

**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
RANDOLPH-SHEPPARD ACT ARBITRATION**

**THE FLORIDA DEPARTMENT OF EDUCATION,
DIVISION OF BLIND SERVICES**

Petitioner,

v.

**THE DEPARTMENT OF THE AIR FORCE,
HURLBURT FIELD**

Respondent.

Case No. R-S/17-03

**Tripartite Panel: Jeanne Charles Wood, Chair
Susan Rockwood Gashel, Panel Member
Lt. Col. Ryan J. Lambrecht, Panel Member**

DECISION AND AWARD

This case comes before a three-member Arbitration Panel convened by the United States Department of Education ("DOE") pursuant to the Randolph-Sheppard Act (RSA), 20 U.S.C. § 107 et seq. A hearing in this matter was held at Hurlburt Field, Florida on January 9 and 10, 2019. Mr. Brent McNeal and Mr. Taylor Wolff represented the Florida Department of Education ("FOE" or "Petitioner"). Ms. Marcia Bachman, Mr. Joseph Loman and Mr. Stephen See represented the United States' Air Force ("Air Force," or "Respondent"). Testimony was given by William J. Findley, Terry Smith, Christopher Wentworth, Angela Maher, Nehemiah Pereira, Jonathan L. Mizell, Matthew Schroeder, and Connie Rosado. Petitioner and Respondent submitted pre-hearing and post-hearing briefs. The post-hearing briefs were timely submitted on March 5, 2019. In reaching its decision, the Panel has considered all the foregoing testimony, exhibits, and briefs.

ISSUES

This arbitration panel is tasked with adjudicating a dispute regarding the application of the RSA to two Air Force dining halls located on Hurlburt Field, Florida. On March 8, 2018, the Rehabilitation Services Administration of the United States Department of Education ("DoE") authorized the convening of this panel to hear and render a decision on the issues raised in the Complaint. The central issue is whether Hurlburt violated the Randolph Shepard Act ("RSA") and its implementing regulations by failing to recognize the RSA priority in issuing solicitation FA4417-17-R-0002 ("Solicitation") for Mess Attendant Services.

RELEVANT LAW

The Randolph-Sheppard Act

§ 107. Operation of vending facilities

(a) Authorization

For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property¹.

(b) Preferences regulations; justification for limitation on operation

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary [of Education], through the Commissioner [of the Rehabilitation Services Administration], shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that:

(1) the priority under this subsection is given to such licensed blind persons..., and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States².

§ 107a Federal and State responsibilities

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment....

The Department of Education's Regulations Implementing the Randolph-Sheppard Act **34 CFR Ch. III**

¹ 20 U.S.C. § 107(a).

² 20 U.S.C. § 107(b).

§ 395.1 Terms.

(d) Cafeteria means a food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a line where the customer serves himself from displayed selections. A cafeteria may be fully automatic or some limited waiter or waitress service may be available and provided within a cafeteria and table or booth seating facilities are always provided.

(x) Vending facility means automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of ... foods, beverages, and other articles of services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws....

§ 395.33 Operation of cafeterias by blind vendors.

(a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary [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 employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.

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

(c) All contracts or other existing arrangements pertaining to the operation of cafeterias on federal

property not covered by contract with, or by permits issued to, State licensing agencies shall be renegotiated subsequent to the effective date of this part on or before the expiration of such contracts or other arrangements pursuant to the provisions of this section.

FACTUAL BACKGROUND

On October 4, 2016, the Air Force posted a "sources sought" notice on the Federal Business Opportunities website, www.tbo.gov, that it was conducting market research to determine the existence of potential 8(a) small business concerns capable of providing Mess "Attendant Services at Hurlburt Field, FL ("Hurlburt"). Hurlburt is a United States Air Force installation located in Okaloosa County, Florida. Hurlburt is the most deployed Air Force installation in the Air Force³. As stated in the notice, a sources sought notice is a request for information, and is issued in order to conduct market research. The Performance Work Statement ("PWS") attached to the notice contained a description of the various services required by the Air Force in its Mess Attendant Services ("MAS") procurement.

On October 26, 2016, Mr. William Findley ("Findley") from the Florida Department of Education ("FDE") sent an email to the point of contact listed in the sources sought notice, informing her that FDE "believes that the PWS describes a food service requirement that falls under the authority of the Randolph-Sheppard Act." FDE is the State Licensing Agency ("SLA") for the blind in the state of Florida. The email also informed the Air Force of the RSA priority for licensed blind vendors to "operate cafeterias (dining facilities)" on Department of Defense properties and requested that future notices include a reference to the RSA's applicability.

On November 7, 2016, the Air Force published a pre-solicitation notice on www.fbo.gov, which said the Air Force intended to make a single award for MAS at Hurlburt Field. In addition, the notice said the acquisition "is being offered for competition to eligible 8(a) Program participants with active 8(a)status." No mention was made of the RSA or RSA priority.

On November 15, 2016, an Air Force contracting officer, Mr. Clyde Shreve, emailed Findley at FDE to inform him the Air Force would not apply RSA priority to the MAS procurement, because the Air Force believed the RSA "does not apply to full food services, mess attendant services of services supporting operations of a military dining facility."

On February 2, 2017, the Air Force contracting officer for the MAS contract, Ms. Angela Maher ("Maher"), issued a written Determination and Findings that determined the RSA did not apply to the MAS contract. Specifically, Maher stated that:

³ Statement of Lieutenant Colonel Jonathan Mizell Respondent's Exhibit 14, p. 1-2.

Based on the above findings and the services defined in the Performance Work Statement, I have determined the Randolph-Sheppard Act does not apply to this requirement for Mess Attendant (and other dining support) services at Hurlburt Field. The Randolph-Sheppard Act only applies to contracts for the operation of military dining facilities. The Contractor will not operate the dining facilities listed in the solicitation and will not exercise any management responsibility over the dining facilities. Air Force personnel are wholly responsible for the operation, management, and performance of the dining facilities and will retain, day-to-day decision making authority; Therefore, the Randolph-Sheppard Act does not apply to this requirement⁴.

On March 28, 2017, Maher emailed Findley at FDE to inform him that she was now the contracting officer for the MAS procurement. Maher informed Findley that she determined the RSA does not apply to the MAS procurement.

On March 28, 2017, the Air Force posted the Solicitation on the Federal Business Opportunities webpage. The Solicitation said the acquisition was being conducted (1) using Streamlined Procedures for Evaluation and Solicitation for Commercial Items (in accordance with Federal Acquisition Regulation(FAR) Part 12.6); (2) using Contracting by Negotiation (in accordance with FAR Part 15); and, (3) using a "100%set-aside for competition amongst eligible 8(a) Small Business Concerns." Proposals were due for submission by April.27, 2017. The Solicitation stated the Air Force's evaluation would be performed in accordance with FAR clause 52.212-2, "Evaluation-Commercial Items." No mention was made of the RSA or RSA priority.

Attachment 1 to the Solicitation stated the evaluation criteria and procedures the Air Force would use to award the contract. The technical factors of the evaluation were the following:

1. An evaluation of an offer's Management Plan to determine if it demonstrated a reasonable approach to "managing and staffing the contract";
2. An evaluation of an offer's Transition Schedule to determine if it contained reasonable key milestones for beginning performance within 30 days of contract award; and
3. An evaluation of an offer's Mission Essential Contractor Services Plan to determine if it met the Solicitation's requirements to:

⁴ Respondent Exhibit 10 (last page).

- A. Perform Mess Attendant Services, as stated in the PWS;
- B. Operate extended hours; and
- C. Provide contingency cooks.

The PWS described the work of the MAS contract as performing the following functions at two dining facilities on Hurlburt AFB, the "Reef" and the "Riptide":

1. Prepare and serve food at the salad bar, sandwich/deli bar and ice cream/pastry bar in accordance with recipe cards and production logs,
2. Cook food in accordance with Air Force corporate food service recipe system and food service production logs, or the military shift leaders upon request. Cooking services would be provided on a contingency basis "in special situations such as mobilization, surge requirements, and deployments."
3. Comply with sanitation requirements of the food code and state and local laws/regulations.
4. Meet required guest flow rates, so that patrons are served and cashiered at a specified rate per minute⁵.
5. Perform cashier services, reconcile the cash drawer with point of sale reports, and ensure cash is turned in on time⁶.
6. Clean and sanitize all dishes, pots, pans, and food contact surfaces⁷.
7. Maintain the interior and exterior of the dining facilities by cleaning areas such as floors, lavatories, window, light fixtures, and the facilities' entrances, exits and sidewalks⁸.

The PWS also required contractors to "provide all personnel, supervision, transportation, and all items and services necessary to perform mess attendant services." Finally, the PWS required contractors to develop and implement a Quality Control Plan that identified, prevented and ensured non-recurrence of defective services in the seven MAS areas listed above.

According to the PWS, at both the Reef and Riptide dining facilities, Air Force personnel performed the recordkeeping, budgeting, accounting, controlling cash and meal payments, verifying all funds received, managing the storeroom, controlling hazardous materials, and planning and controlling meal selection. The Air Force established the hours of operation, and opened and closed each facility. The PWS continued by stating that "Air Force personnel retain all management functions, oversight, and responsibilities for operating both dining facilities." Finally, the PWS identified "government-provided property, equipment and services" as the Reef and Riptide facilities; equipment for use in performance of the contract, such as ovens, grills, freezers, refrigerators,

⁵ Id. at 4, 5, 16.

⁶ Id. at 5-6, 16.

⁷ Id. at 5, 6-7, 16.

⁸ Id. at 7-10, 16.

dishwashers, and cashier stands; materials such as china, glassware, cutlery and utensils; replacement materials (china, glassware, cutlery, etc.) up to 10 percent of the inventory; all food; services such as removal and replacement of equipment; provision of utilities (gas, electricity, sewage and water); facility maintenance and repair; and refuse collection.

On March 31, 2017, the FDE sent a complaint to DOE alleging the Air Force did not comply with the RSA when it issued the Solicitation. The FDE also requested DOE convene an ad hoc arbitration panel as provided for by 20 U.S.C: § 107d-2(a) to hear the FDE's complaint. On February 8, 2018, the Air Force awarded the Mess Attendant Services contract to Alcryst, LLC. The FDE did not submit an offer to the Air Force. On March 8, 2018, the DOE convened this arbitration panel to hear and render a decision on the issues in the FDE complaint.

FINDINGS AND CONCLUSIONS OF LAW

I. Procedural Matter

In its pre-hearing brief, dated January 3, 2019, the Air Force requested the arbitration panel dismiss the Petitioner's complaint for alleging violations of the RSA that are not based in RSA statutes or regulations. Specifically, the Air Force requested the Panel to dismiss FDE's allegations that the Air Force violated the RSA by:

- (1) Failing to include in the Solicitation a notice to offerors about the applicability of the RSA priority to the procurement;
- (2) Failing to include in the Solicitation the "requirements for solicitations" set forth in 34 CFR 395.33; and
- (3) Failing to include in the Solicitation the establishment of a competitive range.

The Panel concluded at the hearing of this matter that it would defer decision on the question presented by the Air Forces motion to dismiss. Accordingly, the Panel finds that these three issues, are ancillary to the dispute in this case. The FDE's disputed three issues (no RSA notice, no "required" solicitation terms, no competitive range) are subordinate to whether the RSA applies to this procurement, because if the RSA does not apply, these issues are moot. The core dispute of this case is whether the Air Force violated the RSA by not inviting the FDE to respond to the Solicitation for its procurement of Mess Attendant Services, not about how the Solicitation was written. Obviously, if the Air Force had extended the RSA priority, it would have written the Solicitation in a manner that would invite SLAs to apply just as it did for the 8(a) entities. The Panel disagrees with the Respondent's claim that Petitioner's allegations are an attempt to rewrite what is required by the RSA and its implementing regulations. Therefore, the Panel denies the

Respondent's request for dismissal, and proceeds with a decision on the merits.

II. The Merits

While Respondent presents various arguments in defense of its actions associated with not applying the RSA priority to the Solicitation¹¹, the crux of this case is centered upon the applicability of the RSA to the Solicitation for Mess Attendant Services at Hurlburt Field. The inquiry is simple: Does the RSA apply to the Solicitation? If so, did the Air Force fail to apply it when FDE was not invited to respond to the Solicitation? And, if the Air Force failed to apply the priority, how should the matter be remedied? In order to answer these questions, a review of the relevant law and its application to the facts of this case will follow.

A. The Legal Landscape

1. The RSA and Its Implementing Regulations

Pursuant to the RSA, a priority "shall be given to blind persons licensed by a State agency" to operate vending facilities on any Federal property, for "the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind[.]"⁹ No "limitation on the placement or operation of a vending facility" is permissible, unless "such placement or operation would adversely affect the interests of the United States"; the limitation must be "fully justified in writing" to the Secretary of Education, "who shall determine whether such limitation is justified;"¹⁰ The RSA provides for DOE to designate the state agencies for the blind to serve as the SLA to license individuals to "vend articles or services" [.]¹¹ FDE is the designated SLA for the State of Florida.¹²

Under the RSA, 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." 20 U.S.C. § 107d-3(e). The regulations promulgated by the DOE are contained at 34 C.F.R. §§ 395.1, et seq. Pursuant to the regulations, each Federal agency is required 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

⁹ 20 U.S.C. § 107.

¹⁰ *Id.*

¹¹ 20 U.S.C. § 107a(a)(5).

¹² 20 U.S.C. 107b; 413.011(3)(t), Fla. Stat; TR, p. 29, 1. 6-19, TR, p. 68, l. 24-25, TR, p. 69, 1. 1-2.

Federal property."¹³

In order to determine whether a vending facility is feasible, each Federal agency "shall provide to the appropriate State licensing agency written notice of its intention to acquire or otherwise occupy such building. Such written notice shall be by certified or registered mail with return receipt and shall be provided as early as practicable but no later than 60 days prior to such intended action."¹⁴

The operation of cafeterias by blind vendors is governed by 34 C.F.R. § 395.33. It contains four parts. Part (a) provides that "[p]riority 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 to 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."

Part (b) provides for SLAs to be invited to respond to solicitations for services. When Federal agencies do not want to enter into direct negotiations, the appropriate SLA "shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated." Part (c) provides that "all contracts or other existing arrangements covered by contracts or permits not issued" to an SLA are to be renegotiated pursuant to the RSA before expiration of such contract or other arrangement. Part (d) authorizes Federal agencies to afford the priority through direct negotiations with SLAs.

So long as the SLA's proposal is "within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award" the Federal agency is required to consult with the Secretary of Education pursuant to part (a), referenced above. Neither the RSA nor its implementing regulations define or distinguish between types of contracts for or pertaining to the operation of a cafeteria. It does not define or distinguish between a Full Food Service (FFS) and a Dining Facility Attendant (DFA) contract.

In 1974 Congress passed amendments to the RSA "to provide for a strengthening of the program..."¹⁵ The Senate Report, explained the need for the legislation. The report states, in pertinent part, that

¹³ 34 C.F.R. §395.30(a)

¹⁴ 34 C.F.R. §395.31(c).

¹⁵ Sen. Rep. No. 93-937 at 1 (1974).

Thirty-eight years have passed since the Randolph-Sheppard Act first became law. Although the program has been a success in terms of providing jobs and income, to blind vendors, that success is as much a credit to the tenacity of the vendors themselves as it is to the administrators of the program or the agencies which house them. That success, furthermore, is tempered by the very real and serious problems currently encountered by the blind vendors and their program.¹⁶

The report continues by describing what it refers to as an "ironic disparity between the Federal and non-Federals sectors" in terms of implementing the statute. It noted that, at the time, there were:

a total of 3,307 blind vending stands throughout the United States. Only 874 of those are on Federal property, though the Randolph-Sheppard program was created to be a Federal program. Three years ago, at the end of fiscal year 1971, there were 881 stands at Federal locations, but there were 3,142 total vending stands. It is plain to see that the program in the State, local, and private sector is flourishing. It is equally plain that the program in the Federal sector is languishing and even backsliding."¹⁷

It is clear that the legislative intent is to support a broad application of the RSA.

2. Federal Acquisition Regulations and The Joint Policy Statement

The Respondent contends that the Air Force is bound by Federal acquisition regulations that govern which procedures the DOD must follow and that the Secretary of Education cannot. "direct DOD contracting officers to place specific language or requirements in DOD solicitations for the procurement of goods or services."¹⁸ In support of its view, Respondent relies on a 2006 Joint Policy Statement. On Aug 29, 2006, the DOE, DOD and Committee for Purchase from People who are Blind or Severely Disabled (CFP) issued a Joint Policy Statement to Congress in accordance with Section 848 of the National Defense Authorization Act ("NDAA") (Public Law 109-163) for Fiscal Year 2006.¹⁹ The NDAA became law on January 6, 2006, and Section 848 states:

The Secretary of Defense, the Secretary of Education, and the Chairman of the Committee for Purchase From People Who Are Blind or Severely Disabled shall

¹⁶ *Id.* at 10.

¹⁷ *Id.*

¹⁸ Respondent's post-hearing brief at 11.

¹⁹ National Defense Authorization Act of Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat 3395 (Jan. 6, 2006).

jointly issue a statement of policy related to the implementation of the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 48) within the Department of Defense and the Department of Education. The joint statement of policy shall specifically address the application of those Acts to both operation and management of all or any part of a military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meal to members of the Armed Forces, and shall take into account and address, to the extent practicable, the positions acceptable to persons representing programs implemented under each Act.²⁰

On February 3, 2006, the DOD, DOE and CFP published a notice in the Federal Register soliciting suggestions for potential policy solutions and received approximately 204 comments.²¹ When the Joint Policy Statement was presented in a Congressional Report: on August 29, 2006, it provided the joint policy of the DOE, DOD and CFP regarding the application of the RSA and the Javits-Wagner-O'Day (JWOD) program to the operation and management of military dining facilities: Specifically, the statement specified that "for contracts not covered" by the provision of the statement regarding JWOD, military dining facility contracts "will be competed under the RSA when the DOD solicits a contractor to exercise management responsibility and day-to-day decision-making for the overall functioning of a military dining facility, including responsibility for its staff and subcontractors, where the DOD role in the contract is generally limited to contract administration functions described in the [FAR] part 42."²² In all other cases, military dining facility contracts would be set aside for JWOD or small businesses when the DOD needed "dining support services ... where DOD food service specialists exercise management responsibility over and above those contract administration functions described in FAR Part 42."²³

Although the Joint Policy Statement pledged to promptly implement regulations reflecting its contents, this was not accomplished. The Joint Policy Statement is currently published on the website for the Office of the Under Secretary of Defense for Acquisition and Sustainment.²⁴ However, in the letter authored by Director, Defense Procurement and Acquisition Policy, Shay D. Assad, it specifically states that "[t]he joint policy should not be cited in individual solicitations until it is implemented in complementary regulations by the ED and DoD."²⁵ On December 10, 2018, the Department of Defense posted a notice on the website for the Office of the Under Secretary of Defense for Acquisition and Sustainment stating that the Joint Policy Statement "no

²⁰ *Id.* at section 848.

²¹ Respondent Exhibit 23 at 3. (Joint Report to Congress, August 29, 2006).

²² *Id.* at 4.

²³ *Id.* para. 4.b.

²⁴ https://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#military_dining

²⁵ *Id.*

longer reflect[ed] the position of the Department of Education." Respondent acknowledges this fact but contends that it did reflect the position of the DOE at the time Maher made the determination about the Hurlburt Field contract.

3. The DeVos Letter

On March 5, 2018, DOE Secretary Betsy DeVos sent a letter to Representative Pete Sessions of the House of Representatives concerning the RSA and the priority to be applied to blind vendors. Secretary DeVos noted that there "has been some dispute over the types of contracts to which the priority applies." In an effort to bring clarity to the matter, she outlined several points in the letter as follows:

1. DOE believed the RSA applied to both "full food service" and "dining facility attendant" contracts by the DOD.
2. The term "operation" in the RSA "means that the vendor must 'manage' or 'direct the working of the cafeteria."
3. Nothing in the RSA required a vendor "to participate in every activity of the cafeteria in order to 'manage' or 'direct the working of the cafeteria."
4. Where a vendor is responsible for all the functions of the cafeteria aside from those performed by military personnel, "the vendor can be said to 'manage' the cafeteria, even if the vendor is not preparing the food."
5. Some contracts may be limited to discrete tasks so as not to entail overall "operation" of the cafeteria, but that characterization would not apply to all "dining facility attendant" contracts.²⁶

In its conclusion, Secretary DeVos' letter quoted an RSA arbitration panel decision from Fort Riley, Kansas, stating that where "the tasks to be performed by a contract for DFA [dining facility attendant] services includes tasks that constitute an integral element of providing food service at a military cafeteria facility, *or* pertain to the operation of a cafeteria, *or* tasks that without which the cafeterias would not be able to function," such contracts "fall within the definition included in the [RSA], and its implementing regulations, and are entitled to [RSA] priority when awarding said contract."²⁷ (Emphasis added).

²⁶ Letter from Betsy DeVos, Secretary of Education, to Pete Sessions, House of Representatives (Mar. 5, 2018).

²⁷ *Id.*, citing Kansas Dep't of Children and Family Servs. v. U.S. Dep't of the Army, Case No. RS/15-15 (May 9, 2017) (Fort Riley) at 31 (emphasis added). Note: The decision by Fort Riley arbitration panel was addressed by the United States District Court for the Eastern District of Virginia in *SourceAmerica, et al, v. U.S. Department of Education, et al,*

There is no evidence that Secretary DeVos' letter to Representative Sessions was published in the Federal Register. In addition, there is no evidence the DeVos letter was published in any other public forum, such as the DOE website. And even accepting Respondent's position that the DeVos letter should not be afforded deference carrying the force of law, it is appropriately viewed as guidance to this panel since the law is clear that it is the Secretary of Education who determines the ultimate applicability of the RSA, to wit: "A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination."²⁸ Based on the Panel's review of the applicable law and guidance, when it comes to providing cafeteria vending services on federal property, every effort should be made to extend a priority to blind vendors.

B. Operation of a Cafeteria

Central to the dispute in this case is whether the contract meets the definition of operation of a cafeteria for purposes of RSA coverage. If the answer is in the affirmative, then the RSA and its implementing regulations are unequivocal that the FOE should have received an invitation to respond to the Solicitation and the priority was to be extended to an SLA unless the Secretary established "such placement or operation would adversely affect the interests of the United States."²⁹ Upon a review of the full record and for the reasons set forth below, the Panel finds that Respondent's failure to invite Petitioner to respond to the solicitation violated the RSA.

1. Does a Mess Attendant Services Contract Qualify as Operation of a Cafeteria?

Petitioner argues that "Vending facilities" under the RSA include cafeterias and that it is well established that military dining halls are "cafeterias" for purposes of the RSA.³⁰ Petitioner argues further that the Solicitation at issue falls within the meaning of operation of a cafeteria for purposes of the RSA priority even if the vendor is not operating the entire cafeteria operation. To the contrary, Respondent contends that the Hurlburt Field contract simply does not qualify as a "cafeteria contract" and the SLA and blind vendor cannot "operate a cafeteria" under the RSA or its implementing regulations because, among other things, neither the SLA nor the blind vendor

Case No. J:17-cv-893 (E.D. Va., Mar 15, 2019). There, the Court stated:

The arbitration findings that (i) the Fort Riley DFA contract is subject to the RSA's preference, (ii) the Army violated the RSA when it failed to apply the RSA's preference to the Fort Riley DFA contract, and (iii) the Army violated the JWNSA No-Poaching Provision must be vacated. The arbitration finding that Army violated the RSA Review Requirement must be affirmed. *SourceAmerica v. United States Dep't of Educ.*, 368 F. Supp. 3d 974, 1002 (E.D. Va. 2019)

²⁸ 20 U.S.C. § 107 (b)

²⁹ *Id.*

³⁰ See *NISH v. Cohen*, 247 F. 3d 197,199 (4th Cir.2001).

will own or be responsible to replace the equipment or the food.³¹ Therefore, the contracting officer was reasonable and rational in deciding the Air Force had no duty to invite the SLA to submit an offer on this contract. The Panel disagrees.

2. The Test for Application of the RSA

The determination of whether a contract for MAS falls within what it means to operate a cafeteria under the RSA and its implementing regulations has been a heavily debated issue resulting in a number of arbitration decisions attempting to bring clarity to the question. It should be noted that the RSA and its regulations do not make a distinction between the type of vending facilities and by extension, cafeteria operation to which the priority applies. Arbitration panels that have been called upon to resolve disputes stemming from this question have issued decisions reflecting either a broad view of the "operate a cafeteria" phrase or a more restrictive view of its meaning. As a result, two (2) tests have been applied to determine the applicability of the RSA.³²

One test that has evolved from RSA arbitration decisions is the "pertaining to the operation of a cafeteria" test. This test dictates that the RSA priority applies to all contracts pertaining to the operation of cafeterias on Federal property, regardless of whether the contractor actually prepares or serves food. It is not restricted to the overall operation of the cafeteria. This is the test the Petitioner contends is applicable to the instant case. The "operation of a cafeteria" test advances the idea that the contract requires control over or management of an entire cafeteria facility, and not just discrete tasks, in order for RSA priority to apply to a military dining facility. This is the test that Respondent argues is applicable. As explained below, Respondent's view of the "operation of a cafeteria" test as requiring the operation of an entire cafeteria (in our case military dining facility) is misplaced.

3. Analysis

It is the conclusion of this Panel that, contrary to the assertions of the Air Force, nothing in the RSA requires that vendors operate the entire military dining facility. This view is supported by a

³¹ Respondent's Post-Hearing brief at 20.

³² See, e.g., *Kansas Dep't of Children and Family Servs. v. US. Dep't of the Army*, R/S 13-08 (2017) (Fort Riley); *Oklahoma Dep't of Rehab. Servs. v. U.S. of the Army*, R/S 15-10 (2016) (Fort Sill); *Georgia Vocational Rehab. Agency v. US. Dep't of Defense*, R/S 13-09 (2016) (Fort Steward); but see, *Washington State Dep't of Servs. for the Blind v. United States*, 58 Fed.Cl. 781(2003) (Washington)(rejecting SLA's argument for application of "pertaining to" test) and *SourceAmerica, et al. v. U.S. Department of Education, et al.*, Case No. I:17-cv-893 (E.D. Va., Mar 15, 2019)(rejecting the argument that services "pertaining to" the operation of a cafeteria which do not include the preparation of food does not meet the definition of operation a cafeteria); *Kentucky v. U.S. Dep 't of the Army*, RIS 11- 06 (Feb. 14, 2014)(Fort Campbell).

majority of arbitration decisions on the issue.³³ As referenced above, the RSA makes no distinction between a FFS operation and a DFA³⁴ operation. The RSA does require that a vendor operate the vending facility.³⁵ Thus, the focus must be on services to be provided as set forth in the PWS. As the Panel explained in *California Department of Rehabilitation v US. Dept. of the Navy*, R/S 15-20 (2018):

The contract label is immaterial. The relevant information is found in the PWS and the array of functions required to be performed. If the work to be performed lands the contract within the orbit of the RSA, then the priority must apply, regardless of a federal department's label for the type of contract.

In this case, the Solicitation calls for the vendor to provide the services of serving and replenishing food and beverage items, preparing fruits and vegetables, preparing sandwiches, replenishing condiments, cashier services, cleaning tableware, utensils and equipment, performing housekeeping/custodial services, and maintaining the grounds around the facilities, as well as providing for contingency cooks. The contractor is also tasked with developing and maintaining a quality control program; providing monthly quality status reports; and meeting periodically to discuss the contractor's performance. All job functions contemplated by the Solicitation are both integral and pertain to the operation of the Hurlburt Field military dining facilities and are, thereby, subject to the RSA.³⁶ As Hurlburt Squadron Commander Lt. Col. Jonathan Mizell explained at the arbitration hearing, if the services under the contract at Hurlburt were not performed, "[y]ou wouldn't have a cafeteria then."³⁷ Thus, based on the services set forth in the PWS, the Panel finds that the MAS contract at issue is for the operation of a cafeteria and is subject to the RSA.³⁸

The recent ruling in *SourceAmerica, et al. v. United States Department of Education, et al.*,³⁹ does not change the result. *SourceAmerica* limits the broad view expressed in cases such as *Fort Riley*, *Fort Sill* and *Fort Steward* referenced earlier in this decision. In particular, it sets aside the arbitration panel's decision in *Kansas v. Army (Fort Riley)* which determined that a contract for DFA services was entitled to the RSA priority. The Panel does not consider this decision to be

³³ There is "no legally required answer" to the issue of whether a DFA contract is subject to the R-S Act. *Wash. v. U.S.*, 59 Fed. Cl. 781 (2003).

³⁴ The MAS contract at issue in this case is synonymous with a DFA.

³⁵ 20 U.S.C. § 107(a).

³⁶ *In re Dep't of the Air Force-Reconsideration*, 72 Comp. Gen. 241,246 (1993). (There is no reason why a contract containing services related to a cafeteria operation would be excluded from the R-S Act; DoE's interpretation of its regulations is "expansive rather than narrow." *Id.*" at 246, 248.

³⁷ *Tr.* at 303.

³⁸ See, *Fort Campbell* at 26.

³⁹ *SourceAmerica, et al. v. U.S. Department of Education, et al.*, Case No. 1:17-cv-893 (E.D. Va., Mar 15, 2019).

dispositive to the instant case because the solicitation at issue in that case did not include the preparation and service of food, whereas the solicitation here does.

The SourceAmerica court went to great lengths to explain that the RSA language requires the operation through management or control of vending facilities which must entail the preparation of food. The Court stated, "The regulation's implication-that 'operation' of dining facilities *must involve control or management over food* is consistent with the plain language interpretation that the RSA's preference applies only where a vendor exercises control or management over the function of a dining facility as a whole and not merely where a vendor performs discrete tasks in support of the functioning of a dining facility."⁴⁰ (Emphasis added).

In the Fort Riley case, the DFA was limited to janitorial and custodial duties such as cleaning, trash removal, and dishwashing. By contrast, the Hurlburt Field contract specifically called for the management of food and an array of food preparation services needed to operate the cafeteria, as well as providing for contingency cooks. Additionally, the contractor is required to develop and maintain a quality control program, provide monthly quality status reports, and meet periodically to discuss the contractor's performance. The contractor is held accountable for the preparation of food in compliance with sanitation requirements of the food code and state and local laws/regulations, as well as, meeting required guest flow rates, so that patrons are served and cashiered at a specified rate per minute. These tasks demonstrate more than accomplishing discrete tasks associated with food service, they include highly executive functions to ensure that the food preparation and service meets with quality standards and production timeframes. As it relates to the instant Solicitation, the contractor manages a vast number of tasks that are essential to providing food services for both dining facilities at Hurlburt Field. To interpret this contract for services in a more limiting way would serve to undermine the legislative and regulatory purpose of "providing blind persons with remunerative employment, enlarging their economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting..."⁴¹ (Emphasis added). To interpret the SourceAmerica decision to mean that even where food services are provided, unless the contractor is managing every single function of a vending facility, the RSA priority does not apply would effectively eradicate the application of the RSA to any military cafeteria facility, which is wholly inconsistent with the legislative intent of the RSA.

Further, the Panel is not persuaded by Respondent's assertion that the RSA does not apply because the "Air Force, however, could still continue to operate the dining facility, even in the absence of any contractor personnel." While the assertion may be correct, that does not mean

⁴⁰ SourceAmerica at 23.

⁴¹ 20 U.S.C. § 107(a).

that the instant solicitation is not a contract for the operation of a cafeteria. Without the services set out in the Solicitation, whether provided by Air Force personnel or a contractor, the cafeteria could not operate. There is no question that military personnel retain a role in the operation of the dining facility. But that role can best be described as oversight of the facility. Accordingly, the array of services provided under the Solicitation both pertains to and involves the operation of a cafeteria.⁴² In other words, the instant solicitation meets both tests used to evaluate cases under the RSA.

The Air Force contends the SLA has failed to point to anything in the RSA or implementing regulations that require Hurlburt to reference the RSA priority in a solicitation. Section 395.33 of the RSA implementing regulations places an affirmative duty on a Federal property managing department, agency, or instrumentality to invite the appropriate SLA to respond to solicitations for offers when a cafeteria contract is contemplated. The mandate is clear. It states, "the appropriate State licensing agency shall be invited to respond..." The Panel concludes that by limiting awardees to 8(a) entities for the instant Solicitation, the Air Force violated the RSA.

Furthermore, Respondent's reliance on the Joint Policy Statement (JPS) has not been accorded any weight by this Panel. Only one recommendation of the JPS was enacted by Congress: the "no-poaching provision." The JPS was developed when there was no RSA Commissioner, without involvement of RSA staff, and without any input from blind consumers or SLAs.⁴³ In fact, the John Warner Act at §856 is an explicit acknowledgement by Congress that food services contracts were awarded under both JWOD and the RSA, and an "implicit acknowledgement by Congress that the RSA does apply to such services if not on the procurement list as of the effective date of the John Warner Act. Such was the conclusion of the arbitration panel in Fort Campbell when it explained that:

The Act [John Warner Act] then defines food services to include 'mess attendant services.' No doubt congress could have been clearer in saying what it intended to say, but the Panel finds that by including the term 'mess attendant services' in Section 1, it impliedly indicated those services are covered by the RSA. If they were not, there was no reason to specifically include those services as a separate item in paragraph 1 and to, then do so again in the definition.⁴⁴

Because no evidence was presented that any portion of the dining facilities at Hurlburt Field has

⁴² See California Department of Rehabilitation v United States Department of the Navy, Case No. R.S 15-20 (2018) (Finding that the services required by the PWS met both the "pertaining to" and "operation of a cafeteria" tests).

⁴³ See letter available at www.ncasb.org/Docs/letter-to-Enzi.pdf.

⁴⁴ Fort Campbell at 26.

ever been operated by JWOD, the RSA applies.⁴⁵

The Air Force urges this Panel to ignore the March 5, 2018 letter from Secretary DeVos, DOE, to the Honorable Pete Sessions claiming that the letter does not represent the official position of the DOE. While the Air Force has provided materials that purport to quote an individual identified as Carlos G. Muniz, there is no record evidence of his purported statement or any other competent evidence that Secretary DeVos' letter no longer reflects the position of the DOE. In any event, only a letter from Secretary DeVos contravening her statement can do so. Accordingly, Secretary DeVos letter, stating that the RSA applies to both FFS and DFA contracts is entitled to deference.⁴⁶

Finally, Respondent argues that the contracting officer's decision was reasonable and appropriate when considering the law, regulations, facts and DOE policy current at the time of her decision. Respondent urges that it would be unreasonable for the Panel to consider a letter (the DeVos letter) that was not issued until over a year after the contracting officer rendered her decision and posted the Solicitation. While it may be true that the contracting officer was not on notice of the DeVos letter at the time of her decision because it did not exist, she was on notice by the FDE that it believed the RSA was applicable. Exercising due diligence, the contracting officer should have learned that it is the DOE that is charged with interpreting the RSA, not the DoD.⁴⁷ There is no evidence that she sought any guidance from the DOE on the matter. Thus, the contracting officer's interpretation of the RSA is not entitled to any deference. Given the confusion and overlap between the RSA, its regulations, the Defense Supplement to the FAR, and several policy statements from DOD and DOE, it is understandable how the contracting officer may have arrived at her decision. However, such decision was erroneous and does not excuse the Respondent's failure to apply the RSA to the Solicitation.

CONCLUSION

The Panel finds that because the instant solicitation calls for services for the operation of a cafeteria encompassing a variety of operational and administrative tasks to include food preparation services, the RSA applies. The Respondent violated the RSA when it failed to invite Petitioner to submit a bid for the Solicitation. Accordingly, a remedy is warranted.

⁴⁵ Likewise Respondent's Exhibits 26 (Joint Explanatory Statement to Accompany NDAA FY 15) and 27 (Federal Register/ Vol. 81, No: 109/Tuesday, June 7, 2016) are without any legal effect, as they do not represent, legislative history or duly enacted regulations, respectively.

⁴⁶ According to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), deference must be made to agency pronouncements when they are based on thorough reasoning. In our case, the letter from Secretary DeVos to the Hon. Pete Sessions contains thorough reasoning, it notes that the RSA does not distinguish between FFS and PFA contracts, that DFA contracts set forth tasks that are instrumental cafeteria tasks and that accordingly pertain to cafeterias. Even more than was the case with Fort Riley, in *Hurlburt's* case, the nature and tasks as set out in the Solicitation make it abundantly clear that the RSA applies to the contract.

⁴⁷ *Miss. Dep't of Rehab. Servs. v. United States*, 61 Fed. CL 20, 25 (2004).

REMEDY

The RSA sets forth the remedial authority of arbitration panels. It states, in relevant part, that:

If the [arbitration] panel...finds that the actions or practices of any [federal] department, agency, or instrumentality are in violation of [the RSA], or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision the panel.

As a matter of law, the Panel concludes that the R-S Act applies to the Solicitation, and that Hurlburt violated the RSA, as set forth above. Having found that Hurlburt violated the RSA, the next issue is the remedy to be afforded to FDE. Respondent contends that the Panel's role is solely limited to determining whether the RSA was violated. With this constraint in mind, the Panel finds:

- a. The Hurlburt MAS Solicitation is for the operation of a cafeteria and is, therefore, subject to the requirements of the RSA and its implementing regulations;
- b. The Air Force violated, the RSA and its implementing regulations when it failed to apply the RSA priority for blind vendors to the Solicitation and Contract at issue in this arbitration.
- c. The Air Force violated the RSA and its implementing regulations in failing to maximize opportunities for blind vendors.
- d. The Air Force shall cause the acts or practices found by this Panel to be in violation of the RSA and its implementing regulations to be terminated promptly and shall take such other action as may necessary to carry out the decision of the Panel.
- e. To that end, the Panel finds as a matter of law that the Air Force is obligated under the RSA and its implementing regulations (by not ordered by this Panel) to resolicit the Hurlburt Solicitation and grant the Florida DOE and its blind vendor the priority afforded by the RSA in doingso.

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

Jeanne Charles Wood, Panel Chairperson

Susan Rockwood Gashel, Panel Member

DATED: June 12, 2019

DISSENTING OPINION

The Panel's Decision has found that the RSA applies to the Hurlburt Mess Attendant Services contract under two separate tests, which it has characterized as the "pertaining to the operation of a cafeteria" test and the "operation of a cafeteria" test. However, the Decision has errors based in misinterpretations of the RSA, the RSA regulation, and procurement statutes.

First, the "pertaining to the operation of a cafeteria" standard should not be applied as a basis for finding the RSA applies to the Mess Attendant Services contract. The "pertaining to the operation of a cafeteria" standard is based on a misinterpretation of the RSA regulation that has been held in the SourceAmerica decision to be an impermissible broadening of the scope of the RSA's priority.⁴⁸ The "pertaining to the operation of a cafeteria" standard has no basis in the text of the RSA, and is not a permissible basis for finding RSA applicability to a military dining facility contract.

Second, the application of the "operation of a cafeteria" test, which is the correct standard for RSA applicability, is not in accordance with the terms of the RSA and the relevant case law. Specifically, the application of the "operation of a cafeteria" standard is based on guidance provided by a letter issued by Secretary DeVos to the Honorable Pete Sessions on March 5, 2018. However, the DeVos letter is not entitled to Skidmore deference due to noncompliance with the procedures necessary to issue a policy letter, and in the letter's containing guidance that is contrary to the plain meaning of the terms of the RSA.

Finally, the Decision does not relate witness testimony that sheds considerable light on the terms of the Solicitation and on how work on the Hurlburt Mess Attendant Services contract is actually performed. Once this testimony is considered, the evidence shows that the RSA does not apply to the Hurlburt Mess Attendant Services contract.

Because the contracting officer's decision to not apply RSA priority to the Hurlburt Mess Attendant Services contract is not arbitrary or capricious, and has a reasonable basis in the facts of this case,⁴⁹ I respectfully dissent.

A. "Pertaining to the Operation" of a Cafeteria

⁴⁸ SourceAmerica, Case No. 1:17-cv-893 (E.D. Va., Mar 15, 2019).

⁴⁹ The RSA does not articulate a standard of review for arbitration panels to apply when reviewing contracting officer determinations; however, because the RSA states that arbitration panel decisions are "subject to appeal and review as a final agency action" for purposes of Title 5, United States Code, Chapter 7 (i.e., 5 U.S.C. § 706(2)(A)), it is appropriate for the facts of this case to apply the standard of review found in 5 U.S.C. § 706(2)(A). 5 U.S.C. §706; 20 U.S.C. § 107d-2(a); Washington State Dep't of Servs for the Blind v. U.S., 58 Fed. Cl. 781, 783, 796 (2003); SourceAmerica, Case No. 1:17-cv-893 at *17.

The RSA states that "blind persons licensed under the provisions of [the RSA] shall be authorized to operate vending facilities on any Federal property."⁵⁰ The RSA is clear that its terms apply only to blind vendors who "operate vending facilities."⁵¹ The phrase "pertaining to the operation" of a vending facility or cafeteria does not appear in the RSA. Instead, this phrase is contained in the RSA regulation at 34 C.F.R. § 39f33. There are two relevant parts to 34 C.F.R. § 395.33, which read as follows:

- (a) **Priority in the operation of cafeterias by blind vendors on Federal property 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 employees, whether by contract or otherwise. Such operation shall be expected to provide 'maximum employment opportunities to blind vendors to the greatest extent possible.

- (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.⁵²

The RSA regulation states that "priority in the **operation of cafeterias**" by blind vendors on Federal property shall be afforded, which is consistent with the RSA.⁵³ The RSA regulation's language about contracts "pertaining to the operation of cafeterias" is in regard to the renegotiation of contracts to be in compliance with the RSA, and not the application of the RSA or the RSA priority.⁵⁴ However, some arbitration panels have misinterpreted and misapplied Section 395.33(c) of the RSA regulation. Specifically, the Fort Riley, Kansas arbitration panel claimed the "pertaining to the operation of a cafeteria" standard should be one of many standards used to determine the RSA' s applicability to military dining facilities, when it said:

Where the tasks to be performed by the contract f r DFA services include tasks that constitute an integral element of providing food service at a military cafeteria facility, or pertain to the operation of a cafeteria, or tasks that without which the cafeterias would not be able to function, fall within the definition included in the RS

⁵⁰ 20 U.S.C. §107(a).

⁵¹ *Id.*

⁵² 34 C.F.R. § 395.33. (Emphasis added).

⁵³ 20 U.S.C. §107(a); 34 C.F.R. § 395.33(a). (Emphasis added).

⁵⁴ 34 C.F.R. § 395.33(c).

Act, and its implementing regulations, are entitled to RS Act priority when awarding said contract.⁵⁵

The Fort Riley panel based the above standard on the reasoning of other arbitration panel decisions, but does not cite the RSA or any Federal Court cases in support of the above test.⁵⁶

The letter from Secretary DeVos to Representative Sessions adopted the "pertaining to the operation of a cafeteria" standard and referenced the Fort Riley decision when discussing this standard.⁵⁷

However, in *SourceAmerica* the court held that the Fort Riley arbitration panel erroneously concluded that the Fort Riley DFA contract was subject to the RSA preference because it had "an unduly broad view of the scope of the preference."⁵⁸ Specifically, the court quoted the "pertain to the operation of a cafeteria" language from the Fort Riley decision as the basis of the arbitration panel's "unduly broad view" of the RSA.⁵⁹ The *SourceAmerica* decision found that "[t]he RSA is explicit that its preference applies only to 'the operation of vending facilities,' not to any contract that pertains to the operation of vending facilities."⁶⁰ Moreover, the decision found that the section of the RSA regulation that defines the scope of the RSA priority is 34 C.F.R. § 395.33(a), which states that "[p]riority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines ... that such operation can be provided at a reasonable cost, with food of a high quality."⁶¹ Finally, the court found that the "pertaining to the operation of cafeterias" language in 34 C.F.R. 395.33(c) compels renegotiation of contracts to be in compliance with 34 C.F.R. § 395.33(a), and that it "did not purport to define the scope of the RSA's preference."⁶² Confirming its finding, the *SourceAmerica* decision said "[i]ndeed, the DOE agrees that the [Fort Riley] arbitration panel had an unduly broad view of the scope of the RSA's preference."⁶³ Therefore, reliance on the "pertaining to the operation of a cafeteria" standard is contrary to the holding of *SourceAmerica*, and the plain meaning of the RSA and the RSA regulation.

⁵⁵ *Kansas Dep't of Children and Family Servs. v. U.S. Dep't of the Army*, Case No. RS/15-15 (May 9, 2017) (Fort Riley) at 31. (Emphasis added).

⁵⁶ *Id.* at 25-26.

⁵⁷ Letter from Betsy DeVos, Secretary of Education, to Pete Sessions, House of Representatives (Mar. 5, 2018) at 1-2.

⁵⁸ *SourceAmerica*, Case No. 1:17-cv-893 at *29, 34-35.

⁵⁹ *Id.* at *35, 36-37.

⁶⁰ *Id.* at *36, citing 20 U.S.C. § 107(b).

⁶¹ *Id.* at *35-36, citing 34 C.F.R. § 395.33(a).

⁶² *Id.* at *35, 36. See also *Wash. State Dep't of Servs for the Blind v. U.S.*, 58 Fed. Cl. 781,790 (2003) ("subsection(c) of 34 C.F.R. 395.33 is a transitional provision intended to assist in the implementation of the RSA rather than to mandate the application of the RSA to all contracts relating in any way to the operation of cafeterias on federal property").

⁶³ *Id.* The decision in *SourceAmerica* was issued on March 15, 2019, which is a year after the issuance of the DeVos letter.

The Decision does not address the findings of the SourceAmerica decision, or explain why SourceAmerica's findings were erroneous. Instead, it states SourceAmerica is not dispositive because the facts of that case "did not include preparation and service of food, whereas the solicitation here does."⁶⁴ However, the facts of SourceAmerica being distinguishable from the facts of this case does not mean that SourceAmerica's interpretation of the RSA and the RSA regulation is not applicable to this case. Instead, SourceAmerica's interpretation of the RSA is on point on a key issue in this case.

Because the "pertaining to the operations of a cafeteria" standard has no basis in the RSA, it is improper to apply this standard to the facts of this case.

B. Skidmore Deference to the DeVos Letter

The Decision's rationale for applying the "pertaining to the operation of a cafeteria" standard appears to be the DeVos letter, which it states "should not be afforded deference carrying the force of law," and yet is "appropriately viewed as guidance to this panel since the [RSA] is clear that it is the Secret of Education who determines the ultimate applicability of the RSA."⁶⁵ The Decision is applying Skidmore⁶⁶ deference to the DeVos letter.⁶⁷ However, the application of Skidmore deference to the DeVos letter is not warranted.

Under Skidmore deference, when an agency issues an interpretive ruling on a statute or regulation without the benefit of the formal "notice and comment" procedures of the Administrative Procedures Act, its interpretive ruling is only "persuasive evidence."⁶⁸ The weight of agency interpretations and opinions "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁶⁹

The DeVos letter should not be considered persuasive evidence or guidance. The DeVos letter was issued after the facts of this case is not in accordance with the plain meaning of the RSA, and does not comply with the procedures for issuing a policy letter.

First, the DeVos letter was issued on December 10, 2018, which is over a year after the final

⁶⁴ Decision and Award at 20.

⁶⁵ Decision and Award at 16.

⁶⁶ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁶⁷ Decision and Award at 23, n. 46.

⁶⁸ *Mississippi Dep 't of Rehab. Svcs. v. US.*, 61 Fed. Cl. 20, 27 (2004). For the formal procedures of the Administrative Procedures Act, see 5 U.S.C. §§ 553, 556, and 557.

⁶⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Solicitation was issued for the Hurlburt Mess Attendant Services contract (the final Solicitation was published on March 28, 2017). There is no indication that the contents of the DeVos letter are retroactive, so using the DeVos letter in this case is unwarranted.

Second, the DeVos letter is not in compliance with the terms of the RSA. The DeVos letter states multiple standards for applying the RSA to the operation of cafeterias on military bases, including the "pertaining to the operation of a cafeteria" standard. However, the "pertaining to the operation" standard has been ruled an "unduly broad view of the scope of the preference" by the SourceAmerica decision.⁷⁰ An agency's regulations, or policy letters interpreting a statute, cannot be manifestly contrary to the statute they purport to implement or interpret.⁷¹

Third, the DeVos letter was not issued in compliance with the consultation procedures required by the RSA. The Decision is correct that the Secretary of Education is the authority named by the RSA to prescribe regulations implementing the RSA. However, the RSA does not give the Secretary of Education unilateral authority to write RSA regulations. Instead, the RSA states that RSA regulations will be prescribed as follows:

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and **the Secretary [i.e., Secretary of Education]**, through the Commissioner [i.e., Commissioner of the Rehabilitation Services Administration], shall, after **consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations** designed to assure that:

- (1) the priority under this subsection is given to such licensed blind persons ..., and
- (2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.⁷²

The Panel was presented with no evidence that the DeVos letter was prescribed after consultation

⁷⁰ SourceAmerica, Case No. 1:17-cv-893 at *29, 34-35.

⁷¹ Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984) (legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (agency opinion letters may not, under the guise of interpreting a regulation, create de facto a new regulation).

⁷² 20 U.S.C. § 107(b). (Emphasis added).

with the Administrator of General Services, the Secretary of Defense, or any other relevant department head. The DeVos letter purports to be a policy or interpretive ruling, not a regulation published in the Code of Federal Regulations. However, the RSA makes clear the Secretary of Education cannot issue RSA rules without consultation with other agencies, as was apparently the case with the DeVos letter.

Finally, the DeVos letter is not in compliance with 41 U.S.C. § 1707, which states the administrative procedures for promulgating procurement policy. Specifically, 41 U.S.C. § 1707(a) states:

- [A] procurement policy, regulation, procedure, or form ... may not take effect until 60 days after it is published for public comment in the Federal Register ... if it-
 - (A) relates to the expenditure of appropriated funds; and
 - (B) (i) has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or
 - (ii) has a significant cost or administrative impact on contractors or offerors.⁷³

The DeVos letter purports to be a policy interpretation of the RSA, not a procurement statute or the FAR; however, its impact meets the definition of a procurement policy stated in 41 U.S.C. § 1707(a). As evidenced by this case, the DeVos letter impacts the competition and award of military dining facility contracts, impacts the expenditure of DOD appropriated funds, and therefore has a "significant effect" beyond the internal operating procedures of the DOE.⁷⁴ However, the Panel was presented with no evidence that the DeVos letter was published in the Federal Register, or in any other public forum, such as the DOE website.⁷⁵ The DOE did not comply with statutory requirements when issuing the DeVos letter, and such noncompliance demonstrates a lack of thoroughness in consideration that disqualifies the DeVos letter from Skidmore deference. Moreover, noncompliance with 41 U.S.C. § 1707(a) makes the DeVos letter invalid as a procurement policy. Therefore, the DeVos letter has no persuasive weight, and should not be granted Skidmore deference.

C. Applicability of the "Operation of a Cafeteria" Standard

The RSA states that its preference applies only where a blind vendor will engage in the "operation of vending facilities on Federal property."⁷⁶ The meaning of the terms "operate" and "operation" is hotly contested in court cases and arbitration panel decisions, and this Decision is no exception.

⁷³ 41 U.S.C. § 1707(a).

⁷⁴ 41 U.S.C. § 1707(a).

⁷⁵ Decision and Award at 16.

⁷⁶ 20 U.S.C. § 107(b).

The Decision states that "operation of a cafeteria"⁷⁷ is satisfied if a contractor performs tasks that are "integral" or "essential" to the operation of a cafeteria.⁷⁸ The "integral" standard appears to be based on the DeVos letter, which said that a vendor meets the definition of the term "operate" if its services "include tasks that constitute an integral element of providing food service at a military cafeteria,"⁷⁹ and the decision in *Texas Workforce Commission v. United States Department of Education*, which granted Skidmore deference to the DeVos letter and held that a vendor meets the definition of "operate" if it performs tasks that are "integral" to the operation of a cafeteria.⁸⁰ However, the Decision's equating "operate" with the performance of "integral" tasks is flawed, because *Texas Workforce Commission* and the Decision based this standard on the DeVos letter, which is not entitled to Skidmore deference for the multiple reasons that have been previously discussed. Instead, the correct standards for interpreting "operate" have been stated in cases such as *Washington State Department of Services for the Blind v. United States*,⁸¹ *Mississippi Department of Rehabilitative Services v. United States*,⁸² and *SourceAmerica*.

The term "operate" is not defined in the RSA or the RSA regulation, and multiple courts and arbitration panels have struggled to determine what this term means, and where to draw the line between contracts that are covered by and excluded from the RSA. The history of RSA cases and policies all agree that RSA applicability is decided on a case-by-case basis, and is not decided by an agency's description of a contract as FFS or DFA.⁸³ In addition, RSA cases agree that in the absence of statutory, regulatory or valid policy definitions of the terms "operate" and "operation," the meanings of these terms are established by their plain meanings as evidenced by the dictionary.⁸⁴

In *Washington State Department of Services for the Blind*, the court consulted dictionary definitions and several prior DOE policy letters and found:

"To operate" is used in 20 D.S.C. § 107(a) as a transitive verb ('to operate vending facilities'). When used as a transitive verb, 'to operate' has distinctive meanings: '1. To control the functioning of; run... 2. To conduct the affairs of; manage ...' The American Heritage Dictionary of the English Language 1233 (4th ed. 2000). The phrase 'to operate vending facilities' in 20 U.S.C. §107(a) therefore connotes a

⁷⁷ Per the RSA regulation, a "cafeteria" is included within the definition of a "vending facility." 34 C.F.R. § 395.1.

⁷⁸ Decision and Award at 19, 21.

⁷⁹ Letter from Betsy DeVos, Secretary of Education, to Pete Sessions, House of Representatives (Mar. 5, 2018).

⁸⁰ *Texas Workforce Comm'n v. Dep't of Educ.*, Case No. EP-17-cv-026 at *30, 32-33, 34 (W.D. Tx., Oct. 31, 2018).

⁸¹ *Wash. State Dep't of Servs. for the Blind v. U.S.*, 58 Fed. Cl. 781 (2003).

⁸² *Miss. Dep't of Rehab. Servs. v. U.S.*, 61 Fed. Cl. 20 (2004).

⁸³ *Id.* at 25, 28; *Washington State Dep't of Servs. for the Blind v. U.S.*, 58 Fed. Cl. 781, 794 (2003).

⁸⁴ *Miss. Dep't of Rehab. Servs. v. U.S.*, 61 Fed. Cl. at 26; *Washington State Dep't of Servs. for the Blind v. U.S.*, 58 Fed. Cl. at 789.

distinctly executive function.⁸⁵

In addition, the court found:

The term "operation," appearing in both 20 U.S.C. 107(a), (b) and 34 C.F.R. 395.33, however, is far more protean and malleable.> The term "operation" is defined in the American Heritage Dictionary as the "act or process of operating or functioning," "the state of being operative or functional," "[a] process or series of acts involved in a particular form of work," and "an instance or method of efficient, productive activity." The American Heritage Dictionary of the English Language 1233 (4th ed. 2000).⁸⁶

After reviewing the statutory and regulatory language, the court found "that the terms. 'to operate vending facilities' and 'operation of cafeterias' in the RSA are capable of being understood by reasonably well informed persons in either of two or more senses."⁸⁷ In addition, the court found that "given the state of DOE guidance and the fact that DOD is entitled to make determinations on a case-by-case basis, no legally required answer to the question of whether a DFA services contract, at least as to a contract like the one at issue here . . . is covered by RSA or not."⁸⁸ Therefore, in a case where the cafeteria contract in question included only janitorial services, the court held that the contracting officer's interpretation of the term "operation of a cafeteria" was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," per the standard of review for agency actions at 5 U.S.C. § 706(2)(A).⁸⁹ The court upheld the decision of the agency, and declined to substitute its judgment for that of the agency.⁹⁰

In Mississippi Department of Rehabilitation Services, the court found that "operate" was defined, in the relevant sense, as "to direct the working of; manage; conduct, work (a railway, business, etc.)," and it also adopted the dictionary definitions used in Washington State Department of Services for the Blind.⁹¹ In a case where the cafeteria contractor assumed "unsupervised managerial control on a day-to-day basis" and the agency's functions were "secondary, relatively minor or supervisory," the court held that the RSA applied to the contract as a matter of law.⁹²

⁸⁵ Washington State Dep't of Servs. for the Blind v. U.S., 58 Fed. Cl. at 789.

⁸⁶ *Id.* at 790.

⁸⁷ *Id.* at 792.

⁸⁸ *Id.* at 796.

⁸⁹ *Id.* at 783, 796.

⁹⁰ *Id.* at 797.

⁹¹ Miss. Dep't of Rehab. Servs. v. U.S., 58 Fed. Cl. at 26.

⁹² *Id.* at 25, 29.

In SourceAmerica, the court determined that:

"Operation" requires control or management of the vending facilities. One cannot be said to operate something unless one is in some sense in charge; operation requires more than mere performance of assigned tasks. And, crucially, the RSA's preference applies to "the operation of *vending facilities*," indicating that it applies only where the vendor will operate the vending facility. As such, the vendor must exercise control or management over the functioning of the vending facility as a whole, not merely exercise control or management over tasks performed in support of the facility's functioning.⁹³

In a case where the cafeteria contractor performed only janitorial and custodial duties, the court held the RSA did not apply to these services because they "constitute ancillary services in support of the operation of a vending facility and do not constitute the operation of a vending facility."⁹⁴

Among these three cases, there are common themes that emerge about the plain meaning of "operate" and "operation":

1. "Operate" and "operation" require control or management of the vending facilities.
2. Performance of only janitorial and custodial services do not demonstrate control or management of a vending facility.
3. A contractor's unsupervised managerial control on a day-to-day basis does demonstrate control or management of a vending facility.

D. Hearing Testimony Is Dispositive in the Outcome of this Case

The Decision gives an accurate summary of the description of work in the Solicitation.

The Air Force was responsible for managerial functions such as recordkeeping, budgeting, accounting, managing the storeroom, planning and controlling meal selection, establishing hours of operation, and opening and closing each facility. The Air Force was also responsible for providing property, equipment and services to include the Reef and Riptide facilities, ovens, grills, refrigerators, all food, removal and replacement of equipment, and facility maintenance and repair. The contractor, according to the Solicitation, was responsible for preparing and serving food; cooking food; complying with sanitation requirements; meeting required guest flow rates;

⁹³ SourceAmerica, Case No. 1:17-cv-893 at *34. (Emphasis in original).

⁹⁴ *Id.* at *29-30.

performing cashier services; cleaning and sanitizing dishes, pots, pans, and food contact surfaces; and cleaning floors, lavatories, windows, etc. However, hearing testimony clarified that in the actual performance of the contract, both Air Force and contractor personnel were responsible for preparing, cooking and serving food. In addition, the hearing testimony clarified that contractor personnel had little to no discretion in how they prepared, cooked and served food, and that they merely followed the instructions of military personnel regarding these matters. Therefore, in light of this testimony, it is incorrect to conclude that the military's role in the operations of the Hurlburt cafeterias "can best be described as oversight of the facility."⁹⁵ Military personnel were responsible for both day-to-day management and control of the Hurlburt cafeterias, and contractors provided support to the military. Therefore, as a matter of law and under the abuse of discretion standard, the RSA does not apply to the Hurlburt Mess Attendant Services contract.

At the hearing, the current Food Service Superintendent, MSgt Nehemiah Pereira, testified that the number of total personnel working at the Hurlburt cafeterias is approximately "52 to 57 contractors" and "42 to 45 military members."⁹⁶ The Program Manager for the current contractor, Ms. Connie Rosado, testified there are 51 contractor employees.⁹⁷ MSgt Pereira testified that cleaning and sanitation is primarily a contractor responsibility, and that military personnel only "help out" as needed.⁹⁸ Specifically, MSgt Pereira testified that Ms. Rosado is responsible for the "whole day-to-day operation" of cleaning facilities and equipment, and that the Contracting Officer Representative only inspects the work performed by the contractor.⁹⁹ Therefore, MSgt Pereira's testimony establishes that contractors are responsible for day-to-day control and management of the cleaning and sanitizing of the Hurlburt cafeterias.

However, the hearing testimony established that the contract's food preparation and cooking services are performed by both military and contract personnel, with contractors, following the instructions of military personnel with little to no discretion. At the Hurlburt cafeterias, food is prepared and served at a salad bar, sandwich/deli bar, ice cream/pastry bar and serving line.¹⁰⁰ MSgt Pereira testified that contractor personnel are primarily responsible for working on the salad bar and ice cream/pastry bar, but their work consists of washing and chopping vegetables for the salad bar, and placing pre-made pastries and ice cream on the ice cream/pastry bar.¹⁰¹ At the sandwich/deli bar, both military and contract personnel assemble sandwiches based on military

⁹⁵ Decision and Award at 22.

⁹⁶ Transcript of Proceedings at 254.

⁹⁷ *Id.* at 317.

⁹⁸ *Id.* at 231-232.

⁹⁹ *Id.* at 275.

¹⁰⁰ Solicitation FA4417-17-R-0002, Performance Work Statement at 4, 16.

¹⁰¹ Transcript of Proceedings at 233-234, 236-237.

recipe cards.¹⁰² In these duties, MSgt Pereira testified there is no contractor discretion in how to assemble a sandwich; for example, if a customer requests two slices of cheese on a sandwich instead of one, a contractor must provide two sandwiches, because the military recipe cards are so strict, "we have to let [customers] know that if they get anything extra it will be double."¹⁰³ At the serving line, MSgt Pereira testified that both military and contractor personnel serve food, with a ratio of approximately one military member for each contractor.¹⁰⁴ The Solicitation states that food must be served in accordance with the portions listed on the Food Service Production Log and Air Force Automated Recipe Service.¹⁰⁵ Finally, MSgt Pereira testified that during the life of the current contract, there have been approximately six contractor cooks and five military cooks working at the Hurlburt cafeterias at any given time.¹⁰⁶ MSgt Pereira testified that only military personnel create the cafeteria's production log, order food, scale the food by recipe on a recipe card and then deliver food to the shift cook for preparation.¹⁰⁷ Ms. Rosado confirmed that only military personnel order food and supplies, and that when contract personnel cook, "[t]he military tell them what to cook."¹⁰⁸

The hearing testimony establishes that Hurlburt cafeterias have both military and contractor employees prepare, cook and serve food, but that only military personnel control and manage the preparing, cooking and serving of food. Both MSgt Pereira and Ms. Rosado were consistent that only military personnel create production logs, order food and supplies, scale food, and deliver food for preparation to military and contractor cooks, and that contractor responsibility exists only over the actual preparation, cooking and serving of food. There was no testimony that disputed MSgt Pereira and Ms. Rosado's testimony. Therefore, contractors do not perform any "executive function"¹⁰⁹ over the management of food at the Hurlburt cafeterias. In regard to control of the cafeterias, contractor responsibility is restricted to discrete tasks, such as sandwich assembly, chopping vegetables and cooking food. However, contractors do not "direct the working of"¹¹⁰ these tasks in any meaningful way. Military personnel tell contractors what to cook, and they regulate how they cook even down to how many slices of cheese can be on a sandwich.

The RSA exists "[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in

¹⁰² *Id.* at 234-235.

¹⁰³ *Id.* at 235.

¹⁰⁴ *Id.* at 232.

¹⁰⁵ Solicitation FA4417-17-R-0002, Performance Work Statement at 4.

¹⁰⁶ Transcript of Proceedings at 239-240, 257-258.

¹⁰⁷ *Id.* at 226-227.

¹⁰⁸ *Id.* at 314, 322.

¹⁰⁹ *Washington State Dep't of Servs. for the Blind v. U.S.*, 58 Fed. Cl. at 789.

¹¹⁰ *Miss. Dep't of Rehab. Servs. v. U.S.*, 58 Fed. Cl. at 26.

striving to make themselves ,self-supporting."¹¹¹ The Decision, in this case is based on legislative intent to support a broad application of the RSA.. However, the RSA case law establishes that not every contract for services at a military cafeteria falls within the RSA's requirement that blind vendors "operate vending facilities."¹¹² The RSA's requirement to operate vending facilities has limits, and there is little to base a decision on other than the plain meaning of these statutory terms.

Because of the lack of valid DOE guidance, the necessity to determine RSA applicability on a case-by-case basis, and the lack of Federal case law on contracts in the same posture as this one, there is insufficient evidence to demonstrate a violation of the terms of the RSA as a matter of law. The DeVos letter does not have persuasive weight for reasons previously stated, and the arbitration panel decisions on similar contracts are not helpful or persuasive because they rely on standards that are not articulated in the RSA, RSA regulation, valid interpretive letters or case law.

Moreover, the facts of this case are in a gray area between the facts in cases such as Washington State Department of Services for the Blind (only janitorial services) and Mississippi Department of Rehabilitation Services (unsupervised managerial control by contractors). Contractors in this case play a significant role in cooking, preparing and serving food, but they have no control over what the military orders them to cook and no discretion over how to cook and serve food. The military control over this contract is too extensive to find that the contractor controls or manages the Hurlburt cafeterias in any meaningful way. Therefore, the decision of the contracting officer should stand because it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law", per the standard of review for agency actions at 5 U.S.C. § 706(2)(A).¹¹³

For the reasons above, I respectfully dissent.

Lt. Col. Ryan J. Lambrecht, Panel Member

¹¹¹ 20 U.S.C. § 107(a).

¹¹² *Id.*

¹¹³ U.S.C. § 706(2)(A); Washington State Dep't of Servs. for the Blind v. U.S., 58 Fed. Cl. at 783, 796.

