncommon for incumbents to do this.<sup>19</sup>

15. Solicitation W911S7-14-R-0002 Section L.3. PROPOSAL PREPARATION INSTRUCTIONS – VOLUMN II – TECHNICAL ACCEPTABILITY states: TAB B3 – TRAINING APPROACH. At a minimum, the training approach shall include the offeror's proposed approach to meet the training requirements listed in the PWS to include certification and re-certification of all personnel.

16. The Army's source selection decision document dated 24 March 2017 determined that the SLA's training approach, as set forth in their offer, was “unacceptable,” concluding with the following:

Area 3: Training Approach – Unacceptable – The proposal's training approach does not acceptably demonstrate the offeror's ability to meet the training requirements listed in Performance Work Statement (PWS), to include certification and re-certification of all personnel.

The SLA's proposal provides only a very minimal, top level training approach with reference to implementing its training program upon approval, and maintain an employee training plan to be delivered to the Government 20 days after contract award. These statements do not demonstrate an acceptable training approach. The offeror's training approach was all unacceptable with regard to initial and refresher training. The offeror only indicated that supervisors are charged with the responsibility to impart

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<sup>17</sup> *Id.*

<sup>18</sup> *Tr.* 204.

<sup>19</sup> *Tr.* 208, 209.

training to new employees, and provided no detailed approach. Retraining was addressed but the offeror did not offer an acceptable demonstration of the retraining.

The SSEB concluded, based on the referenced evaluation criteria set forth in the solicitation, the SLA's Area 3: Training Approach, is unacceptable based on the SLA's failure to acceptably present the rationale the SLA would use to comply with the identified PWS training requirements.<sup>20</sup>

17. The SLA proposal's Executive Summary specifically stated "All employees, if contract is awarded to the contractor, will attend training and indoctrination classes prior to commencing work."<sup>21</sup> However, Tab B3 entitled RSB's Subcontractor's Training Approach of the SLA's proposal does not include this information. The CFO for the SLA acknowledged that information regarding fluctuating workloads was in the Executive Summary, not Volume II of the SLA proposal.<sup>22</sup> The SLA strategy for a standby workforce was in the Executive Summary, not Volume II of the SLA proposal.<sup>23</sup> The CFO opined that he felt the Army would evaluate the Executive Summary.<sup>24</sup> There is no dispute that the Executive Summary provided in the SLA's proposal included information that was not in the individual technical volumes evaluated by the Army technical evaluation teams. The SLA "assumed" the Army would consider this information during the technical evaluation of its proposal. The panel has chosen to amend the requirements of the solicitation by requiring the Army to consider this information in its determination as to whether or not the SLA has submitted a technically acceptable proposal. This would place the evaluation of the SLA's outside the four corners of the terms of the solicitation, effectively modifying the solicitation's evaluation criteria.

### **Requirements for Army to Evaluate Proposals in a Manner Consistent with the Solicitation**

18. The United States Court of Federal Claims in *The State of Texas v. United States*, has recently reaffirmed that federal agencies are required to evaluate proposals in a manner consistent with the terms of the solicitation, stating:

Agencies are required to evaluate proposals and make contract awards based on the criteria set forth in the solicitation. See *NEQ, LLC v. United States*, 88 Fed. Cl. 38, 47–48 (2009) ("It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation."). It is equally well-established that agencies cannot evaluate proposals based on criteria that are not disclosed in the solicitation. See *NVE, Inc. v. United States*, 121 Fed. Cl. 169, 180 (2015). This court in *Banknote Corp. of America, Inc. v. United States* stated:

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<sup>20</sup> *Id.* at 4.

<sup>21</sup> *SLA Proposal Executive Summary* at 3.

<sup>22</sup> *Tr.* 77.

<sup>23</sup> *Tr.* 78.

<sup>24</sup> *Tr.* 82.

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

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[I]t is well-settled that “a solicitation need not identify each element to be considered by the agency during the course of the evaluation where such element is intrinsic to the stated factors.” *Analytical & Research Tech., Inc. v. United States*, 39 Fed. Cl. 34, 45 (1997)[.]

*Banknote Corp. of Am., Inc. v. United States*, 56 Fed. Cl. 377, 386-87 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004) (footnote and other citations omitted); see also *NVE, Inc. v. United States*, 121 Fed. Cl. at 180; *Transatlantic Lines, LLC v. United States*, 122 Fed. Cl. 624, 632 (2015); *FirstLine Transp. Sec., Inc. v. United States*, 100 Fed. Cl. 359, 388 (2011) (“It is a fundamental principle of procurement law that an agency must conduct its best-value analysis using the evaluation factors and subfactors specified in the solicitation.” (citing 48 C.F.R. § 15.101–1(b)(1) (2011); 48 C.F.R. § 15.305(a) (2011); *Acra, Inc. v. United States*, 44 Fed. Cl. 288, 293 (1999))); *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. at 536-37; *NEQ, LLC v. United States*, 88 Fed. Cl. at 47-48; *PHT Supply Corp. v. United States*, 71 Fed. Cl. 1, 13-14 (2006). 25

19. I agree with the majority’s finding that the contracting officer did not review the Executive Summary submitted by the SLA and the Army evaluation team responsible for evaluating the technical acceptability of the SLA’s proposal, was not given the SLA’s Executive Summary for evaluation because it was not included in Volume II of the SLA proposal.<sup>26</sup> The Army went to great lengths to evaluate the proposals submitted by the offerors in response to the solicitation in strict conformance to the terms of the solicitation. The panel has opted to deviate from these standards. If the Army was to deviate from the evaluation terms of the solicitation for the SLA, was it also obligated to deviate from the evaluation terms of the solicitation for other offerors? In my opinion, this only creates further confusion as regards the application of the R-SA to source

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<sup>25</sup> *The State of Texas v. United States*, United States Court of Federal Claims, No. 17-847C, November 7, 2017, at 19-20.

<sup>26</sup> Majority Decision, Para. 3.

selections government by federal acquisition regulations and creates additional litigation risk for the Army.

### **Deference To be Given to the Contracting Officer's Determination**

20. Courts have consistently applied the standards found in 5 U.S.C. 706(2)(A) to procurement cases and have long recognized that contracting officers are “entitled to exercise discretion upon a broad range of issues confronting them” in the procurement process. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed Cir. 2001). The agency’s procurement decision, as evidenced by the contracting officer’s decision, must be viewed to determine whether or not it was reasonable. *QBE, LLC v. U.S.*, 120 Fed. Cl. 397, 401 (2015). In accordance with this standard, the decision by the agency will not be set aside unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>27</sup> While there is testimony that the Army was strict in its application of source selection criteria to the SLA proposal, the SLA acknowledged that its proposal was not in conformance to the solicitation. The SLA acknowledged that material included in the Executive Summary of its proposal was not in the Volumes required by Section L of the Solicitation. If the Army had deviated from the source selection terms of the solicitation, it faced significant litigation risk from the other offerors. Therefore, the panel should have given deference to the KO’s decision to exclude the SLA from the competitive range and applied the above review standard in rendering its final decision.

### **R-SA Application and the Competitive Range**

21. The application of the R-SA Priority is tied directly to the 34 CFR §395.3328. The United States Court of Federal Claims in *the State of Texas v. United States* addressed the application of the priority under the R-SA stating:

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<sup>27</sup> *Id.*

<sup>28</sup> **34 CFR §395.33 Operation of Cafeterias by Blind Vendors** is the governing regulation regarding the application of the R-SA to this source selection that is the subject of this arbitration and states the following:

(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

To be awarded a contract, the first step is for a prospective SLA to successfully fall within a competitive range established by the contracting officer. See *Commonwealth of Ky., Educ. Cabinet, Dep't for the Blind v. United States*, 62 Fed. Cl. at 447. The proposals within the competitive range, including from an SLA, are then evaluated by the agency and,

[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 [of Education] as required under paragraph (a) of this section.

34 C.F.R. § 395.33(b). If the SLA is not satisfied with the action taken in regards to its proposal, “it may file a complaint with the Secretary [of Education] under the provisions of [34 C.F.R.] § 395.37.” *Id.*; see also *Commonwealth of Ky., Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d at 1225.<sup>29</sup>

22. The significance of the Army’s determination to exclude the SLA from the competitive range because the SLA’s proposal was technically deficient is central to this arbitration. 34 CFR §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 property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section.” If the Army accepts the panel’s determination that the SLA’s proposal should have included within the competitive range, the Army will be required to consult with the Secretary for the Secretary to determine whether the SLA can provide 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>30</sup>

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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>29</sup> *The State of Texas v. United States*, United States Court of Federal Claims, No. 17-847C, November 7, 2017, at 19-20.

<sup>30</sup> 34 CFR §395.33(a).

23. The challenge for the panel is that the DoE has not defined the term “competitive range” nor has the DoE established regulations to require the establishment of a competitive range. As discussed above, the Army put the SLA on notice of the technical requirements necessary to comply with Section L of the Solicitation. Since the SLA failed to object in a timely manner to the source selection process included within the Army solicitation, the SLA waived any objection it may have had to the use of these source selection terms in making an award decision. As a result, the SLA has failed to meet its burden of proof that the Army violated the R-SA by failing include the SLA in the competitive range and making an award under the strict terms of the Solicitation. The panel did not find that the Army conducted the source selection in a manner inconsistent with the terms of the Solicitation. The panel simply disagreed with the decision of the contracting officer to refuse to allow the Army’s technical evaluation teams to evaluate the SLA’s Executive Summary as part of the technical evaluation of the SLA’s proposal.

24. The Randolph-Sheppard Act is found at 20 U.S.C. § 107, et seq., and had its most recent substantive revision in 1974. In relevant part, the RSA states “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.”<sup>31</sup> The statute goes on to state that the Secretary of Education shall “establish requirements for the uniform application of this Act...including...policies on the selection and establishing new vending machines.”<sup>32</sup>

The Department of Education has failed to promulgate regulations that address the interaction of the RSA and agency procurement regulations (the FAR and its supplements) when the SLA through the State compete for award of dining hall service contracts. If the DoE and/or the Office of Management and Budget were to resolve these issues through regulation, these arbitrations and Court cases could be avoided. The disruptive cost of these arbitrations could, therefore, be avoided. If the R-SA Program is an entitlement program where agencies have limited source selection options, the DoE needs to present that issue to the public for comment.

### **Concurrence with the Secretary of the Department of Education**

25. The majority relies on an R-SA arbitration decision, *Texas v. Air Force*, Case No. R-S/16-09 (Feb 28, 2017) to find that the panel has the authority to conduct a de novo review of the government’s competitive range determination. The panel also used this arbitration decision to support the notion that the panel is not bound by the arbitrary and capricious standard of review.<sup>33</sup> This position is not supported by the United States

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<sup>31</sup> 20 U.S.C. § 107a(a)(1).

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> *Majority Decision, Para. B. Standard of Proof*, p.9.

Court of Federal Claims in the State of Texas v. United States<sup>34</sup> and the analysis in paragraph 20 above.

26. The Majority has found “there was a violation of the RSA. Respondent must take action to “carry out the decision of the Panel.” Respondent shall include the SLA in the competitive range and commence negotiations with it”.<sup>35</sup> There is clear legal authority that the decision of the panel is not binding on the Army, the courts or the Secretary. The Secretary has no authority to enforce an order or finding of the panel. The decision of the panel is advisory to the Secretary of the Department of Education (DOE) and enforcement must be through the appropriate court with jurisdiction over this matter or voluntarily through the Army. The 11th 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 (11th Cir. 1990).
27. 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, 122914 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.
28. Finally, in Maryland State Dep’t of Education v. U.S. Dep’t of Veterans Affairs, 98 F.3d 165 (4th 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 disagree with the decision of the contracting officer and determine that the SLA should be placed within the competitive range. The finding of the panel that the Army is in violation of the RSA is not enforceable. It has no authority to order remedies for such violations. That responsibility lies with the head of the procuring agency. This limitation on the authority of the Secretary is important to the overall interpretation of the interaction of the RSA and the Army.

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<sup>34</sup> *The State of Texas v. United States*, United States Court of Federal Claims, No. 17-847C, November 7, 2017.

<sup>35</sup> *Majority Decision, Para. IV. Conclusion & Remedy*, p.18.

## **Entitlement versus Stewardship**

29. The panel is required to make a difficult decision since there are compassionate concerns for the SLA. The R-SA imposes a statutory policy to provide economic opportunities for blind vendors. The State of Missouri contracts with the federal government to provide these opportunities under certain statutory and regulatory conditions. While the Army has an obligation under the R-SA to provide a priority for the award of dining halls service contracts under certain prescribed conditions, the Army also has a specific charter to be good stewards of the Army's appropriated funds. The court in *Texas State Com. For Blind v. United States* ignored the compassionate concerns of the R-SA and attempted to find equal justice for all through a careful analysis of Congressional intent, opining that agencies are required to evaluate proposals in strict conformance to the terms of the solicitation.

## **Conclusion**

30. The majority has opted to treat the SLA's offeror under a relaxed standard that deviates from the strict terms of the solicitation. The Army has opted to strictly apply the terms of the solicitation in the technical evaluation of all offers. This position is consistent with federal acquisition regulations. I agree with the Army's position that all offerors must be evaluated in strict conformance with the terms of the solicitation and the federal acquisition regulations that apply to this source selection. Therefore, the Army's finding that the SLA's proposal was not technically acceptable should stand because the SLA has failed its burden of proof to establish that the Army's technical evaluation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Dated May 1, 2019

Steven Fuscher, Panel Member, Dissenting