

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

No. R-S/16-08

DECISION AND AWARD

OPPORTUNITIES FOR OHIOANS WITH DISABILITIES,

Petitioner,

vs.

**UNITED STATES DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR
FORCE BASE,**

Respondent.

DECISION AND AWARD

Pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107f (R-S Act), an arbitration was convened in the above-captioned matter, as authorized by 20 U.S.C. § 107d-2. Petitioner Opportunities for Ohioans with Disabilities (OOD), the designated State Licensing Agency¹ (SLA) pursuant to the R-S Act appointed Susan Rockwood Gashel as arbitrator, and the United States Department of the Air Force, Wright-Patterson Air Force Base (WPAFB) appointed Steven Fuscher as its Panel Member. Mr. Michael LeRoy was jointly appointed by Arbitrators Gashel and Fuscher as Panel Chair. The hearing took place on November 29, 2017 at WPAFB. OOD was represented by Daniel F. Edwards, Charissa D. Payer, and Lisa Haywood. WPAFB was represented by Daniel J. Dougherty Jr. and Thomas J. Menza.

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

I. ISSUES

- A. Whether WPAFB violated the R-S Act by improperly awarding the contract for dining facilities to Sun Quality Foods.
- B. Whether WPAFB violated the R-S Act by failing to award the dining facilities contract to OOD and Lenny's Food Service.

II. STANDARD OF REVIEW

This Panel is directed to, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision[.]” 20 U.S.C. § 107d-2(a). That subchapter, provides, at 5 U.S.C. § 556(d), that the proponent of an order has the burden of proof, and an order may issue “in accordance with the reliable, probative, and substantial evidence.” *Id.* According, the SLA has the burden of proof to prove by substantial evidence that WPAFB violated the Act. “This is something more than a mere scintilla but something less than the weight of the evidence.” *Pennaco Energy v. U.S. Dep’t of Interior*, 377 F.3d 2247, 1156 (10th Cir. 2004).

III. FINDINGS OF FACT

- A. Joint Stipulated Findings of Fact
 - 1. The United States Department of the Air Force is a department, agency, or instrumentality of the United States that is in control of the maintenance, operation, and protection of certain dining facilities located on Federal property at WPAFB located in Dayton, Ohio.
 - 2. The State of Ohio by and through OOD, also known as the Bureau, is an Ohio state agency, and the SLA, under the R-S Act, and its implementing regulations.
 - 3. Leonard Johnson is a legally blind individual residing in Montgomery County, Ohio, and is the incumbent licensed manager under the R-S Act who is 100 percent responsible for the management and operation of dining facilities under the current and prior full food service at WPAFB.

Visited December 6, 2019

4. On or about October 3, 2014, the United States government by and through the Department of the Air Force, issued Solicitation Number FA8601-15-R-004 (Solicitation) for a full food service dining facility contract at WPAFB.
5. The Solicitation was issued by WPAFB, AFL-CMC/PZI Contracting Division. Mr. Richard E. Fries, Jr., contracting officer with the AFL-CMC/PZI Contracting Division, was the contracting officer responsible for the solicitation.
6. Mr. Fries has the authority to issue the solicitation on the behalf of the United States and the Department of the Air Force.
7. In a letter dated October 6, 2014, the SLA expressed its wishes to exercise its priority under the R-S Act to operate the dining facilities at WPAFB.
8. Ohio, by and through its SLA in partnership with Mr. Johnson, timely submitted a proposal under the solicitation. At all times during the solicitation phase, Ohio was represented by the Bureau in the agency-level protest and demand for arbitration.
9. By letter dated April 18, 2016, the SLA, by and through the Bureau, filed an agency-level protest challenging the Air Force's decision to award the dining facilities' contract to other than the SLA.
10. On May 6, 2016, the protest was dismissed.
11. On April 16, 2016, the SLA, by and through the Bureau, submitted a demand for arbitration under the R-S Act to the Commissioner of the Rehabilitation Services Administration, United States Department of Education (DoE).
12. By correspondence dated April 31, 2016, the DoE authorized the convening of an arbitration panel to hear and render a decision on the issues raised in the SLA's complaint letter.

B. Panel's Findings of Fact

13. The R-S Act grants a priority to licensed blind persons to operate vending facilities,

such as the dining facilities at WPAFB, on Federal property. 20 U.S.C. § 107. The purpose of the R-S Act is to provide blind persons with remunerative employment, enlarge the economic opportunities of the blind, and to stimulate the blind to greater efforts in striving to make themselves self-supporting. *Id.* The R-S Act requires that, “wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.” 20 U.S.C. § 107(b)(2).

14. To justify “any limitation on the placement or operation” of a vending facility (including a cafeteria), the R-S Act requires a full justification to the DoE Secretary, who determines whether such a limitation is justified. The only grounds permitted for a limitation on the placement or operation of a vending facility are whether the interests of the United States would be adversely affected.

15. The DoE is the only Federal agency with a specific mandate to enact regulations to implement the R-S Act. 20 U.S.C. §§ 107(b), 107d-3(e). Since the DoE “has been charged with primary rule-making authority,” ... “deference shall be given to that agency’s [DoE] implementing regulations.” *Kentucky v. United States*, 62 Fed. Cl. 445, 454–55 (2004), *aff’d sub nom. Kentucky, Educ. Cabinet, Dep’t for the Blind v. United States*, 424 F.3d 1222 (Fed. Cir. 2005).

16. The regulation at 34 C.F.R. § 395.33 governs the award of cafeterias. Section (a) thereof provides that the priority shall be afforded when the Secretary determines, on an individual basis, after consultation with the Federal agency, that the “operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.”

Section (b) requires that the appropriate SLA be invited to respond to solicitations for offers when a cafeteria contract is contemplated. The solicitation “shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and

accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and ***has been ranked among those proposals which have a reasonable chance of being selected for final award***, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of Section 395.37 (emphasis added).”

Section (d) authorizes an award of a cafeteria contract through direct negotiations.

17. Mr. Fries testified as follows:

- that he did not have specific training regarding the R-S Act, and that the Solicitation was the first procurement that he led for dining facilities under the R-S Act. Transcript of Proceedings, Case No. R-S/16-08, November 29, 2017. TR at 19.
- seven proposals were received for the Solicitation; all were in the competitive range. TR at 28. Technical proposals were corrected so that all bidders could compete on price. TR at 29.
- he agrees that Lenny’s Food Service as the SLA has been and is fully capable of performing the work. TR at 29-30.
- it was his decision to revise the evaluation criteria. TR at 28. The solicitation was revised to require that the proposal be “technically acceptable, the entity’s past performance is determined to be acceptable, and the entity’s Total Evaluated Price (TEP) is five percent or \$1 million, whichever is less, of the lowest TEP (5% limitation). TR at 32. This requirement only applies to the SLA, and not to any other bidder. Id.
- his intent was that unless the SLA was within 5% of the total evaluated price of the lowest bidder, that the SLA would not receive an award. TR at 34.
- he acknowledged that the 5% does not appear in the FAR, the defense FAR supplement, or in anything published by the Department of Education regarding the R-S

Act. TR at 36. He stated “our market research determined that there was other bases that had to use five percent out there.” Id. Petitioner’s (P) Ex. 23 is a document he saw before the proposal revision. TR at 39.

- He is bound by the Federal Acquisition Regulations (FAR), and the Defense Federal Acquisition Regulations (DFAR). TR at 78.

18. In 2006, pursuant to the National Defense Authorization Act for Fiscal Year 2006, DoD, DoE, and the Committee for Purchase from People who are Blind or Severely Disabled issued a Joint Report to Congress (Joint Policy). P. Ex. 22. In relevant part, it provided that the term “fair and reasonable price” (with respect to the R-S Act):

means that the State licensing agency’s final proposal revision does not exceed the offer that represents the best value (as determined by the contracting officer after applying its source selection criteria contained in the solicitation) by more than five percent of that offer, or one million dollars, whichever is less, over all performance periods required by the solicitation.

P. Ex. 22, p. 5. It also provided for “complementary regulations” to be enacted. No regulations were enacted. P Ex. 23 is a memorandum to the Directors of the Defense Agencies dated March 16, 2007 from the Office of the Under Secretary of Defense, directing that “the joint policy should not be cited in individual solicitations until it is implemented in complementary regulations by” DoE and DoD”.² Thereafter, one Court concluded:

Because no regulations have been implemented to give effect to the policies set forth in the Joint Report, and because DoD has clarified that the Joint Report would not be effective until implemented through regulations, the Joint Report was not binding on the Army.

Moore’s Cafeteria Servs. v. United States, 77 Fed. Cl. 180, 186 (2007), aff’d, 314 F.

² There was one exception to this directive, which is not applicable here.

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(Fed. Cir. 2008).

19. In spite of seeing P. Ex. 23, that the Joint Report should not be cited for individual solicitations, Mr. Fries did not check with anyone at the Department of Defense (DoD) or the Air Force to validate that he could use the 5%, \$1 million limitation. TR at 40. His rationale: "No, because we did not cite the joint report from 2006." Id. He believed he would be "okay" if he's "not citing it." Id.
20. With respect to socioeconomic preferences, HUBZone receives a 10% preference. TR at 50. This is implemented by increasing the non-HUBZone price by 10% and evaluating the HUBZone at the price that it proposed. TR at 50. SB (Small Business) preference is also 10%. P. Ex. 1, p. 1.
21. The person who is lowest is the one who is determined to be fair and reasonable. TR at 56.
22. The Secretary of Education has not concurred with WPAFB's decision to award to Son's. TR at 67. Respondent (R.) Ex. 15 is a document submitted by WPAFB to the DoE dated 24 November 2014. It states that the "SLA was found to not fall within the 5% or \$1,000,000 whichever is less of the lower TEP for award." It seeks concurrence from the Secretary of Education that "award of the Dining Facility contract at WPAFB should be made to other than the SLA, as the blind vendor is not able to operate a cafeteria/dining facility in such a manner as to provide food service at a comparable cost as that available from other providers of cafeteria services." R. Ex. 15, p. 3. At R. Ex. 15, section 3.2.2 of the Air Force Instruction is set out:

If the SLA submits a proposal that is within the competitive range established by the contracting officer, the contract will be awarded to the SLA except as follows:

3.2.2.1. The contracting officer may award to other than the SLA when the "On-site Official" determines that the award to the SLA would adversely affect the interests of the United States and the Secretary, U.S. Department of Education, approves the

determination (processing must be fully justified in writing through AFPC/SV³), **or when the “On-Site Official” determines**, after conferring with AFPC/SV, and the Secretary, U.S. Department, agrees, **that the blind vendor does not have the capacity to operate a cafeteria/dining facility in such a manner as to provide food service at a comparable cost and of comparable high quality as that available from other providers of cafeteria services.**

(emphasis added)

The basis for the information in P. Ex 12 was not reflective of the actual price proposals of OOD and the offeror with the lowest TWP; it was based on “stale information.” P Ex. 12 did not reflect that Mr. Fries had determined that bids that were significantly higher than the SLA’s were considered to be reasonable, the OOD’s bid was in the competitive range and had been determined to be reasonable, and that the 5% limitation was applied only the price proposal of OOD. TR at 72-74. It requests the “concurrence” of the Secretary of DoE.

23. According to R. Ex. 16, an email from Mr. Jesse Hartle of the Department of Education in response to WPAFB request for “concurrence,” the DoE’s Rehabilitation Services Administration “does not have the authority to concur with any decision reached by a managing agency that determines that an SLA is not to be awarded a contract.”
24. Mr. Fries testified the base commander, the “on-site official” did not find that the blind vendor lacked the capacity to operate the cafeteria, did not find that the food service was not a comparable high quality; the only issue with OOD’s submission was cost. TR at 134. Acknowledging that the statute provides for comparable cost, Mr. Fries testified that he nevertheless applied a lowest cost threshold to his evaluation. TR at 135.
25. Based on the evaluation criteria set forth in the solicitation, it is Mr. Fries’ testimony that in terms of a reasonable chance for award the only contractor that has a reasonable

³ According to R Ex. 15, p. 5, AFPC/SV means Air Force Personnel Center Services Directorate Management Support.

chance for award is the one with the lowest total evaluated price.

26. The solicitation was for a 100% small business set aside and Randolph-Sheppard. TR at 150. The awardee is a small business. TR at 151.

IV. CONCLUSIONS OF LAW

1. The SLA is not required to file a pre-award bid protest, because, the law does not require the doing of a futile act. Whether filed in the Government Accountability Office, the United States Court of Claims, or other venue, such a protest would be dismissed as not ripe for adjudication.
2. The R-S Act is superior to other socio-economic preferences; WPAFB's evaluation of the bids submitted in this case violated the R-S Act because the evaluation elevated other socio-economic preferences above the R-S Act, which is impermissible as a matter of law.
3. The Competition in Contracting Act (CICA) and military procurement law apply "except in case of other procurement procedures expressly authorized by statute." 10 U.S.C. § 2304(a)(1), 41 U.S.C. § 3301. The R-S Act is such a procurement procedure. Automated Comm. Syst v. U.S., 49 Fed. Cl. 570, 577-78 (2001), NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001). Accordingly, the Federal Acquisition Regulations (FAR), and the Defense Federal Acquisition Regulations (DFAR) do not apply to R- S Act procurements.
4. 34 CFR 395.33(a) provides for an individualized determination by the Secretary of Education, after consultation with the Federal agency, to ensure that the operation provides maximum employment opportunities to blind vendors to the greatest extent possible. WPAFC failed to consult with the Secretary of Education as required by 34 C.F.R. § 395.33. Instead, it sought concurrence from DoE. Neither the R-S Act nor the Air Force's own instruction provide for concurrence. Accordingly, the Panel concludes that WPAFB violated the R-S Act when it failed seek a determination from DoE's secretary that the cafeteria operation "can be provided at a reasonable cost, with food of a high quality comparable to that currently provided." 34 C.F.R. § 395.33(a).

5. Only the Secretary of Education has the authority to impose a limitation on the placement or operation of a vending facility. 20 U.S.C. § 107. By providing for a 5% limitation, WPAFB placed a limitation on the continued placement of a vending facility in violation of the R-S Act without following the procedures set out in 20 U.S.C. § 107.

V. ANALYSIS

- A. WPAFB's Waiver Argument Fails Because a Pre-Bid Protest Would Be Dismissed by the GAO and the Court of Claims; the Law Does Not Require the Doing of a Futile Act

WPAFB claims that, by failing to raise its objection to the 5% limitation before the date proposals were due, the SLA waived the right to complain when it submitted its offer. That is not the case. As set out more fully below, even if the SLA were to file a pre-award bid protest, it would be dismissed. Because “[t]he law does not require the doing of a futile act,” *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), this Panel will not penalize the SLA for failure to file a pre-award bid protest.

As recently as last fall, the Texas SLA brought a pre-award bid protest against the Air Force. *State v. United States*, 134 Fed. Cl. 8 (2017). There, the Air Force moved to dismiss the pre-award bid protest. Its motion was granted on the basis that

Protestor’s allegations arising from the Randolph–Sheppard Act are not ripe for judicial decision because there has not been a determination as to whether the State of Texas is entitled to a priority contemplated in accordance with the Randolph–Sheppard Act and the implementing regulations.”

State v. United States, 134 Fed. Cl. 8, 26 (2017).

Thus, even if the State of Ohio had filed a pre-bid protest, it would have been dismissed, whether it was filed in the Court of Federal Claims or whether it was filed in the Government Accountability Office (GAO). As a matter of routine, the GAO dismisses bid protests brought by SLAs. B-400912.2, GAO B-400583; B400583.2. The Court of

Claims, since 2004, has repeatedly stated that it lacks jurisdiction to determine cases alleging violation of the R-S Act. See Kentucky v. United States, 62 Fed. Cl. 445, 460 (2004), aff'd sub nom. Kentucky, Educ. Cabinet, Dep't for the Blind v. United States, 424 F.3d 1222 (Fed. Cir. 2005) (“this court concludes that the statutory scheme of the RSA requires exhaustion of administrative procedures before an aggrieved SLA may raise an RSA claim in this court.”); Colo. Dep't of Human Serv. v. U.S., 74 Fed.Cl. 339 (2006) (“The Court of Claims lacks jurisdiction under the Tucker Act and the APA and will not entertain a motion for a preliminary injunction pending the outcome of the R-S Act arbitration.”)

Last year, in State of Kansas v. United States, 192 F. Supp. 3d 1184, 1194–95 (D. Kan. 2016), aff'd in part sub nom. Kansas by & through Kansas Dep't for Children & Families v. SourceAmerica, 874 F.3d 1226 (10th Cir. 2017), the Court determined that because Kansas' Complaint alleged an R-S Act violation, the Court of Federal Claims' lacks jurisdiction to hear it, even though Kansas' claims also may fit within the provisions of § 1491(b) of the Tucker Act. Here, as in Kentucky, a DOE arbitration panel first must decide whether the Army has violated the R-S Act before the Court of Federal Claims may exercise jurisdiction over any remaining procurement dispute (and only if the claims fits within the parameters of the Tucker Act).

WPAFB cites to N. Carolina Div. of Servs. For Blind v. United States, 53 Fed. Cl. 147, 165 (2002), aff'd sub nom. N. Carolina Div. of Servs. for the Blind v. United States, 60 F. App'x 826 (Fed. Cir. 2003) for the proposition that the SLA, by not seeking a pre-award review of the solicitation's terms, has waived that right. Yet, we have seen that the Air Force itself argued against this view in State v. United States, 134 Fed. Cl. 8 (2017), and obtained a dismissal of a pre-award bid protest. Accordingly, the Panel concludes that the North Carolina case cited above no longer represents the view of the Court of Claims with respect to cases founded on the R-S Act.⁴

⁴ While a number of DoE arbitration panels have concluded that waiver principles apply, those decisions are

no longer good law, given the Federal Court of Claims recent jurisprudence.

WPAFB also cites to Moore's Cafeteria Services v. U.S., 77 Fed. Cl. 180, 184 (Fed. Cl. 2007). Because Plaintiff there was a disappointed bidder, but not a state licensing agency, the R- S Act's arbitration procedures do not apply. Moore's Cafeteria Services had standing to file a pre-award bid protest. The Court of Claims has definitively stated, just last fall, that it will not entertain a pre-award bid protest from a state licensing agency.

Because the SLA has established that, under current jurisprudence, that it would be futile to file an appeal with the GAO or to file a complaint with the Court of Claims, WPAFB's waiver argument is unavailing, especially given its recent position in State v. United States, 134 Fed. Cl. 8 (2017):

Defendant filed a motion to dismiss pursuant to RCFC 12(b)(1) (2017) and RCFC 12(b)(6) on the basis that protestor's claims are not ripe, protestors lack standing, and protestors have failed to state a claim upon which relief may be granted

State v. United States, 134 Fed. Cl. 8, 15 (2017). The Air Force succeeded in obtaining dismissal of a pre-award bid protest in the Federal Court of Claims just a few months ago:

Protestor's allegations arising from the Randolph-Sheppard Act are not ripe for judicial decision because there has not been a determination as to whether the State of Texas is entitled to a priority contemplated in accordance with the Randolph-Sheppard Act and the implementing regulations. Given the absence of a final agency action and that protestors remain in the competition, mitigating any hardship, protestor's challenge in this bid protest is not yet ripe for judicial review.

State v. United States, 134 Fed. Cl. 8, 26 (2017). Thus, under current jurisprudence, it would have been imprudent for the State of Ohio to file for any relief until after the Air Force completed its award process. The only exception would have been if Ohio had sought injunctive relief, not required in this case because OOD, through Mr. Johnson, is operating the cafeteria through a bridge contract. TR at 57-58.

B. The R-S Act Priority is Superior to other Socio-Economic Preferences

The proper application of the R-S Act priority when a federal agency seeks to establish other socio-economic preferences is for the R-S Act to take precedence over small businesses preferences. Department of the Air Force--Recon., B'250465.6 et al., June 4, 1993, 93'1 CPD 431 at 13; Automated Communication Sys., Inc. v. United States, 49 Fed. Cl. 570, 578 (2001). A GAO Decision resulting from a protest brought by a non-blind operated concern explains how the R-S Act priority and the small business preferences can be accommodated in a solicitation:

The solicitation can include a cascading set of priorities or preferences whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if its proposal is found to be within the competitive range and consultation with the Secretary of Education results in agreement that award should be made to the SLA; otherwise, award will be made to an eligible small business in accordance with the RFP's evaluation scheme. Such an approach would preserve the SLA's superior preference, while according small businesses a preference vis- -vis large businesses (other than the SLA), to which they are entitled under the Small Business Act and applicable regulations,

In re Intermark, GAO B-290925 (2002). Ex. 1, page 1, establishes that there is a 10% preference for small business and Hub-Zone, among other socio-economic preferences. As we have seen from the above case law, the law is that the R-S Act priority is superior to these preferences.

C. The 5% Limitation is Impermissible Under the Law

WPAFB has chosen a back-door approach to change the law. This extra-legal tactic is impermissible. By choosing to place a 5% limitation on the price of OOD, WPAFB has attempted to circumvent the R-S Act priority. In fact, that means that, while the successful offeror, a small business concern, gets a 10% preference, the R-S Act is accorded less weight. On this basis alone, the Panel concludes that the SLA has established by substantial evidence that WPAFB violated the R-S Act's priority, when it created an extra-legal limitation on the placement of a vending facility.

WPAFB claims that consultations with the Secretary of Education are not required when the contracting officer⁵ determined that the SLA's offer does not have a reasonable chance for final award. WPAFB is wrong. There is nothing in the R-S Act which gives the contracting officer the exclusive right to determine the SLA did not have reasonable chance of being selected.⁶ In fact, the Contracting Officer disregarded the plain language of the regulation that requires consultation with the Secretary when the SLA's proposal:

has been ranked among those proposals which have a reasonable chance of being selected for final award.

34 C.F.R. § 395.33(b). By adding in a "lowest bid" requirement, WPAFB completely eliminated the "ranked among those proposals which have a reasonable chance of being selected for award" language, and instead substituted "lowest bid" for the regulatory language. The only reasonable interpretation of 34 C.F.R. § 395.33(b) was for the Contracting Officer to determine that the SLA's bid had been ranked among those proposals eligible for award. Failure to do so was a violation of the R-S Act.

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

The statutory and regulatory scheme make it clear that an SLA's bid cannot be rejected without the on-site official consulting with the Secretary of Education, who makes the final decision. 34 C.F.R. § 395.33(a). See Colo. Dep't of Human Serv. v. U.S., R-S/10-6 (May 30, 2012) ("the fact that a blind vendor's bid was not within a competitive range

⁵ Military procurement law and Defense's regulations apply "except in case of other procurement procedures expressly authorized by statute." 10 U.S.C. 2304(a)(1), Automated Comm. Sys. v. U.S., 49 Fed. Cl. 577-78 (2001). That the R-S Act is such a procurement procedure has long been established. NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001). Accordingly, the contracting officer must apply the R-S Act first, and does not have the authority to disregard the plain language of the R-S Act.

⁶ A contracting officer's interpretation of the R-S Act is not entitled to deference because it is the Department of Education, not the Department of Defense, which is charged with interpreting the R-S Act. Miss. Dep't of Rehab. Servs. v. United States, 61 Fed. Cl. 20, 25 (2004).

set by a contracting agency does not preclude the Secretary of Education from concluding that the blind vendor is entitled to the priority when the blind vendor can nonetheless provide services at a reasonable cost.”); Randolph-Sheppard Vendors of America, Inc. v. Harris, 628 F.2d 1364, 1367 (D.C. Cir. 1980) (“the bidding system allows the Secretary to determine whether the blind operator’s cost is “reasonable,” and the bidding regulation provides that if the blind vendor’s bid falls within a reasonable and competitive range, even if it is higher than some others, it will be given priority.”)

Here, given that the SLA’s bid was third out of seven in terms of price, it is self-evident that the SLA’s bid was ranked among those bids that had a reasonable chance of being selected for award.

20 U.S.C. § 107d-3(e) provides as follows with respect to regulations governing the award of cafeteria contracts:

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.

Throughout the R-S Act, deference is given to the Secretary of Education to resolve questions about the SLA and its ability to provide services at a reasonable price. 20 U.S.C. § 107(b) expressly provides that “any limitation on the placement or operation of vending facility” is within the exclusive purview of the Secretary. The Panel concludes that any interpretation of 34 C.F.R. § 395.33 that eliminates the Secretary from being the ultimate decider is inconsistent with the basic intent to have the Secretary act as the final arbiter. Accordingly, WPAFB’s failure to properly consult with the Secretary of Education as required by 34 C.F.R. § 395.33(a) violated the R-S Act.

This is especially so because, whether “cited” or applied, the 5% limitation conflicts with the law that requires award to the SLA when there is a reasonable chance of being

selected for the award. Only two companies bid lower than OOD. According to the last paragraph of p. 2 of Ex. 21, “the team found that six of the seven proposals were complete, balanced, and reasonable.” That in itself shows that six bids (except the highest, which was not OOD’s) had a reasonable chance for award.

By choosing to award to the lowest bidder, the R-S Act priority is rendered completely ineffective. This is not in keeping with Congressional intent that the blind have a prior right to operate vending facilities on all Federal property. By choosing to go with the lowest bidder and not properly consult with the Secretary of Education, the Panel concludes that the SLA has established by substantial evidence that the R-S Act was violated.

E. This Panel is Not Charged with Interpreting or Making a Decision Pursuant to the Anti-Deficiency Act

This Panel draws its authority from 20 U.S.C. § 107d-1(b) which provides that whenever a SLA determines that a Federal agency is failing to comply with the R-S Act or its implementing regulations, the SLA may file a Complaint and the Secretary shall convene a panel to arbitrate the dispute. This Panel does not have authority to rule on WPAFB’s interpretation or claims pursuant to 31 U.S.C. § 1341.

While WPAFB claims that acquisition officials must follow the FAR, in the case of an R-S Act procurement, the FAR does not apply, because the R-S Act is a procurement procedure expressly authorized by statute. Nish v. Cohen, 348 F.3d 1263 (10th Cir. 2003); Nish v. Rumsfeld, 188 F.Supp. 2d 1321 (D.N.M. 2002), aff’d 348 F3d 1263 (10th Cir. 2003).

While WPAFB claims that only the Air Force can make the decision on which offeror should receive the award, WPAFB does not cite to a single case that has so held. In Nish v. Rumsfeld, 188 F.Supp. 2d 1321 (D.N.M. 2002), aff’d 348 F3d 1263 (10th Cir. 2003), the Court noted that the Competition in Contracting Act (CICA) (the FAR is the implementing regulation for the CICA) allows for a noncompetitive process when authorized by statute. Id. At 1322. The opinion referred to the exclusion of the CICA as

the “savings clause.” Id. Accordingly, the Court ruled that the R-S Act “is reasonably interpreted as a statute authorizing procurement and falls within the “savings clause” of the CICA. Id. At 1326. In other words, the CICA does not apply to procurements under the R-S Act.

F. Authority of the Panel

Citing to Maryland v. VA, 98 F. 3d 165 (4th Cir. 1996), WPAFB states that the only authority of the Panel is to “refer cases back to the agency so that the agency can take appropriate actions necessary to carry out the decision of the panel.” The Panel notes that the Maryland Court acknowledged that a federal entity could “simply refuse” to remedy the violations. This comes close to a wrong without a remedy, something usually disdained by the courts. Oddly, the Maryland Court found that the SLA could file another arbitration complaint. The Panel concludes that this could result in an endless loop of arbitrations and thus does not constitute a viable remedy.

The Panel agrees with the more current case of Kentucky by & through Educ. & Workforce Dev. Cabinet Office for Blind v. United States by & through Mattis, 2017 WL 1091793 *1 (W.D. Ky. Mar. 22, 2017), which granted injunctive relief to an SLA to enforce the Act. In that District Court case, the Court had previously ruled the Department of Defense (DoD) was required to afford the blind vendor priority and enjoined DoD to renegotiate with the SLA. The injunction was stayed and the 2017 case lifted the stay, allowing the decision of the arbitration panel to be enforced. Accordingly, the Panel rejects the conclusion of Maryland limiting its authority to solely determining whether or not the Act was violated.

VI. DECISION AND AWARD

- A. WPAFB violated the R-S Act by improperly awarding the contracting for dining facilities to Sun Quality Foods and by failing to award the dining facilities contract to OOD and Lenny’s Food Service.
- B. WPAFB violated the R-S Act and its implementing regulations by failing to properly apply the R-S Act priority to the solicitation and contract at issue in this arbitration.

- C. WPAFB violated the R-S Act and its implementing regulations by failing to maximize employment opportunities for blind vendors
- D. WPAFB shall cause the acts or practices found by this Panel to be in violation of the R-S Act and its implementing regulations to be terminated promptly and shall take such other action as may be 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 was obligated under the R-S Act and its implementing regulations to evaluate the proposals as required by 34 C.F.R. § 395.33 and to award to the SLA based on the R-S Act priority so long as the operation of the cafeteria can be provided at a reasonable cost with food of a high quality comparable to that currently provided employees.

Dated February 22, 2018.

Michael LeRoy, Panel Chair

Steven Fuscher, Panel Member (Dissenting to the Majority Decision)

Susan Rockwood Gashel, Panel Member

**DISSENT IN THE MATTER OF AN ARBITRATION BEFORE THE UNITED STATES
DEPARTMENT OF EDUCATION,**

**REHABILITATION SERVICES ADMINISTRATION RANDOLPH-SHEPPARD ACT
ARBITRATION**

CASE NO. R-S/16-08

**OPPORTUNITIES FOR OHIOANS WITH DISABILITIES - BUREAU OF SERVICES
FOR THE VISUALLY IMPAIRED**

Complainant

And

DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, OH

Respondent

Appearances:

For the Complainant:

Daniel F. Edwards, Frost Brown Todd LLC

Charissa D. Payer, Ohio Assistant Attorneys General

Lisa Haywood, Ohio Assistant Attorneys General

For the Respondent:

Daniel J. Dougherty Jr., Department of the Air Force

Thomas J. Menza, Department of the Air Force

The majority decided that (1) WPAFB violated the R-S Act by improperly awarding the contract for dining facilities to Sun Quality Foods and by failing to award the dining facilities contract to OOD and Lenny's Food Service. (2) WPAFB violated the R-S Act and its implementing regulations by failing to properly apply the R-S Act priority to the solicitation and contract at issue in this arbitration. (3) WPAFB violated the R-S Act and its implementing regulations by failing to maximize employment opportunities for blind vendors. (4) WPAFB shall cause the acts or practices found by this Panel to be in violation of the R-S Act and its implementing regulations to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the Panel. And, (5) To that end, the Panel finds as a matter of law that the Air Force was obligated under the R-S Act and its implementing regulations to evaluate the proposals as required by 34 C.F.R. §395.33 and to award to the SLA based on the R-S Act priority so long as the operation of the cafeteria can be provided at a reasonable cost with food of a high quality comparable to that currently provided employees.

I dissent to the majority decision on all findings since, in my opinion, the State Licensing Agency (SLA) failed to make timely objections to the source selection process used by

WPAFB and to the accommodation made by WPAFB to address the priority granted the SLA in this competitive source selection. While I agree with a number of Findings of Fact, this dissent includes those findings as a matter of clarity and ease of reading.

JURISDICTION

The Panel conducted an arbitration hearing pursuant to 20 USC 107d-1(b) and CFR §395.37. The Secretary for the United States Department of Education, Office of Special Education and Rehabilitative Services Rehabilitation Services Administration , Janet L. LaBreck, (Secretary) authorized the convening of this panel on April 28, 2016 in accordance with Section 4 of the " Policies and Procedure s for Convening and Conducting an Arbitration." A hearing was held in the above matter on November 29, 2017 at Wright-Patterson Air Force Base ("WPAFB") in Ohio. The panel members were Susan Rockwood Gashel, Steven R. Fuscher and Michael H. LeRoy. Mr. LeRoy was the panel chair and neutral arbitrator for this panel. The parties were given the full opportunity to present testimony and evidence.

DEFINITION OF ISSUES

On April 19 , 20 16 , The State of Ohio through the Opportunities for Ohioans with Disabilities, Bureau of Services for the Visually Impaired Bureau of Vocational Rehabilitation Division of Disability Determination (OOD), requested an arbitration panel be convened to address the following two issues: Issue I: Whether WPAFB is in violation of the Randolph- Sheppard Act by improperly awarding the contract for dining facilities to Sun Quality foods.

Issue II: Whether WPAFB is in violation of Randolph-Sheppard Act by failing to award the dining facilities contract to Opportunities for Ohioans with Disabilities and Lenny ' s Food Service. There is no dispute that OOD, as the SLA, had timely notice of the government's procurement strategy and the accommodation made by WPAFB to address the RSA priority authorized OOD. However, 000 did not make timely objection to WPAFB's procurement strategy or to the accommodation of the RSA priority until OOD was determined not eligible for award. In my opinion, this is and should be treated

as a case of waiver by OOD.

RELIEF REQUESTED

OOD requests the following relief: WPAFB comply with the Randolph-Sheppard Act and award the dining facilities contract to OOD and Lenny's Food Service.

FINDINGS OF FACT

During the panel proceedings, the parties agreed to the following Stipulations of Fact⁷:

1. The United States Department of the Air Force is a department , agency , or instrumentality of the United States that is in control of the maintenance, operation, and protection of certain dining facilities located on federal property at Wright Patterson Air Force Base, Wright Patterson located in Dayton , Ohio .
2. The State of Ohio by and through Opportunities for Ohioans With Disabilities, also known as the Bureau , is an Ohio state agency, and the state licensing agency, also known as SLA, under the Randolph -Sheppard Act, also known as RSA, United States Code Sections 107 and so forth, and the RSA's implementing regulations.
3. Leonard Johnson is a legally blind individual residing in Montgomery County, Ohio, and is the incumbent licensed manager under the RSA who is 100 percent responsible for the management and operation of dining facilities under the current and prior full food service contract at Wright Patterson.
4. On or about October 3, 2014, the United States government by and through the Department of the Air Force, issued Solicitation 1 Number FA8601- 2 15-R-0004, Solicitation, for a full food service dining facility contract at Wright Patterson.
5. The solicitation was issued by Air Force, Wright Patterson Air Force Base, AFL-CMC/PZI Contracting Division. Mr. Richard E. Fries -- that's F-R -I- E-S -- Jr., contracting officer with the AFL8 CMC / PZ I Contracting Division, was the contracting

⁷ Transcript (T) at pp. 6-8.

officer responsible for the solicitation .

6. Mr. Fries has the authority to issue the solicitation on the behalf of the United States and the Department of the Air Force.
7. In a letter dated October 6th, 2014, the SLA expressed its wishes to exercise its priority under the RSA to operate the dining facilities at Wright Patterson.
8. Ohio, by and through its SLA in partnership with Mr. Johnson, timely submitted a proposal under the solicitation. At all times during the solicitation phase, Ohio was represented by the Bureau in the agency-level protest and demand for arbitration.
9. By letter dated April 18 , 2016 , the S LA, by and through the Bureau, filed an agency-level protest challenging the Air Force's decision to award the dining facilities' contract to 1 other than the SLA.
10. On May 6th, 20 16, the protest was dismissed.
11. On April 16th, 2016, the SLA, by and through the Bureau, submitted a demand for arbitration under the RSA to the commissioner of the Rehabilitation Services Administration, United States Department of Education.
12. By correspondence dated April 31, 20 J 6 , the DO E authorized the convening of an arbitration pane l to hear and render a decision on the issues raised in the SLA's complaint letter.

ADDITIONAL FINDINGS OF FACT

In addition to the stipulated Findings of Fact, the arbitration record supports the following additional Findings of Fact:

1. For several years, OOD, the SLA for Ohio, and the Air Force, have contracted for Full Food Service (FFS) dining facility services at WPAFB, Dayton, Ohio. OOD contracted with Lenny's Food Service (Lenny's) as the licensed blind vendor to operate the contract. The contractual arrangement had been direct (sole source) negotiation under the authority of the RSA. During these periods of performance , Lenny's delivered high

quality food service at WPAFB with no performance issues at prices determined by the Air Force to be fair and reasonable.⁸

2. In 2014, during the budget crunch, the Air Force determined to compete the award for these dining hall services rather than negotiate a sole source award in an effort to get a better price. The source selection method chosen by the Air Force to compete for this award was a technically acceptable and acceptable past performance, lowest price procurement strategy.⁹
3. Amendment 1, dated October 28, 2014, to the solicitation changed to solicitation source selection terms to accommodate the RSA priority stating:

Award will go to the responsible offeror who submits a proposal that (1) conforms to the requirements of the solicitation; (2) that receives a rating of "Acceptable" on both the Technical and Past Performance evaluation factors; and (3) that submits the proposal with the lowest Total Evaluated Price (TEP), provided that the TEP is not unbalanced and is reasonable; (4) however, as provided under the Randolph- Sheppard Act (RSA), the award will otherwise go to the entity whose proposal is submitted through the State Licensing Agency (SLA) provided that the proposal is technically acceptable, the entity's past performance is determined to be acceptable and the entity's TEP is **5% or \$1,000,000.00 whichever is less of the lowest TEP.**¹⁰

4. The amended evaluation criteria was based on the Contracting Officer's market research regarding the use of a percentage limitation by other Air Force bases in soliciting for dining facility service contracts. After conducting this market research, the Contracting Officer determined the revised source selection criteria of 5% or \$1,000,000.00 priority for OOD was a reasonable accommodation of the RSA. As the SLA, only OOD was the beneficiary of the RSA priority defined in the revised source

⁸ Transcript (T) at 23-30, 57-58, 90,134.

⁹ Id.

¹⁰ Complainant's Exhibit 2, p.13 of 97.

selection criteria.¹¹

5. The Randolph-Sheppard Act was passed in 1936 to benefit the visually impaired, and to permit them to have a meaningful opportunity to operate businesses and be entrepreneurs. (20 U.S.C. §§ 107(a)).¹²
6. 34 C.F.R. § 395.33 **Operation of Cafeterias by Blind Vendors**¹³ addresses the RSA priority as regards the operation of cafeterias by blind vendors. The regulations state:
 - (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

¹¹ T. at 34-36, 109, 142.

¹² T.at 22.

¹³ 34 C.F.R. § 395.33

, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of §395.37.

- (c) All contracts or other existing arrangements pertaining to the operation of cafeterias on Federal property not covered by contract with, or by permits issued to, State licensing agencies shall be renegotiated subsequent to the effective date of this part on or before the expiration of such contracts or other arrangements pursuant to the provisions of this section.
- (d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, Federal property managing departments, agencies, and instrumentalities may afford priority in the operation of cafeterias by blind vendors on Federal property through direct negotiations with State licensing agencies whenever such department, agency, or instrumentality determines, on an individual basis, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees: Provided, however, That the provisions of paragraphs (a) and (b) of this section shall apply in the event that the negotiations authorized by this paragraph do not result in a contract.
7. March 10, 2016, the contracting officer, Mr. Fries, submitted a request for concurrence to the Department of Education, the purpose of which was to "receive Department of Education concurrence in accordance with AFT 34-206. 3.2.2.1, that the blind vendor who submitted a proposal in response to Air Force issued solicitation for Dining Facilities at Wright-Patterson AFB is not able to operate a cafeteria/dining facility in such a manner as to provide food service at a comparable cost as that available from other providers of cafeteria services."¹⁴
8. At the closing date for the receipt of proposals, seven offerors submitted proposals, including OOD. For purposes of opening discussions, all seven offerors were found

¹⁴ Respondent Exhibit 15, p. 2 of 27.

to be in the competitive range and OOD was afforded the benefit of the RSA priority authorized by the solicitation.¹⁵

9. OOD 's proposal was determined to not be within those proposals that had a reasonable chance for being selected for final award because OO D' s proposal exceeded 5% of the lowest TEP submitted by offerors.¹⁶
10. In accordance with AFI 34-206, 3.2.2.1, the Contracting Officer acknowledged that award to an offeror other than OOD requires concurrence from A FPC/SV and the Secretary that award of the Dining Facility contract should be made to other than the SLA (OOD) because the " blind vendor is not able to operate a cafeteria/dining facility in such a manner as to provide food service at a comparable cost as that available from other providers of cafeteria services."¹⁷
11. Air Force Instruction 34-206 (AFI 34-20 I 6) paragraph 3.2.2. states:

3.2.2. If the SLA submits a proposal that is within the competitive range established by the contracting officer, the contract will be awarded to the SLA, except as follows:

3.2.2.1. The contracting officer may award to other than the SLA when the "On-site Official" determines that the award to the SLA would adversely affect the interests of the United States and the Secretary, U.S. Department of Education, approves the determination (processing must be fully justified in writing through AFPC/SV, or when the "On-site Official" deter mines , after conferring with AFPC /S V, and the Secretary, U.S. Department of Education, agrees, that the blind vendor does not have the capacity to operate a cafeteria/dining facility in such a manner as to provide food service at a comparable cost and of comparable high quality as that available from other providers of cafeteria services.¹⁸

12. The On-Site Official is the base commander WPAFB who submitted a request for

¹⁵ i d.

¹⁶ Id.

¹⁷ id.

¹⁸ T at 133-134, Tab 12 at 13.

concurrence to the Air Force Personnel Center (AFPC/SV) dated December 16, 2015 as required by AFI 34-206. The Commander, AFSVA, concurred on March 2, 2016. The Secretary was included in the routing for the memorandum.¹⁹

13. The Department of Education, after an internal answer from the Department of Education Office of General Counsel, stated in an email dated April 6, 2016 " the provisions of CFR 395.30 do not apply to the situation at hand, because the Air Force is not suggesting that the award to the SLA would adversely affect the United States ."²⁰

ISSUE: Whether WPAFB is in violation of Randolph-Sheppard Act by failing to award the dining facilities contract to Opportunities/or Ohioans with Disabilities and Lenny's Food Service.

LIMITS ON AUTHORITY OF THE SECRETARY

In order to address this issue, it must be understood that the Secretary does not have the authority to direct the Air Force to award a contract to the OOD. 34 CFR §395.37(d) states the following:

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

The Air Force position is that the Secretary has no authority to direct the Air Force to terminate the contractor awarded the contract, or order the contracting officer to award a contract to OOD's licensee, Lenny' s, that would obligate funds consistent with an order of the panel. This position is supported by the 11th Circuit Court of Appeals in *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482 (11th Cir. 1990). The Court found that an arbitration panel convened under the authority of the RSA "has no

¹⁹ T. at 134. Petitioner Exhibit 12 at 2-3.

²⁰ Respondent Exhibit Pat I.

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).

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 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.

Finally, in *Maryland State Dep't of Education v. US. 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 identify acts of the Air Force that, in their opinion, are in violation of the RSA, the panel has no authority to order remedies for such violations. That responsibility lies with the head of the procuring agency.

Given the RSA's limitations on enforcement of orders by the panel, the panel' s decision is ultimately an advisory opinion to the Secretary who can seek action through Congress if the Secretary determines the remedy by the head of the procuring agency is inadequate to remedy a violation of the RSA. This conclusion is supported by the fact that contract awards are made by government contracting officers. The authority of government contracting officers to bind the government is limited by their warrant. If a contracting officer binds the government to a contract in violation of the contracting

officer's warrant, the contracting officer faces administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds under the Antideficiency Act (ADA), 31 U.S.C. § 1341 et al. The following section explores the limits of the contracting officer's authority under the ADA.

AUTHORITY OF CONTRACTING OFFICER

The Antideficiency Act (ADA), 31 U.S.C. § 1341 et al. consists of several statutes. The ADA was originally enacted in 1870 (16 Stat. 251) for the purpose of preventing the federal government from making expenditures in excess of the amounts that Congress appropriated. The Supreme Court in *United States v. MacCollom* reaffirmed that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress"²¹. The Supreme Court addressed this issue further stating: "Where Congress has addressed the subject, as it has here, and authorized expenditures where a condition is met, the clear implication is that, where the condition is not met, the expenditure is not authorized."²²

The Antideficiency Act, therefore, re-enforces the care that must be taken by the WPAFB contracting officer to ensure that Congress has authorized the obligation of funds under the resulting government contract and that the contracting officer has complied with all conditions for award imposed by Congress. With these limitations on the authority of the contracting officer, the contracting officer may authorize either a sole source or competitive award with a RSA priority if certain conditions are met. The following section addresses the RSA's independent statutory authority to award a sole source contract²³ or grant a priority that authorizes the contracting officer to pay a

²¹ *United States v. MacCollom*, 426 U.S. 317 (1976), 322, citing *Reeside v. Walker*, 11 How. 272, 52 U.S. 291 (1851).

²² *id.* citing *Botany Mills v. United States*, 278 U.S. 282, 278 U.S. 289 (1929); *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 414 U.S. 458 (1974).

²³ *NISH v. Cohen*, 247 F.3d 197, 205 (4th Cir. 2001) stated: CICA, however, broadly defines "procurement" as including "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract

premium over the proposed lower cost of FFS dining facility services by a competing offeror and award a contract to the SLA.

SOLE SOURCE VERSUS COMPETITIVE PROCUREMENTS

34 CFR §395.33(d)²⁴ provides authority for a sole source award through direct negotiations with the SLA (in this case OOD). This authority requires the contracting officer to determine on an individual basis, " that such operation can be provided at a reasonable cost, with food of a high quality to that currently provided employees."²⁵

However, if the government and the SLA negotiations do not result in a contract, 34 CFR §395.33 (a) and (b) apply to the subsequent competition for the award of FFS dining hall services.²⁶

34 CFR §395.33 (a)²⁷ provides a "priority" for the award of a contract under the authority of the RSA. This priority authorizes the contractor officer to award a contract to the SLA at a price that is a premium over the low responsive responsible offeror. Even if the contracting officer proposes an award to an SLA because of the RSA priority, the

completion and closeout." 10 U.S.C. § 2302(3)(A) (adopting the definition of "procurement" in the Office of Federal Procurement Policy Act, 41 U.S.C. § 403). The provisions of the RS Act clearly fit this sweeping definition of procurement. Indeed, it authorizes the Secretary of DOE to secure " the operation of cafeterias on Federal property by blind licensees whether by contract or otherwise. " 20 U.S.C. § 107d 3(e).⁷ Our adoption of the contrary position that the RS Act is not a procurement statute pursuant to CICA-would require a misreading and misapplication of both statutes.

²⁴ 34 CFR §395.33(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: Provide d, 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.

²⁵ Id.

²⁶ Id.

²⁷ 34 CFR §395.33(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.

Secretary must still determine, "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."²⁸

34 CFR §395.33(b)²⁹ establishes a regulatory requirement that allows the SLA to submit a proposal to compete for the award of contract that is within the scope of the RSA. The RSA parameters for award under these regulations require consultation with the Secretary " [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 ."³⁰

Therefore, the WPAFB contracting officer "may" use the RSA to obligate the government to pay a premium for FFS dining hall services when the SLA submits a proposal that is judged to be within the competitive range³¹, has a reasonable chance of being selected for final award³² and the Secretary determines the SLA is providing services "at a reasonable cost, with food of a high quality comparable to that currently provided employees."³³ However, the Secretary does not have the authority to direct

²⁸ Id.

²⁹ 34 CFR §395.J J (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.

³⁰ Id .

³¹ 34 CFR §395.33(a)

³² Id.

³³ 34 CFR §395.33(b)

the WPAFB contracting officer to award the contract to OOD. This limitation on the authority of the Secretary is important to the overall interpretation of the interaction of the RSA and agency procurement regulations that control the award of a contract subject to the RSA priority and the obligation of agency funds by the contracting officer. The following analysis addresses whether or not OOD satisfied the RSA regulatory requirements to be eligible for award for the FFS dining hall services covered by this solicitation.

DOE INTERPRETATION OF RSA COORDINATION WITH SECRETARY

The Office of the Secretary has opined that the Secretary is not required, in this case, to determine "[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"³⁴ because the contracting officer determined OOD's proposal did not have a reasonable chance to be selected for final award.³⁵ The opinion from the DoE stated: "In this case, the SLA was deemed to be in the competitive range, but was not ranked among those proposals that have a reasonable chance of being selected for final award so consulting with the Secretary of Education is not required."³⁶ The opinion continued stating: " Again the provisions of CFR 395.30 do not apply to the situation at hand, because the Air Force is not suggesting that the award to the SLA would adversely affect the United States."³⁷

Therefore, the DoE' s opinion to WPAFB stated that the agency was not required to consult with the Secretary because OOD's proposal was not ranked among those proposals that have a reasonable chance of being selected for final award and the Air Force was not suggesting that an award to OOD would adversely affect the interests of the United States.³⁸ Thus, WPAFB did not violate the RSA regarding coordination with

³⁴ Id.

³⁵ Additional Findings of Fact (AfoF), para. 13.

³⁶ Id.

³⁷ Id. See also fn 30 that includes the text of the DoD email opinion.

³⁸ Respondent Exhibit P Page I of 3 includes the complete email dated April 6, 2016 from Jess Hartle of

the Secretary because, in the opinion of DoE, coordination with the Secretary was not required. While this opinion is not a formal response from the Secretary, the email reflects the opinion of the DoE Office of General Counsel and carries significant weight since it is the agency's legal interpretation of its own regulations.

This interpretation is consistent with the Court of Federal Claims in *Texas v. US*, No. 17-847C, November 7, 2017, where the Court specifically addressed the scope and application of AFI 34-206 stating:

Similarly, with regard to AFI 34-206, protestors argue that AFI 34-206 "affirmatively states" that "[i]f the SLA submits a proposal that is within the competitive range established by the contracting officer, the contract will be awarded to the SLA." (emphasis in the original). While AFI 34-206 does, in fact, state that "[i]f the SLA submits a proposal that is within the competitive range established by the contracting officer, the contract will be awarded to the SLA," AFI 34-206 also explicitly describes

DoE states: Good Morning Jenifer, I want to apologize for how long it took to get an answer for you, but I had to get an answer from our OGC before responding. The RSA does not have the authority to concur with any decision reached by a managing agency that determines that an SLA is not to be awarded a contract. CFR 395.33(b) states, " if the proposal received from the State licensing agency is judged to be within the 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. "In this case, the SLA was deemed to be in the competitive range, but was not ranked among those proposals that have a reasonable chance of being selected for final award so consulting with the Secretary of Education is not required.

Furthermore, the next sentence of CFR 395.33 states " 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." Because the decision reached through the arbitration process established by the Randolph Sheppard Act constitutes the final agency action on disagreements raised regarding implementation of the act, the Department cannot comment on a decision reached by a managing agency that may be the subject of an arbitration hearing.

The only instance in which the Department of Education can address an issue of limiting the Randolph Sheppard Act occurs in CFR 395.30(b) "Any limitation on the location or operation of a vending facility for blind vendors by a department, agency or instrumentality of the United States based on a finding that such location or operation or type of location or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary who shall determine whether such limitation is warranted. A determination made by the Secretary concerning such limitation shall be binding on any department, agency or instrumentality of the United States affected by such determination. The Secretary shall publish such determination in the federal Register along with support documents directly relating to the determination." Again the provisions of CFR 395.30 do not apply to the situation at hand, because the Air Force is not suggesting that the award to the SLA would adversely affect the United States.

two exceptions to this general statement. First, AFT 34-206 explains that the "contracting officer may award to other than the SLA" when a determination is made that "the award to the SLA would adversely affect the United States, and the Secretary, U.S. Department of Education, approves the determination." Second, AFI 34-206 states that the "contracting officer may award to other than the SLA when a determination is made, "and the Secretary, U.S. Department of Education, agrees, that the blind vendor does not have the capacity to operate a cafeteria/dining facility in such a manner as to provide food service at a comparable cost of high quality as that available from other providers of cafeteria services." As this language demonstrates, AFT 34-206 sets forth the same process for determining whether an SLA shall receive a priority as 34 C.F.R. §395.33(a).³⁹

The majority interpretation of the AFI is simply not consistent with the DoE's interpretation of its own regulations and the Court of Federal Claims position that the AFT does not modify the RSA regulations but is consistent with the interpretation of the RSA regulations.

COMPETITIVE PROCUREMENTS UNDER THE RSA

The interaction between the RSA and the Federal Acquisition Regulations (FAR) is not specifically addressed in the FAR. I agree with the majority that both the RSA and the FAR apply to the source selection in question. This acquisition is not a sole source acquisition resulting from direct negotiations authorized by 34 CFR §395.33(d). On or about October 3, 2014, WPAFB issued Solicitation 1 Number FA8601-2 15-R-0004.⁴⁰ The Solicitation notified potential offerers that the successful offeror must be determined to have submitted a technically acceptable offer with acceptable past performance and have the lowest price.⁴¹ OOD expressed its intent to submit a proposal by letter dated October 6th, 2014 and expressed its wishes to exercise its priority under the RSA to

³⁹ Texas v. US, No. 17-847C, November 7, 2017 at 16.

⁴⁰ Findings of Fact (FoF) 4

⁴¹ Additional Findings of Fact (AFoF) 2.

operate the dining facilities at Wright Patterson.⁴² The solicitation was amended October 28, 2014 to accommodate the RSA priority.⁴³

Amendment 1 to the solicitation added the following to address the priority claimed by OOD:

the award will otherwise go to the entity whose proposal is submitted through the State Licensing Agency (SLA) provided that the proposal is technically acceptable, the entity's past performance is determined to be acceptable and the entity's TEP is **5% or \$1,000,000.00 whichever is less of the lowest TEP.**⁴⁴

OOD submitted a responsive proposal that was technically acceptable and OOD's past performance was determined to be acceptable; however, OOD's Total Evaluated Price (TEP) was not within 5% of the low, responsive, responsible offeror's TEP. As a result, OOD was not granted the priority authorized by the solicitation because OOD's proposal was determined to not be within those proposals that had a reasonable chance for being selected for final award.⁴⁵

OOD requested this arbitration because OOD was under the impression that since all seven proposals, including OOD's proposal, were within the competitive range, the government would initiate negotiations with OOD. However, the government did not initiate negotiations with any offeror and made an award decision based on the source selection criteria included within the solicitation.

OOD argues that WPAFB cannot rely on the source selection criteria established in the solicitation to deny award to OOD. OOD asserts that, as long as OOD can establish that it can provide, high quality food for a price that the Air Force has determined to be fair and reasonable, the RSA priority applies. OOD does not dispute that its price

⁴² FoF 7.

⁴³ FoF 3.

⁴⁴ Id.

⁴⁵ AFoF 9.

proposal exceeds the 5% preference stated in the solicitation but argues that it is not bound by the terms of the solicitation. As will be addressed later in the **COMPLIANCE WITH SOURCE SELECTION TERMS** of this opinion, the Court of Federal Claims in *Texas v. US*, No. 17-847C, November 7, 2017, stated that the government is obligated to follow the terms of the solicitation when making an award decision.

OOD is confusing the authority under 34 CFR §395.33 (d)⁴⁶ to enter into direct negotiation with the government for a sole source award and 34 CFR §395.33(a)⁴⁷ that provides a "priority" for the award of a contract during a competitive source selection. The government defined that priority for award in its amended solicitation. If OOD had submitted a proposal that was within 5% of the lowest TEP by an offeror with acceptable past performance and an acceptable technical proposal, OOD would be entitled for award under the terms of the solicitation. OOD's proposal exceeded 5% of the lowest TEP and the government denied the award to OOD.

OOD argues that the RSA is one of a number of socio-economic preference programs that authorize a contracting officer to pay a premium for services in order to benefit identified social-economically challenged groups. I agree with the majority that 20U.S.C. § 107(b) directs the Secretary to establish a priority for the award of contracts to licensed blind persons wherever feasible to the extent that the award of the contract does not adversely affect the interests of the United States. Any limitation on "placement or operation" of such a facility that would adversely affect the interests of

⁴⁶ 34 CFR §395.33(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.

⁴⁷ 34 C FR §395.33(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.

the United States must be fully justified in writing to the Secretary.⁴⁸

However, OOD never objected to the definition of the RSA priority authorized by the solicitation until after submission of proposals and after evaluation of proposals where WPAFB determined OOD was not eligible for award. WPAFB argues that OOD had an obligation to make a timely challenge the terms of the solicitation, if, in their opinion, the definition of the RSA priority in the solicitation was too restrictive. This interpretation is, in my opinion, consistent with federal acquisition legal precedent that will be more fully explored in the following session. If OOD felt that the terms of the solicitation were an unreasonable restriction on the RSA priority, OOD had an obligation to request an immediate arbitration that would have allowed all parties to address the issue prior to the submission of proposals. OOD did not request arbitration until after the submission of proposals when OOD was informed it would not be awarded the contract. By its failure to make a timely objection to the solicitation definition of the RSA priority, OOD waived its right to object to the terms of the solicitation and is subject to its terms. As addressed below, the legal concept of waiver is well established within the government acquisition environment.

WAIVER OF RSA OBJECTIONS BY OOD

The U.S. Court of Appeals for the Federal Circuit in *The Blue & Gold Fleet, L.P. v.*

⁴⁸ 20 USC 107(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 authorize d to operate vending facilities on any Federal property. (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, through the Commissioner, shall, after consultation with the Administrator of General Services and other head s 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 license d blind persons (including assignment of vend in g machine in co me pursuant to section 10 7d- 3 of this title to achieve and protect such priority), and (2)wherever feasible, one or more vend in g 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. Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary , who shall determine whether such limitation is justified. 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. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

United States, 492 F.3d 1308 (Fed. Cir. 2007) affirmed the waiver rule, stating:

Therefore, while it is true that the jurisdictional grant of 28 U.S.C. §1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of § 1491(b)(3) for courts to "give due regard to the need for expeditious resolution of the action" and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule. Recognition of this rule finds further support in the GAO's bid protest regulations and in our analogous doctrines. Accordingly, a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a §1491(b) action in the Court of Federal Claims.⁴⁹

The court also addressed the issue of patent ambiguity, stating:

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

⁴⁹ *id.* at pg 2.

before the contract is bid, thus avoiding costly litigation after the fact.⁵⁰

The court explained that:

In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation."⁵¹

The GAO has adopted a similar rule under 4 C.F.R. § 21.2(a)(l) where protests must be made prior to receipt of initial proposals where alleged improprieties are apparent prior to bid opening.⁵² Several decisions of the Court of Federal Claims have also recognized the value of the waiver rule to prevent the inefficient and costly expenditure time and effort to re-submit or re-evaluate proposals. Examples of the cases cited include: *NC. Div. of Servs. for the Blind v. United States*, 53 Fed.Cl. 147, 165 (2002); *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed.Cl.167, 175 n. 14 (2005); *MVM, Inc. v. United States*, 46 Fed.Cl. 126, 130 (2000); *Allied Tech. Group, Inc. v. United States*, 39 Fed.Cl. 125, 146 (1997); *Aero/ease Long Beach v. United States*, 31 Fed.Cl. 342,358 (1994).

The court cited. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032 (Fed.Cir.1992) to support the principle of laches and equitable estoppel. The court referenced decisions by the Court of Federal Claims that support this principle to avoid

⁵⁰ id.

⁵¹ Id.

⁵² 4 C.F.R. § 21.2(a)(l) states : " Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurement s where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation."

delays in the procurement process citing *Transatlantic Lines LLC v. United States*, 68 Fed.Cl. 48, 52, 57 (2005) and *CW Gov't Travel, Inc. v. United States*, 61 Fed.Cl. 559, 568-69 (2004) for the principle of considering delays as part of the laches analysis.

North Carolina Division of Services for the Blind v. United States, 53 Fed. Cl. 147, 165 (Fed. Cl. 2002) also stands for the proposition that the proper procedure to follow when an offeror identifies a problem with a solicitation is to make a timely objection rather than waiting to see if the offeror is the successful awardee under the solicitation. The majority ignores these legal precedents. The inequity of the majority position is addressed in the timeliness section below.

The majority's analysis that GAO protests and actions before the Court of Federal Claims are not ripe for adjudication until an RSA arbitration is complete and a final action is determined by the DoE, fails to address the SLA's right to request a timely arbitration under the authority of the RSA. There is nothing in the RSA regulations that requires the SLA to wait until the end of a source selection to request arbitration on a specific issue impacting the SLA in a particular competitive source selection that is required to accommodate the RSA priority. If the SLAs in those cases had requested a timely arbitration and there had been an arbitration decision, the administrative remedies would have been exhausted and the Court of Federal Claims would have jurisdiction. The SLA had a remedy, but did not exercise that remedy in a timely manner.

COMPLIANCE WITH SOURCE SELECTION TERMS

The Court of Federal Claims in *Texas v. US*, No. 17-847C, November 7, 2017, addressed a broad range of RSA issues. The court specifically addressed the requirement for the government to comply with the terms of the solicitation in evaluating offers. The court stated:

The court further notes that protestors' argument that the State of Texas was entitled to an immediate priority contract right as soon as it was included in the competitive range is also not consistent with the Randolph-Sheppard Act, the implementing regulations at 34 C.F.R. § 395.33, and the established principle in this court that an agency cannot

deviate from the terms of its solicitation when conducting its evaluation of proposals. Relevant to this bid protest, the solicitation set forth evaluation criteria for determining whether and when to afford the priority to the SLA , which are consistent with the Randolph-Sheppard Act and the implementing regulations. 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 *NYE, Inc. v. United States* , 121 Fed. Cl. 169, 180 (2015).⁵³

The court continues:

This court in *Banknote Corp. of America, Inc. v. United States* stated:

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 importance, *Isratex, Inc. v. United States*, 25 Cl. Ct. 223, 230 (1992). See also *Cube Corp. v. United States* , 46 Fed. Cl. 368, 377 (2000); *Dubinsky v. United States*, 43 Fed. Cl. 243, 266 (1999). That said, an agency still has " great discretion in determining the scope of an evaluation factor." *Forestry Surveys & 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

⁵³ *Texas v. US*, No. 17 - 847 C at 19.

result-that it had a substantial chance to receive the contract award but for that error.⁵⁴

The majority's failure to address the requirement of the government to comply with the terms of the solicitation is clearly inconsistent with basic government contract hornbook law. As the Court in *Texas v. US* reaffirms, it is basic government contracting procedure that requires the government to comply with the terms of the solicitation when evaluating offers. This basic principle re-enforces the obligation of the SLA to make timely objection through RSA arbitrations of RSA issues that impact a source selection. This requirement supports the need for timely objection by the RSA. The following analysis addresses that issue.

TIMELINESS

While it may seem harsh to apply the waiver rule to OOD, OOD has not been without remedies. Timely requests for arbitration resolve the majority's concern regarding the "ripeness" of an issue for adjudication. The RSA arbitration decision is a final agency action that addresses the concern of the Court of Federal Claims. Timely arbitrations also address issues regarding the adequacy of the terms of the solicitation to address the RSA priority. For example, OOD could have made a timely challenge to the competition for the award of the contract by requesting an arbitration to determine if WPAFB and OOD could negotiate a sole source contract under the authority of 34 CFR §395.33 (d). OOD had been providing dining hall services at WPAFB on a sole source basis for a number of years and the cost of those services were determined to be reasonable by WPAFB.⁵⁵ If OOD and WPAFB were able to negotiate a contract that demonstrated OOD could continue to provide for the operation of the dining facilities at a reasonable cost, with food of a high quality to that currently provided employees , WPAFB would need to demonstrate to the Secretary that not awarding the contract would be adversely affect the interests of the United States⁵⁶. By taking this timely

⁵⁴ Id.

⁵⁵ AFoF I.

⁵⁶ See fn 3 where the Office of General Counsel for the DoE opined that the only instance in which the Department of Education can address an issue of limiting the Randolph Sheppard Act occurs in CFR 395.30(b) "Any limitation on the location or operation of a vending facility for blind vendors by a

action before the initiation of the competition, OOD would have retained the rights granted the OOD under the RSA.

OOD could have also immediately requested an arbitration of the terms of the solicitation that limited the RSA priority to 5% of the TEP or \$1,000,000.00 whichever is less of the lowest TEP.⁵⁷ OOD was on notice of the limitation on the priority upon publication of Amendment I to the solicitation dated October 28, 2014.⁵⁸ A timely objection to the terms of the solicitation would have allowed an arbitration panel to determine if the terms of the solicitation complied with 34 CFR §395.33(a) that grants OOD a "[p]riority in the operation of cafeterias by blind vendors on Federal property." This priority "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."⁵⁹

By waiting until after the notice of award to raise their objection to the terms of the solicitation, OOD is in the position of using the knowledge gained from the competition to strengthen its negotiation position at the expense of its competitors and forces the government to incur the expense of after-the-fact arbitration and potential litigation

department, agency or instrumentality of the United States based on a finding that such location or operation or type of location or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary who shall determine whether such limitation is warranted. A determination made by the Secretary concerning such limitation shall be binding on any department, agency or instrumentality of the United States affected by such determination. The Secretary shall publish such determination in the Federal Register along with support documents directly relating to the determination."

⁵⁷ See AFoF 3 where the solicitation stated: " Randolph-Sheppard Act (RSA), the award will otherwise go to the entity whose proposal is submitted through the State Licensing Agency (SLA) provided that the proposal is technically acceptable, the entity's past performance is determined to be acceptable and the entity's TEP is **5% or \$1,000,000.00 whichever is less of the lowest TEP.**"

⁵⁸ Id.

⁵⁹ 34 CFR §395.33(a). See fn19 for full text of regulation.

expense. This is the exact result addressed by the United States Court of Appeals, Federal Circuit in *The Blue & Gold Fleet, L.P. v. United States*.⁶⁰

Therefore, there is clear precedent that OOD waived its objections to the terms of the solicitation when its proposal exceeded 5% of the lowest TEP and the majority should have held in favor of WPAFB.

LEGAL FINDINGS OF THE PANEL ARE INCONSISTENT WITH FEDERAL PROCUREMENT PRECEDENT

The majority's finding that WPAFB violated the R-S Act by improperly awarding the contract for dining facilities to Sun Quality Foods and by failing to award the dining facilities contract to OOD and Lenny's Food Service is inconsistent with federal procurement legal precedent regarding waiver. In addition, there is no evidence to support a finding that WPAFB failed to comply with the terms of the solicitation in the award of the contract. Therefore, it is my opinion that WPAFB did not violate the Randolph-Sheppard Act by awarding the contract for FFS dining facilities to Sun Quality foods.

The majority's finding that WPAFB violated the R-S Act and its implementing regulations by failing to properly apply the R-S Act priority to the solicitation and contract at issue in this arbitration, fails to impose an obligation on OOD to make a timely objection to WPAFB's accommodation of the RSA priority provided OOD. OOD may have been successful in making a timely argument in an RSA arbitration that the solicitation accommodation of the RSA priority was unreasonable; however, OOD waited until after the source selection decision to request arbitration of the issue.

Therefore, in my opinion, WPAFB did not violate the Randolph-Sheppard Act by failing to award the dining facilities contract to Opportunities for Ohioans with Disabilities and Lenny's Food Service. WPAFB applied the RSA priority consistently with the terms of the solicitation.

The majority found that WPAFB violated the R-S Act and its implementing regulations

⁶⁰ See fn 42

by failing to maximize employment opportunities for blind vendors ; however, OOD was provided with an opportunity to compete for award and there is no evidence to suggest that WPAFB violated the terms of the solicitation in making an award decision. It appears the majority position stands for the proposition that the SLA is "entitled" to award and the competitive source selection is irrelevant to the award process. There is simply no support for this position in the RSA or the implementing regulations.

The majority directs that " WPAFB shall cause the acts or practices found by this Panel to be in violation of the R-S Act and its implementing regulations to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the Panel." However, as addressed above, the Secretary has no authority to order WPAFB to take any action consistent with this decision. It is simply an advisory opinion for the head of the agency to determine if correction action will be taken and an advisory opinion to the Secretary to determine if the Secretary will file a report to Congress if the head of the agency takes action inconsistent with this opinion.

The majority's final determination simply ignores the facts and federal procurement law as regards competitive source selections under federal acquisition regulations. The majority found that "as a matter of law that the Air Force was obligated under the R-S Act and its implementing regulations to evaluate the proposals as required by 34 C.F.R. § 395.33 and to award to the SLA based on the R-S Act priority so long as the operation of the cafeteria can be provided at a reasonable cost with food of a high quality comparable to that currently provided employees." While this finding may be consistent with a sole source negotiation and award of a dining hall services contract, it fails to acknowledge the application of the federal acquisition regulatory source selection process to competitive source selections for dining hall services. WPAFB did accommodate the RSA priority in the source selection, OOD's only complaint is that OOD was not awarded the contract. Under the terms of the source selection, OOD was not entitled to award and should be bound by that finding. Contrary to the majority position that the government simply chose to award to the lowest bidder, WPAFB accommodated the RSA priority.

There is no support in the record for the majority ' s finding that WPAFB ignored or intended to ignore the RSA priority as defined in the solicitation. OOD submitted a proposal consistent with the terms of the solicitation, but its TEP was not less than 5% greater than the TEP of the low responsive, responsible offeror. As a result, OOD was not eligible for award. There is nothing in the record to support the majority's position that WPAFB would have ignored the terms of the solicitation and awarded to the low responsive, responsible offeror if OOD had submitted a proposal that was within 5% of the TEP of the low responsive, responsible offeror.

Conclusion

As regards whether WPAFB is in violation of the Randolph-Sheppard Act by improperly awarding the contract for dining facilities to Sun Quality foods, I believe the majority erred in its findings because WPAFB offered OOD a full and fair opportunity to compete for award of the contract.

WPAFB is not in violation of Randolph- Sheppard Act by failing to award the dining facilities contract to Opportunities for Ohioans with Disabilities and Lenny's Food Service, the majority's finding would eliminate the competitive source selection process under the RSA as a viable option for the government to compete acquisitions for FFS Dining Hall Services.

The majority failed to acknowledge the application of the solicitation to the award of the contract. If the finding of the majority is determined to be the law, no competition can be conducted with any certainty since the only apparent awardee is the SLA. The RSA provides for the competitive award of FFS dining hall service contracts but the RSA does not establish an entitlement for the SLA to be awarded FFS dining hall service contracts. By failing to acknowledge that OOD was bound to comply with the terms of the solicitation, absent timely objections to the terms of the solicitation, the majority has attempted to rewrite the RSA regulations as regards competitive source selections where the FAR and the RSA regulations govern a competitive source

February 21, 2018

Visited December 6, 2019

Steven R. Fuscher, Panel Member

Dissenting to all findings of the Majority Decision