FIXING THE RANDOLPH-SHEPPARD ACT: SERVING UP SOME COMMON UNDERSTANDING

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I. Introduction

Congress passed the Randolph-Sheppard Act (the Act) to give blind persons more economic and employment opportunities and to help them become more self-sufficient.[1] To this end, the Act provides blind vendors with a priority for contracts for the operation of cafeterias for Federal agencies.[2] Consequently, blind vendors often compete for cafeteria contracts on Federal installations, including military bases. Unfortunately, both the Act and its implementing regulations fail to define all key terms, such as "priority," "operate," "operation," and "competitive range." This creates confusion and disagreement among interested parties as to how to implement the statute properly, and that leads to lengthy arbitration and litigation.

On average, from the time a complainant files an arbitration complaint with the Department of Education (DoEd),[3] Federal agencies wait 685 days for a decision from an arbitration panel organized pursuant to the Act[4]—a

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[1] 20 U.S.C. § 107(a).

[2] *Id.* §§ 107(b), 107d-3(e).

[3] Congress charged the Department of Education (DoEd), through its subordinate agency, the Rehabilitation Services Administration, to administer the Randolph-Sheppard Act (the Act). *Id.* § 107a.

[4] *See infra* app.

bewildering length of time that leaves all parties in limbo.[5] This delay is particularly relevant to the Armed Forces because military cafeterias are involved in fifteen of the seventeen posted arbitration decisions[6] between Federal agencies and a state licensing agency (SLA), which is the entity designated to represent blind vendors in submitting proposals for contract solicitations[7] and adjudicating disputes with Federal agencies.[8] While changing a statute about cafeterias may seem minor compared to the overall Department of Defense (DoD) mission set, the costs associated with this delay can add up when considering there is at least one cafeteria at many, if not most, DoD installations. This is all the more important when considering that the DoD has identified improving acquisition and fiscal efficiency and discipline as one of its primary goals.[9]

The majority of these cases arise from the solicitation or award of a contract. Each state has an SLA, and each SLA can file an arbitration request when it determines a Federal agency "is failing to comply with the provisions of [the Act]."[10] There is no statutory or regulatory bar on when an SLA can file for arbitration. Upon receipt of the request, the DoEd, which Congress charged with implementing the Act, is required to convene arbitration.[11]

Parties contend with not only lengthy arbitrations but also a lack of statutory and regulatory definitions, often forcing agencies (and, subsequently, arbitration panels) to guess at Congress's intent. The lack of definitions also allows arbitration panels to apply whichever definitions they favor, regardless of the impact on the Federal acquisition system. To make matters worse, there is no requirement for any panel member to have experience with the Federal acquisition system or the Act.[12] Panels are

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[5] This period does not include any subsequent litigation time in Federal court. See *infra* app., for a discussion of the average times an arbitration takes from the filing of the complaint to the receipt of a decision from the arbitration panel.

[6] The DoEd publishes on its website arbitration panel decisions issued over the previous seven years. *See Arbitration Panels*, REHAB. SERVS. ADMIN., https://rsa.ed.gov/about/programs/randolph-sheppard-vending-facility-program/decisions-of-arbitration-panels (last visited Feb. 8, 2022).

[7] 34 C.F.R. § 395.33(b) (2021).

[8] 20 U.S.C. § 107d-2(b)(2).

[9] U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 10 (2018).

[10] 20 U.S.C. § 107d-1(b).

[11] *Id.* § 107d-2(a).

[12] See Stephanie Villalta, *Shepherd Away from Arbitration: Rethinking the Randolph-Sheppard Act's Arbitration Scheme for Randolph-Sheppard Bid Protests*, 48 PUB. CONT. L.J.

comprised of three individuals:[13] the SLA selects one,[14] the Federal agency selects another, and then those two members select the panel chairperson.[15] If the two selected members cannot agree on a panel chairperson, the DoEd selects the third member.[16] The panel's rulings often come down to the panel chairperson, who may be interacting with the Federal acquisition system and the Act for the first time.

To mitigate this unfamiliarity, improve implementation of the Act, and decrease the time devoted to arbitration and litigation, Congress should revise the Act and its implementing regulations by defining at least the terms "priority," "operate," and "competitive range" and identifying their relation to the overall Federal acquisition scheme. These terms often form the basis of arbitration and litigation, as parties disagree on their definitions and how (and sometimes, whether) they relate to the overall Federal acquisition scheme. This article will discuss each term in turn. Each section will examine the relevant statutory and regulatory language, discuss the court cases that shed light on their meaning, and identify where arbitration panel decisions have strayed from the law. This article will conclude with a discussion of several potential solutions to better incorporate the Act into the Federal acquisition scheme and reduce confusion, arbitration, and litigation.

II. "Priority": Not a Guarantee of Contract Award

The meaning of "priority" has been the subject of litigation since shortly after Congress included the term in the Act in 1974.[17] Since then, its meaning has continued to be a source of confusion in arbitration and litigation, making it difficult for agencies to know how to implement the Act in cafeteria solicitations. State licensing agencies have argued that priority almost guarantees the award of a contract for the operation of a cafeteria to SLAs, while Federal agencies have countered that priority is not so generous. Arbitration panels and courts have described the Act's priority

637 (2019), for a discussion of issues with the Act's arbitration scheme and an argument to give the Government Accountability Office and the Court of Federal Claims jurisdiction over Act-related protests.

[13] 20 U.S.C. § 107d-2(b)(2).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Randolph-Sheppard Vendors of Am., Inc. v. Harris, 628 F.2d 1364 (D.C. Cir. 1980).

as a "prior right,"[18] something other than an "absolute right,"[19] and simply the regulatory contract award process.[20] Panels have also described it as taking precedence over all other socioeconomic preferences.[21] The failure to define "priority" clearly is a significant oversight because it is one of the key measures that implements the Act's primary purpose. This section examines the statutory and regulatory background of "priority," how courts have interpreted the term, and how arbitration panels have expanded the meaning of the term beyond what the statutory and regulatory plain language requires and how courts have interpreted it.

A. Statutory and Regulatory Background

The plain language of the statute makes clear that Congress did not intend for every single SLA proposal submission on behalf of a blind vendor to result in that SLA receiving a contract award. Instead, Congress left it to the DoEd to "prescribe regulations to establish a priority for the operation of cafeterias on Federal property."[22] The DoEd established priority by creating two selection methods for contracts to operate cafeterias.[23] The first method provides that priority may be afforded by Federal agencies when entering into "direct negotiations" with an SLA for a contract to operate a cafeteria.[24] The only limitation is the agency must determine the SLA can provide the services at a "reasonable cost, with food of a high quality comparable to that currently provided employees."[25] The agency is not

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[18] Opportunities for Ohioans with Disabilities v. U.S. Dep't of the Air Force, Wright-Patterson Air Force Base, No. R-S/16-08, at 16 (2018) (LeRoy, Arb.).
[19] Dep't of the Air Force—Reconsidered, 72 Comp. Gen. 241, 244 (1993); *see Randolph-Sheppard Vendors of Am., Inc.*, 628 F.2d at 1367 ("It would be unreasonable to require agency heads to grant unqualified priorities to blind vendors to operate cafeterias, despite the vendor's anticipated cost. In fact such a scheme, unlike the present one, would actually exceed the authority delegated to the Secretary by the Amendments.").
[20] *See* NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001).
[21] *Opportunities for Ohioans*, No. R-S/16-08, at 9; Okla. Dep't of Rehab. Servs. v. U.S. Dep't of the Army, Fort Sill, No. R-S/15-10, at 18 (2016) (Geister, Arb.); Ga. Vocational Rehab. Agency v. U.S. Dep't of Def., Dep't of the Army, Fort Stewart, Ga., No. R/S 13-09, at 28 (Harris, Arb.).
[22] 20 U.S.C. § 107d-3(e).
[23] 34 C.F.R. § 395.33 (2021).
[24] *Id.* § 395.33(d).
[25] *Id.*

required to use this selection method, but if this method fails, the agency must use the second selection method.[26]

The second selection method is a competitive selection process with three requirements.[27] First, the Federal agency must invite the SLA "to respond to solicitations for offers when a cafeteria contract is contemplated."[28] Second, the solicitations "shall establish criteria under which all responses will be judged."[29] Third, if the SLA's proposal 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 Federal agency must consult with the Secretary of Education (SecEd) to ensure the SLA's services can be provided at a reasonable cost and provide "food of a high quality comparable to that currently provided employees."[30] The opportunity to choose between these two selection methods—one allowing direct negotiation with an SLA to the exclusion of other potential sources and the other allowing competition among multiple offerors—shows the DoEd's intent clearly: it did not see Congress's use of "priority" as a mandate for contract award to SLAs under all circumstances, nor would it mandate the use of SLAs for all cafeteria contracts.

B. Judicial Approach to Priority

Courts have tended to support this approach. In *NISH v. Cohen*, the U.S. Court of Appeals for the Fourth Circuit explained a Federal agency honors the established priority when it employs one of the two selection methods.[31] *NISH v. Cohen* revolved around the definition of "cafeteria"[32] and the application of the Competition in Contracting Act (CICA) to the Act.[33] In exploring CICA's application, the Fourth Circuit confirmed two important points about the Act's priority. First, that Congress charged the DoEd with establishing regulations to implement priority.[34] Second, that the DoEd "regulations offer two options by which a federal agency may implement

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[26] *Id.*
[27] *Id.* § 395.33(b).
[28] *Id.*
[29] *Id.*
[30] *Id.* § 395.33(a).
[31] *See* NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001).
[32] *Id.* at 199.
[33] *Id.* at 204.
[34] *Id.* at 203.

the priority mandated for blind vendors."[35] The court then outlined the two selection methods discussed above (i.e., direct negotiation and competitive selection). The court concluded that the Act's inclusion of procurement procedures exempts it from CICA's full and open competition requirement.[36] Based on this case, applying the priority appears straightforward so long as the Federal agency chooses one of the two selection methods outlined in the DoEd's implementing regulations. It also supports the notion that a Federal agency is not required to award a cafeteria contract to an SLA.

The D.C. Circuit similarly confirmed that the Act's priority is not a guarantee of award.[37] Shortly after Congress amended the Act in 1974 and the DoEd implemented its regulations, a U.S. senator, blind vendors, and several advocacy groups for blind people sued the DoEd.[38] The plaintiffs were concerned that the new implementing regulations did not go far enough in capturing Congress's intent with regard to priority.[39] The court concluded that priority is not an "unqualified" right to contract award, explaining it would be "unreasonable to require agency heads to grant unqualified priorities to blind vendors to operate cafeterias, despite the vendor's anticipated cost."[40] Based on this, while a Federal agency has the authority to negotiate directly with the SLA, when the competitive selection method is employed, priority does not guarantee contract award. Mandating award to the SLA in the competitive selection method would seem to undercut the purpose of having a competitive selection method, which is to allow multiple potential vendors the opportunity to compete for contract award.

While priority may not guarantee award in every circumstance, courts have examined how it compares to other programs in the Federal acquisition scheme designed to benefit certain groups or entities such as small businesses. This understanding is helpful because small businesses are often SLAs' primary competitors, and agencies may seek to incorporate small business programs and the Act into their solicitations. Those cases hold that the Act priority does not necessarily conflict with other set-asides, such as the historically underutilized business zones (HUBZone) set-aside[41] and

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[35] *Id.*
[36] *Id.* at 204 (reasoning that the Act satisfies the Competition in Contracting Act's "except in the case of procurement procedures otherwise expressly authorized by statute" exception).
[37] Randolph-Sheppard Vendors of Am., Inc. v. Harris, 628 F.2d 1364, 1367 (D.C. Cir. 1980).
[38] *Id.* at 1365.
[39] *Id.* at 1367.
[40] *Id.*
[41] Automated Commc'n Sys., Inc. v. United States, 49 Fed. Cl. 570, 577–80 (2001).

other small business set-asides.[42] Because the preference in the Javits-Wagner-O'Day (JWOD) Act[43] is in direct conflict with the Act priority, courts have historically found that the Act controls because it is more specific than the JWOD Act.[44] The case discussing the HUBZone preference determined that, although the Act is more specific than the HUBZone preference, the Act and the HUBZone preference were not incompatible.[45] Practitioners should understand that while the Act's priority does not guarantee award in every solicitation, it might carry greater weight when in conflict with other Federal acquisition program benefits.

C. Arbitration Problems with Priority

Unfortunately, the plain language understanding has not borne out in arbitration. Panel members' general lack of expertise in and disregard for the Federal acquisition process has led to panels incorrectly applying priority to the exercise of contract options, expanding the plain language meaning of "priority," and outright rejecting the Federal Acquisition Regulation (FAR)—the very regulation that controls Federal acquisitions. This misapplication of law can have a chilling effect on contracting officers tasked with balancing how an arbitration panel might rule, small business acquisition requirements, and installation food service needs. Some agencies choose to forgo the nearly two-year arbitration fight knowing arbitration panels will likely rule against them if they do not award to the SLA.

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[42] Intermark, Inc., B-290925, 2002 CPD ¶ 180 (Comp. Gen. Oct. 23, 2002).
[43] 41 U.S.C. §§ 8501–8506.
[44] NISH v. Rumsfeld, 348 F.3d 1263, 1272 (10th Cir. 2003); NISH v. Cohen, 247 F.3d 197, 204–05 (4th Cir. 2001). Congress addressed this in part by instituting a "no poaching" rule that entailed cafeteria contracts on military installations awarded under the Javits-Wagner-O'Day (JWOD) Act to remain subject to the JWOD Act. Where cafeteria contracts on military installations were previously awarded under the Act, those contracts would remain subject to the Act. John Warner National Defense Authorization Act of Fiscal Year 2007, Pub. L. No. 109-364, § 856, 120 Stat. 2083, 2347 (2006). This did not resolve all of the issues between the competing applications of these two statutes. In 2014, Congress next directed the Secretary of Defense to promulgate "regulations explaining how the two Acts should apply to new contracts." Kansas v. SourceAmerica, 874 F.3d 1226, 1234 (10th Cir. 2017). Confusion remains as to the how the Act and the JWOD Act apply as there has been recent litigation on the subject. *See* SourceAmerica v. U.S. Dep't of Educ., 368 F. Supp. 3d 974 (E.D. Va. 2019), *aff'd in part, vacated in part sub nom.*, Kansas v. SourceAmerica, 826 F. App'x 272 (4th Cir. 2020).
[45] *Automated Commc'n Sys., Inc.*, 49 Fed. Cl. at 577–78.

As an example, a panel improperly invoked priority in a dispute about the exercise of an option in an arbitration case at Fort Sill, Oklahoma.[46] In this case, the Army decided not to exercise an option on a cafeteria contract it held with the Oklahoma SLA.[47] Rather, it decided to resolicit the contract.[48] The SLA requested arbitration to determine if the decision not to exercise the option violated the Act and whether the SLA's exclusion from the competitive range violated the Act.[49]

The first allegation in the arbitration centered on whether the Army's decision not to exercise an option was a limitation that the SecEd should have previously cleared.[50] An agency's discretion to exercise an option is governed by FAR 17.207[51] and is typically within the sole discretion of the contracting officer.[52] The arbitration panel rejected the FAR, concluded the Army violated its obligations under the Act, and turned to the Act priority to, at least in part, justify its holding.[53] Speaking on the agency's discretion to exercise an option, the panel held that "[w]hen conducting a procurement subject to the [Act], a federal agency's discretion is limited by the priority given to blind vendors."[54] While the arbitration panel's assertion may be true in some circumstances, it is not true in all situations. For example, it is not true when it comes to the exercise of an option because the implementing regulations make clear that the priority applies at contract award.[55] The decision to exercise an option comes at the end of a term of performance, only after a contracting officer determines that it is in the best interest of the agency to exercise the option; it has nothing to do with contract award.[56]

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[46] Okla. Dep't of Rehab. Servs. v. U.S. Dep't of the Army, Fort Sill, No. RS/18-09, at 37 (2020) (Sellman, Arb.).
[47] *Id.* at 8.
[48] *Id.*
[49] *Id.* at 3.
[50] *Id.*
[51] *See* 48 C.F.R. § 17.207 (2021). The Federal Acquisition Regulation (FAR) is codified in Title 48 of the *Code of Federal Regulations*.
[52] *See, e.g.*, Mktg. & Mgmt. Info., Inc. v. United States, 62 Fed. Cl. 126, 130 (2004) (citing Gov't Sys. Advisors, Inc. v. United States, 847 F.2d 811, 813 (1988)).
[53] *Okla. Dep't of Rehab. Servs.*, No. RS/18-09, at 37.
[54] *Id.*
[55] *See* discussion *infra* Section II.A.
[56] *See* FAR 17.207 (2022). Before an option may be exercised, contracting officers must determine the "requirement covered by the option fulfills an existing Government need" and the "exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors . . . considered," among other things. *Id.*

The arbitration panel was wrong in relying on priority in its decision about the exercise of an option.

As others have done,[57] this panel also incorrectly determined the FAR did not apply to this situation. The panel relied on *NISH v. Cohen* to support its conclusion that the FAR does not apply "when the [Act's] priority applies."[58] This is simply an incorrect application of *NISH v. Cohen* and the Act's priority. As previously discussed, the Fourth Circuit determined in *NISH v. Cohen* that solicitations conducted pursuant to the Act are not subject to CICA, not that they are exempt from *every* procurement regulation included in the FAR.[59] Any time an arbitration panel relies on *NISH v. Cohen* for the proposition that the FAR does not apply to solicitations subject to the Act, it misapplies the law. Furthermore, to the extent that Act procurements exist outside normal acquisition procedures, the DoEd's implementation of priority allows an agency to apply as much of the FAR that does not contradict with the Act to contracts for the operation of a cafeteria.[60] The second requirement in the competitive selection method requires solicitations to "establish criteria under which all responses will be judged."[61] Nothing here precludes the application of the FAR to contracts for the operation of a cafeteria.

Arbitration panels have rejected the plain meaning of the term "priority," using it instead as a magic carpet to take SLAs to any destination they want. When agencies cannot rely on the plain meaning of the Act, it creates confusion in the statute's application. This, if anything, results in

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[57] *See* Opportunities for Ohioans with Disabilities v. U.S. Dep't of the Air Force, Wright-Patterson Air Force Base, No. R-S/16-08, at 9 (2018) (LeRoy, Arb.) (relying on *NISH v. Cohen* in holding that neither the FAR nor the Defense Federal Acquisition Regulations apply to Act procurements); S.C. Comm'n for the Blind v. U.S. Dep't of the Army, Nos. R-S/12-09, R-S/15-07, at 18–20 (2016) (Hudson, Arb.) (Gashel, S. concurring) (relying on the Competition in Contracting Act to argue that the FAR does not apply to Act procurements). *But see* Ill. Dep't of Hum. Servs., Div. of Rehab. Servs. v. U.S. Dep't of Energy-Fermi Nat'l Accelerator Lab'y, No. R-S/16-12, at 7 (LeRoy, Arb.) (holding that Department of Energy procurement regulations "do not apply to R-S Act procurements, insofar as they conflict with the regulations implementing the R-S Act"); N.J. Comm'n for the Blind & Visually Impaired v. Dep't of the Air Force, Joint Base McGuire-Dix-Lakehurst, No. R-S/15-19, at 12–13 (Weisenfeld, Arb.) (holding that the FAR and the Act did not contradict each other in that particular case).

[58] *Okla. Dep't of Rehab. Servs.*, No. RS/18-09, at 37.

[59] *See* discussion *supra* Section II.B.

[60] 34 C.F.R. § 395.33(b) (2021).

[61] *Id.*

more arbitration and litigation. A clear definition of "priority" and its application will mitigate confusion and time spent in arbitration.

III. "Operation": A Cafeteria by Any Other Name

Congress has left undefined the terms "operate" and "operation," which are key to understanding which cafeteria contracts the Act covers. Currently, the Act provides that blind vendors get priority in cafeteria contracts only if the contract is for the operation of a cafeteria.[62] That is, if a contract is for the operation of a cafeteria, the Act applies; if the contract is not for the operation of a cafeteria, the Act does not apply. Unfortunately, because "operation" is undefined, this tautology is wholly unhelpful in practice. Two general approaches have filled the void—one broad and one narrow. The broad approach has the effect of giving almost any contract having anything to do with a cafeteria to the SLA, effectively removing any agency discretion in the award of the contract. The narrow approach covers contracts where the contractor will exercise management or control over the cafeteria's operations, which allows contracting officers some measure of discretion in tailoring contracts to meet the agency's needs.

A. Broad Approach

The U.S. Court of Appeals for the Fifth Circuit has favored the broad approach. It held the terms "operate" and "operation" were ambiguous before determining that an expansive definition should apply on a case-by-case basis.[63] The Fifth Circuit case stems from a contracting officer's decision to solicit two contracts—one for limited services, including custodial and sanitation services for a cafeteria and another for full food services—where both contracts were historically solicited as the same cafeteria contract.[64] The question before the court was whether the first contract qualified as a contract for the "operation" of a cafeteria.[65] The court found the term "operate" ambiguous for two reasons. First, the statute does

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[62] *See* 20 U.S.C. §§ 107, 107d-3(e).
[63] Tex. Workforce Comm'n v. U.S. Dep't of Educ., Rehab. Servs. Admin., 973 F.3d 383, 386 (5th Cir. 2020).
[64] *Id.* at 385.
[65] *Id.*

not define the term.[66] Second, the court concluded that, even following a review of case law and multiple dictionary definitions, the definition could not be narrowed.[67]

Finding the term ambiguous, the court relied generally on the statute's overall purpose and specifically on a letter from the SecEd to a member of Congress to determine that, under the circumstances presented, the Act applied.[68] In examining the term in light of the Act's objective, the court concluded that a "broader reading of 'operate' which includes more than only executive-level functions would further the Act's purpose."[69] The court viewed the SecEd's assertion in her letter that the definition of "operate" did not require a "vendor to participate in every activity of the cafeteria in order to 'manage' or 'direct the working of' the cafeteria"[70] supported this end. However, the court explained that "operate" may not apply to contracts "which are limited to discrete tasks."[71] While the court's ruling was limited to this particular contract,[72] its approach brings almost any contract related to a cafeteria within the Act's purview. If custodial services—something reasonably viewed as ancillary to a cafeteria's operation and management—qualify as "operating" a cafeteria, it is difficult to see what would not qualify. This expansive view of the term "operate" was at odds with a narrower characterization coming, up until recently, out of the Fourth Circuit.

B. Narrow Approach

Conversely, the District Court for the Eastern District of Virginia took a narrower approach to "operate" and "operation."[73] The court relied on the "plain language of the [Act's] preference, the meaning of 'operate' in other parts of the [Act], and the regulations issued pursuant to the [Act]."[74] In doing so, the court stated that the "plain language of the [Act] makes clear

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[66] *Id.* at 386, 388.
[67] *Id.* at 386–89.
[68] *Id.* at 389–90.
[69] *Id.* at 389.
[70] *Id.* at 389–90.
[71] *Id.* at 390.
[72] *Id.* at 390–91.
[73] SourceAmerica v. U.S. Dep't of Educ., 368 F. Supp. 3d 974, 991–92 (E.D. Va. 2019), *aff'd in part, vacated in part sub nom.*, Kansas v. SourceAmerica, 826 F. App'x 272 (4th Cir. 2020).
[74] *Id.* at 992.

that its preference applies only where the vendor exercises control or management over the functioning of the vending facility as a whole."[75] The court added that "'[o]peration' requires control or management of the vending facilities. One cannot be said to operate something unless one is in some sense in charge; operation requires more than mere performance of assigned tasks."[76] This approach meant that the Act would not apply unless the SLA was actually managing the cafeteria or controlling its functions.

Until recently, the district court's narrow approach created a circuit split as to the definition of "operate." In September 2020, the Fourth Circuit weighed in on the Act by vacating the district court's opinion on grounds unrelated to the definition of "operate."[77] However, it did not address the meaning of the term.[78]

While the Fourth Circuit's decision resolved the circuit split for the time being, it did not obviate the need for a precise definition of "operate" and "operation." If anything, parties need greater clarity as to which contracts the Act applies now more than ever. Currently, Federal agencies, blind vendors, and SLAs are left with a term deemed ambiguous and court-provided direction for agencies to look at each contract individually and apply the "standard" correctly. Given the low threshold for initiating Act arbitration, without more clarity on the meaning of the terms "operate" and "operation," litigation will likely only increase.

IV. "Competitive Range": Starting to Get It Right—Not the Finish Line

The failure to define "competitive range" on its own or in relation to the Federal acquisition system is an oversight that confuses parties and makes it difficult for contracting officers to accomplish their mission. In Federal acquisition, competitive ranges are a tool for contracting officers to refine proposals in an effort to ensure the Government gets what it needs.[79] They provide an opportunity for agencies and contractors to identify and resolve significant weaknesses and deficiencies before contract award, alleviating

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[75] *Id.*
[76] *Id.*
[77] *SourceAmerica*, 826 F. App'x at 286–87.
[78] *Id.*
[79] *See* David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L. J. 509, 544–47 (2003) (discussing changes to the establishment of competitive ranges and discussions following the FAR Part 15 rewrite).

contract management issues that might otherwise arise during the life of a contract.[80]

A competitive range is by no means a finish line, though, as the competition among offerors continues into the competitive range.[81] Because it is not an end point, it makes no sense to use it as such whereby a Federal agency must award a contract to the SLA, especially when the SLA's proposal is rife with weaknesses and deficiencies that the SLA refuses to fix.

A 2016 Fort Stewart arbitration panel took this exact approach when it reviewed a contracting officer's decision to remove an SLA from the competitive range because, after discussions, the SLA failed to address its deficiencies.[82] In this case, the contracting officer received five proposals, including one from an SLA.[83] One determining factor in establishing a competitive range was that none of the five proposals was good enough for contract award; each proposal had weaknesses and deficiencies that the offeror needed to address.[84] The contracting officer sent letters outlining each offeror's deficiencies and requesting revised proposals.[85] The SLA's proposal had anywhere from thirty-two to sixty-six weaknesses and deficiencies.[86] The SLA addressed the deficiencies in a letter to the contracting officer but failed to revise its proposal.[87] Because of this, the contracting officer subsequently eliminated the SLA's proposal from the competitive range.[88] In response, the SLA requested arbitration to protest its elimination, and the DoEd convened a panel to determine if the "Army's

[80] FAR 15.306(d) (2020).
[81] Federal Acquisition Regulation; Part 15 Rewrite; Contracting by Negotiation and Competitive Range Determination, 62 Fed. Reg. 51224 (Sept. 30, 1997). Those who rewrote Part 15 explained that they wanted to make it clear to potential offerors that getting into the competitive range required them to continue "compet[ing] aggressively" and "those eliminated from the range [would be] spared the cost of pursuing an award they have little or no chance of winning." *Id.* at 51227.
[82] S.C. Comm'n for the Blind v. U.S. Dep't of the Army, Nos. R-S/12-09, R-S/15-07, at 10 (2016) (Hudson, Arb.).
[83] *Id.*
[84] *Id.* at 11.
[85] *Id.*
[86] *Id.* at 12. The parties debated the actual number at the hearing. *Id.*
[87] *Id.* at 11.
[88] *Id.*

failure to apply the priority to the solicitation was in violation of the Randolph-Sheppard Act."[89]

The panel concluded that "[a]t the point where the [contracting] officer found that the SLA proposal was within the competitive range, he was required to apply the Act's priority requirement."[90] In essence, even though the contracting officer included all offerors in the competitive range (because none of them were initially good enough for award), the panel determined that because the SLA was placed in the competitive range, it should have received the contract award. However, in Federal acquisition, a competitive range provides a tool for offerors to improve their proposals and a chance for contracting officers to winnow competition for reasons including efficiency.[91] A contracting officer even has the discretion to remove an offeror from the competitive range if the contracting officer "decides that an offeror's proposal should no longer be included in the competitive range."[92] The panel decision reinforces the incorrect notion that a competitive range is merely a finish line, and it flies in the face of the common understanding of a competitive range's purpose: to improve proposals and provide the best value to the Government.[93]

The DoEd previously attempted to formalize this "finish line" perspective in a manual it rescinded in 2017[94] and has not since replaced. Regardless, in a 2020 arbitration, the panel relied on the following passage from the rescinded manual to determine that the contracting officer should have placed the SLA within the competitive range so the contracting officer could examine the possibility of making the SLA's proposal acceptable.

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[89] *Id.* at 4. It is worth noting the DoEd's characterization of the central issue in the arbitration makes the determination at the outset, without any evidence or argument, that the Army failed to apply priority. This is incredibly problematic. Whether the Army failed was for the arbitration panel to resolve, not the DoEd to dictate. If the DoEd makes conclusions based on a complaint rather than evidence presented, it makes one wonder about the purpose of conducting arbitration at all.

[90] *Id.* at 15.

[91] FAR 15.306 (2022).

[92] *Id.* This determination takes place only after conducting discussions with offerors in the competitive range, but removal from the competitive range can occur even if the offeror has not had an opportunity to submit a revised proposal.

[93] *Id.*

[94] REHAB. SERVS. ADMIN., U.S. DEP'T OF EDUC., RSA-PD-17-01, RETIREMENT OF CERTAIN POLICY ISSUANCES (2017). Aside from a citation to the *Code of Federal Regulations* on the DoEd's Act website, there is no current policy guidance discussing DoEd's views on the competitive range. Reasonable questions can arise regarding the applicability of the rescinded guidance and the weight it should be afforded, but those are irrelevant because of its rescission.

> [T]he determining factor for judging whether a proposal [of the SLA] should be within the competitive range is if the offer can be made acceptable by conducting meaningful discussions. To be more specific, this should be interpreted as meaning whether the contracting officer is of the opinion that clarification, modification, or appropriate minor revision to the SLA proposal may result in the offer being fully acceptable. This judgment would be consistent with an action involving a commercial offeror under comparable circumstances. The proposal must be considered within the competitive range unless it is technically inferior or contains unduly high selling prices to patrons that the possibility of being made acceptable through meaningful negotiations is precluded.[95]

Essentially, an SLA's offer should be included in a competitive range after a determination that meaningful discussions can make it acceptable. As just demonstrated, there is no way for a contracting officer to know if discussions will make an SLA's offer acceptable. A contracting officer cannot know at the outset whether an SLA will revise its proposal once in the competitive range. Because of the very generous nature of the finish-line theory, though, SLAs continue to rely on this manual despite its rescission. The next paragraph requires agencies to award the contract to an SLA when it is within the competitive range.[96] However, reliance on this passage is problematic not only because it has been rescinded but also because it presupposes the establishment of a competitive range at all. Agencies are not required to establish competitive ranges under the Act or the FAR.[97] Award can still be made to an SLA (or any other offeror) in the absence of a competitive range.

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[95] Okla. Dep't of Rehab. Servs. v. U.S. Dep't of the Army, Fort Sill, No. RS/18-09, at 43 (2020) (Sellman, Arb.) (second alteration in original). The arbitration panel did not include in its opinion a citation to the manual, which is currently located in an online archive. *See* U.S. DEP'T OF EDUC., ADMINISTRATION OF THE RANDOLPH-SHEPPARD VENDING PROGRAM BY FEDERAL PROPERTY MANAGING AGENCIES (1988), https://archive.org/embed/in.ernet.dli.2015.157187.

[96] U.S. DEP'T OF EDUC., *supra* note 95, at 37.

[97] The DoEd regulations do not require the establishment of a competitive range. The regulatory requirement is to consult with the DoEd only if the SLA's proposal is within the competitive range and has been ranked among those proposals that have a reasonable chance of being selected for final award. *See* 34 C.F.R. § 395.33(b) (2021). Under the FAR, there is no requirement to establish a competitive range as long as agencies provide notice to potential offerors that award may be made without discussion. *See* FAR 15.306(a)(3) (2022).

The finish-line approach strains the common understanding of a competitive selection method and belies the purpose of the two selection methods the DoEd established. The term "competitive range" appears only when using a competitive selection method. It seems absurd for an agency to put together a competitive solicitation and review multiple offers if the agency must ultimately award the contract to the SLA once it "crosses the competitive range finish line." The agency may as well have entered into direct negotiations with the SLA rather than set up the ruse of getting several different small businesses' hopes up only to disappoint them because a potentially flawed SLA proposal made it into the competitive range. Defining what is otherwise a common term and its relation to the overall Federal acquisition process will reduce confusion and frustration for contracting officers trying to implement the Act and reduce arbitration and litigation.

V. Proposed Solutions: Mandatory Source or Room for Agency Discretion

Reform efforts should focus on the amount of discretion Congress wants agencies to exercise in making contracting decisions. The amount of discretion an agency's contracting officer exercises will inform how the terms are defined or whether they remain in the Act and its implementing regulations at all. If Congress wants to remove all discretion for contract award from contracting officers, making SLAs (and the blind vendors they represent) mandatory sources will accomplish this. If, on the other hand, Congress wants to balance the purpose of the Act with a contracting officer's traditional discretion, it can do so by clearly incorporating the Act into the overall Federal acquisition scheme. In any case, Congress should define the terms with an eye towards minimizing arbitration and improving implementation.

A. Mandatory Source: Simple and Straightforward—Reduced Agency Discretion

Establishing the Act as a mandatory source statute would simplify its implementation and remove much of the discretion an agency traditionally exercises. A mandatory source designation requires Federal agencies to

procure certain products or services from a particular source.[98] This is not a novel concept; Congress is familiar with mandatory sources. For example, it has statutorily designated as mandatory sources in the Federal acquisition system both Federal Prison Industries, Inc.[99] and the Committee for Purchase from People Who Are Blind or Severely Disabled pursuant to the JWOD Act.[100] These statutes differ from the Act in that they include "shall procure" language instead of the Act's "priority" language.[101] A mandatory source designation would require amending the Act to remove the priority language and insert language along the following lines: "**An entity of the Federal Government intending to procure services for the operation of a cafeteria shall procure the service from the state licensing agency of the state where the services will be performed.**"[102] With this requirement, there would be confusion about neither the meaning of "priority" nor how competitive range fits into an Act acquisition because there would be no competitive selection method. Making SLAs mandatory sources would also clarify the role of competitive ranges in cafeteria procurements. Simply put, because there would be no competition in the award of these contracts, there would be no need for a competitive range. Removing the agency's discretion in this way would reduce arbitration and litigation by eliminating confusion

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[98] FAR 8.002, 8.003 (2022); *cf.* FAR 8.004.

[99] *See* 18 U.S.C. § 4124.

[100] *See* 41 U.S.C. § 8504.

[101] For example, the JWOD Act states:

> An entity of the Federal Government intending to procure a product or service on the procurement list referred to in [41 U.S.C. § 8503] shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. § 8504. Congress requires Federal agencies to procure items from Federal Prison Industries, Inc. by stating the "several Federal departments and agencies and all other Government institutions of the United States shall purchase at not to exceed current market prices, such products of the industries authorized by [18 U.S.C. §§ 4121–4130] as meet their requirements and may be available." 18 U.S.C. § 4124(a). Compare this to the two instances of priority in the Act: "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," 20 U.S.C. § 107(b), and "[t]he Secretary, through the Commissioner, shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees," *id.* § 107d-3(e).

[102] This article's recommended legislative changes appear in bold typeface.

about who should get these contracts and how the contracts should be awarded.

One alternative for enacting the mandatory source approach is folding the Act's cafeteria contract aspects into the JWOD Act.[103] The JWOD Act requires contracting officers to purchase products or services identified on a procurement list from non-profit agencies organized for the benefit of the blind or severely disabled.[104] This would not be a significant shift because the JWOD Act procurement list already provides cafeteria services for many military installations and other Federal agencies.[105] Listing cafeteria services on the JWOD Act procurement list would maintain both economic opportunities for the blind and the mandatory source designation for cafeteria contracts.

One significant problem with the mandatory source solution is that once Congress makes that designation, it removes the incentives inherent in a competitive selection process to control prices and produce quality food. Once a vendor knows the agency has no recourse, there is no effective method to ensure prices remain reasonable, which can be a problem when agency budgets are tight. An engorged cafeteria budget diverts money from other agency priorities. Similarly, when freed from competition, the advantage in serving high quality food disappears. Under a mandatory source regime, there is little to encourage a vendor to rein in cost and produce quality food.

While a mandatory source regime would resolve priority and competitive range issues, the term "operate" would still be in play to the extent it is used to determine for which cafeteria contracts SLAs would serve as the mandatory source. If Congress intends to follow the broad approach

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[103] There is significant history between Act litigants and JWOD Act litigants. Perhaps the most recent altercation took place in the *SourceAmerica* litigation in the Fourth Circuit. SourceAmerica v. U.S. Dep't of Educ., 368 F. Supp. 3d 974, 991–92 (E.D. Va. 2019), *aff'd in part, vacated in part sub nom.*, Kansas v. SourceAmerica, 826 F. App'x 272 (4th Cir. 2020). The tension between the Act and the JWOD Act often results in beneficiaries of each act on opposite sides of cafeteria contract litigation. That history is beyond the scope of this article, though it does form some of the basis for this recommendation.

[104] *See* 41 U.S.C. § 8504.

[105] Congress authorized JWOD Act beneficiaries to operate cafeterias at some Federal installations in limited circumstances in 2006. *See SourceAmerica*, 368 F. Supp. 3d at 980–82 (briefly discussing the history of and interplay between the Act and the JWOD Act). A search of the JWOD Act procurement list for "food service" and "food" yields seventy-three results of food service contracts at different Federal agency locations. *Procurement List*, U.S. ABILITYONE COMM'N, https://www.abilityone.gov/procurement_list/index.html (Feb. 9, 2022).

outlined above, it should remove "services for the operation of a cafeteria" from the definition proposed above and replace it with "any cafeteria-related services," making clear that an agency must award any contract for cafeteria-related services to an SLA. However, if Congress intends to limit the types of cafeteria contracts to which the Act applies to preserve agency discretion, it should define "operate" in a way that is easy to understand and implement. For example, Congress could define "operation" and "operate" as, "**management or control over the cafeteria. Ordering food, writing a menu, preparing the food, and serving the food, when together, qualify as 'operating' a cafeteria. Services performed in a cafeteria or in relation to a cafeteria do not qualify as 'operating' or the 'operation' of a cafeteria unless the contract is also for the management function of the cafeteria. Custodial services, by themselves, do not qualify as 'operating' a cafeteria.**" This definition would make clear that "operate" means more than an ancillary activity like custodial services—it requires overall control of the cafeteria. Alternatively, "operation" and "operate" could be changed to "**manage and exert overall control over the cafeteria's operations.**" There may be greater understanding about what it means to manage something than there appears to be with operating a cafeteria. While these are not a cure-all for arbitration and litigation, they would help to offer clarity and create space for agency discretion in determining how to best meet its food service requirements.

B. Balanced Approach

A balanced approach can preserve the benefits the Act affords and those inherent in competition while also reducing Act arbitration and litigation. If Congress wants to preserve agencies' discretion to determine how to best satisfy cafeteria requirements at military installations, a nuanced approach is necessary. To maximize discretion while preserving the Act's benefits, Congress should define priority as a price preference, "operate" as a management function, and "competitive range" as it is in the FAR.

In most Federal acquisition programs designed to benefit a certain group, a contract is specifically designated, or set-aside, for that group in the solicitation.[106] The difficulty with defining priority as a set-aside for SLAs is that there is only one SLA in each state, so creating a set-aside approach would, in effect, make the SLA a mandatory source in that state. Defining

[106] FAR 6.2 (2022).

priority as a price preference, where either the SLA's price is adjusted downward by a certain percentage or the other offerors' prices are adjusted upward at the evaluation stage would mark a clearer reflection of congressional intent under these circumstances than the statute's current language. It would also give agencies the freedom to consider multiple factors (e.g., price, management plan, food quality) when soliciting a cafeteria contract. This is similar to the approach for HUBZone contracts.[107] This approach recognizes that an SLA might not be able to diffuse its overhead costs across many contracts like other contractors. This straightforward benchmark would reduce arbitration and litigation because it would be easier to determine if and how priority was applied in the contract selection process.

Similarly, defining "operate" and "operation" as providing management services for cafeterias would provide flexibility to the agency in determining its needs while preserving the benefit for the blind vendors on those contracts that would involve a management function. This approach does not prevent an agency from lumping all cafeteria-related services into the same contract, nor does it preclude contracting for ancillary services with non-SLA vendors outside of the auspices of the Act if agencies determine that is in their best interest. It does remove the inherent ambiguity in terms and encourage a common understanding among SLAs and agencies, thereby reducing the need to turn to arbitrators for a solution.

Finally, the implementing regulations should clearly state that the concept and definition of "competitive range" as implemented in the FAR govern in Act acquisitions. There is no compelling reason to have one term mean two things in the same area of the law. This approach requires an agency to consult with SecEd only if the SLA's proposal is both within a competitive range and among those that have a reasonable chance of selection for final award. If, after being included in a competitive range, an SLA's proposal still has weaknesses and deficiencies such that it is not ranked among those proposals that have a reasonable chance of final award selection, the agency may award to a different offeror without having to seek SecEd's approval. Not only will this reduce the administrative burden of coordinating with another Federal agency to award what should be a relatively straightforward contract, but it will also reduce arbitration and litigation because agencies will no longer have to guess at what meaning

[107] *See* 15 U.S.C. § 657a; FAR 52.219-4.

an arbitration panel will give "competitive range." Instead, its meaning will be clearly outlined in the FAR.

VI. Conclusion

Because most military installations have cafeterias, the Act has a significant impact across the DoD. Disagreements about the meanings of key terms in the Act and its implementing regulations can lead to lengthy arbitration and litigation. Congress can clarify the process for awarding cafeteria-related contracts for all parties by defining these key terms in the following ways: "priority" as a price preference, "operate" as a management function, and "competitive range" as defined in the FAR. While differences may remain about other aspects of the Act, making the recommended changes will go a long way to freeing valuable time and resources for agencies, SLAs, and blind vendors. These changes will ensure all parties are on the same page with regard to these key terms, which will reduce confusion about implementation and minimize the time and money spent in arbitration and litigation.

Appendix: Average Arbitration Timeline

Case[109]	Hearing Requested	Hearing Date	Decision Date	Days from Hearing Request to Decision	Days from Hearing to Decision
R-S/10-07	N/A[110]	7 Jan. 12	13 May 13	N/A	492
R/S 13-09	20 May 14	14 July 15	11 Jan. 16	601	181
R-S/15-10	3 Feb. 15	27 July 16	23 Dec. 16	689	149
R-S/13-13	N/A	19 July 16	2 Nov. 16	N/A	106
R-S/15-07	13 Jan. 15	4 May 16	2 Sept. 16	598	121
RS/15-15	7 May 15	20 Jan. 17	9 May 17	733	109
R-S/15-13	24 Apr. 15	15 Nov. 16	2 Feb. 17	650	79
R-S/16-09	9 May 16	13 Dec. 16	28 Feb. 17	295	77
R-S/16-07	1 Apr. 16	9 Feb. 17	31 July 17	486	172
R-S/16-04	15 Mar. 17	17 Oct. 17	30 Jan. 18	321	105
R-S/16-08	16 Apr. 16	29 Nov. 17	22 Feb. 18	677	85
R-S/15-19	18 Aug. 15	10 Jan. 18	24 Apr. 18	980	104
R/S 15-20	24 Aug. 15	3 May 18	8 Oct. 18	1,141	158
R-S/16-13	7 Dec. 16	27 Jan. 19	1 May 19	875	94
R-S/17-03	31 Mar. 17	9 Jan. 19	13 June 19	804	155
R-S/16-12	14 Sept. 16	13 Nov. 19	30 Apr. 20	1,324	169
RS/18-09	19 Apr. 18	14 Jan. 20	22 June 20	795	160

[109] Any inconsistencies in arbitration designations are a product of panels' naming conventions.
[110] "N/A" indicates that the information was not available.

Congress has required the DoEd to publish arbitration panel decisions on its website,[111] which it has done since 2013. This table covers only those cases between an SLA and a Federal agency; it does not include arbitrations between a blind vendor and an SLA. The average number of days between the arbitration hearing request and the actual hearing was 685.6 days. The average number of days between the hearing date and the decision's publication was 140 days. Thirteen arbitrations took longer than 100 days from the hearing to produce a decision. Four took less than 100 days, but the shortest period from filing to decision in those cases took 295 days; the longest took 875 days, with the other 2 taking 650 days and 677 days. The cases were still incredibly long when compared to the time it takes to get a decision on a protest from either the Government Accountability Office or the Court of Federal Claims. From filing to decision, the arbitration cases take much longer than the mandatory maximum of 100 days at a Government Accountability Office protest[112] or the average 133 days from filing to decision at the Court of Federal Claims.[113]

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[111] 20 U.S.C. § 107d-2(c). The decisions are available on the DoEd's website. *Decisions of Arbitration Panels*, U.S. DEP'T OF EDUC. (May 28, 2021), https://www2.ed.gov/programs/rsarsp/arbitration-decisions.html. There are at least four other cases of which the author is aware that have not yet been posted on the Department of Education's website at the time of writing.

[112] 4 C.F.R. § 21.9 (2021).

[113] MARK V. ARENA ET AL., RAND CORP., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS: IDENTIFYING ISSUES, TRENDS, AND DRIVERS 54 (2018).