The Applicability of the Randolph-Sheppard Act to Military Mess Halls

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I can see clearly now the [competition's] gone. I can see all obstacles in my way.[1]

Introduction

The Randolph-Sheppard Act for the Blind (RSA),[2] enacted in 1936, provides blind vendors with a preference for certain federal contracts. Since 1936, Congress has amended the Act several times to strengthen consideration for blind vendors, most importantly in 1974.[3] Recent decisions at the federal district and appellate levels interpreting the RSA in light of the 1974 amendments have further expanded the Act's reach.[4] One such expansion, the application of the Act to military mess hall contracts, has sparked significant controversy, in part, because the blind vendor preference directly conflicts with other procurement preference programs.[5]

This article surveys the current controversy over military mess halls under the RSA. It begins with a brief history of the Act, to include the 1974 amendments that expanded the RSA to include "cafeterias" on "federal property."[6] Next, the article addresses three areas of litigation concerning military mess hall contracts arising from the 1974 amendments. The first area involves whether the RSA applies to military mess halls at all. It discusses agency interpretations and implementation of the 1974 RSA amendments, which read "mess halls" into the RSA's definition of "cafeteria," and the resultant federal cases, *NISH v. Cohen*[7] and *NISH v. Rumsfeld*.[8] The second area of litigation concerns the relationship of the blind vendor priority to other procurement preference programs, including the Javits Wagner O'Day Act,[9] the Historically Underutilized Business Zone (HUBZone) Act,[10] and small business set-asides, as exemplified by *In re Intermark*[11] and *Automated Communications Systems, Inc. v. United States*.[12] The third area of litigation explores the scope of the blind vendor preference. It discusses aspects of competitive range determination, as in *Oklahoma v. Oklahoma Department of Rehabilitative Services*,[13] and the discretion accorded a contracting officer's determination of the applicability of the RSA, analyzed in *Washington State Department of Services for the Blind* (*WSDSB*) *v. United States*.[14] The article concludes with a cursory discussion of future mess hall litigation in light of these federal opinions and the National Defense Authorization Act for Fiscal Year 2004.[15]

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1. JOHNNY NASH, I CAN SEE CLEARLY NOW, *on* I CAN SEE CLEARLY NOW (Sony 1972).
2. 20 U.S.C. §§ 107-107f (2000).
3. *See generally* Randolph-Sheppard Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1622.
4. *See, e.g.*, NISH v. Cohen, 95 F. Supp. 2d 497 (E.D. Va. 2000), *aff'd*, 247 F.3d 197 (4th Cir. 2001).
5. *See, e.g., id.* at 498 (illustrating conflict with the Javits Wagner O'Day Act).
6. Randolph-Sheppard Act Amendments of 1974, §§ 202, 207, 88 Stat. at 1623, 29.
7. 95 F. Supp. 2d 497 (E.D. Va. 2000), *aff'd*, 247 F.3d 197 (4th Cir. 2001).
8. 188 F. Supp. 2d 1321 (D.N.M. 2002).
9. 41 U.S.C. §§ 46-48c (2000).
10. 15 U.S.C. §§ 631-650.
11. B-290925, 2002 Comp. Gen. LEXIS 167 (Oct. 23, 2002).
12. 49 Fed. Cl. 570 (2001).
13. 1998 U.S. Dist. LEXIS 23041 (W.D. Okla. Jan. 7, 1998).
14. 2003 U.S. Claims LEXIS 381 (Fed. Cl. Dec. 17, 2003).
15. H.R. 1588, 108th Cong. (2003) (enacted).

History of the Randolph-Sheppard Act

Congress enacted the RSA in 1936 to "provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting."[16] To that end, the Act authorized blind vendors to operate vending stands in federal buildings.[17] Due in part to the authority the Act bestowed on agency officials to approve blind vendors' operations,[18] the 1936 Act met with limited success.

Spurred by the "invention of vending machines," Congress reexamined the RSA in 1954.[19] Although the amendments "showed concern for expanding the opportunities of the blind,"[20] such as applying the RSA to federal *properties* (previously *buildings*), the Act maintained discretion with agency officials to implement the Act's provisions "so far as feasible."[21] Consequently, "[in] reality [the 1954 amendments] fell far short of [c]ongressional intent to expand the blind vendor program."[22]

In 1974, Congress again addressed the lack of impetus for the program,[23] responding with amendments that (1) secured the priority of blind vendors on federal properties; and (2) expanded the scope of blind vendor opportunities.[24] The 1974 amendments established a federal-state relationship that effectively replaced the previous "so far as feasible" preference.[25] The amendments mandated the Department of Education (DOE), through the Commissioner of Rehabilitative Services Administration (CRSA), to publish regulations ensuring the *priority* of blind vendors in the "operation of vending facilities on [f]ederal property."[26] The amendments require State Licensing Agencies (SLAs), through their respective chief executives, to "give preference to blind persons who are in need of employment"[27] and to "cooperate with the [CRSA] in carrying out the purpose of the [RSA]."[28]

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16. Act of June 20, 1936, Pub. L. No. 74-732, § 1, 49 Stat. 1559.

17. *Id.*

18. *See id.*

19. Contract & Fiscal Law Dep't, The Judge Advocate General's School & Legal Center, U.S. Army, 52d Graduate Course Contract Law Deskbook 10-25 (Fall 2003) [hereinafter Contract Law Deskbook] (construing Act of Aug. 3, 1954, Pub. L. No. 83-565, 68 Stat. 663).

20. *Id.*

21. Act of Aug. 3, 1954, § 4, 68 Stat. at 663.

22. Contract Law Deskbook, *supra* note 19, at 10-26. *See also* Randolph-Sheppard Act Amendments of 1974, Pub. L. No. 93-516, § 201(1), 88 Stat. 1622 ("[T]he [blind vendor] program has not developed, and has not been sustained, in the manner and spirit in which the Congress intended at the time of the [RSA's] enactment.").

23. *See generally* Review of Vending Operations on Federally Controlled Property, Comp. Gen. No. B-176886, Sept. 27, 1993, *cited in* Contract Law Deskbook, *supra* note 19, at 10-27.

24. *See* Randolph-Sheppard Act Amendments of 1974, § 202, 88 Stat. at 1623.

25. *See id*. § 203, 88 Stat. at 1623-24 (codified as amended at 20 U.S.C. § 107a (2000)).

26. *Id*. § 202, 88 Stat. at 1623 (codified as amended at 20 U.S.C. § 107(b)).

27. 20 U.S.C. § 107a(b).

28. *Id.* § 107b(1). The 1974 RSA amendments outline how the SLAs get involved in giving priority to blind vendors on federal property. The Act states that "in authorizing the operation of vending facilities on [f]ederal property, priority shall be given to blind persons licensed by a [s]tate agency." *Id.* The Act then directs the Secretary of Education to designate an SLA in each state. "These SLAs license blind persons for the operation of vending facilities on federal property. In issuing licenses, the SLAs are required to give preference to blind persons who need employment." *Id.* §§ 107a(a)(5), (b)(2), *cited in* North Carolina Div. of Servs. for the Blind v. United States, 53 Fed. Cl. 147, 150 (2002). The regulations promulgated by the DOE under the Act then invite the SLAs to respond to solicitations for cafeteria operation contracts:

> [T]o establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and . . . quality . . . the appropriate [SLA] shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate . . . agency.

34 C.F.R. § 395.33 (LEXIS 2004).

In addition to strengthening the blind vendor preference, the 1974 amendments expanded the scope of the RSA to include management functions previously considered beyond blind vendor capabilities.[29] This extension included the addition of the operation of cafeterias to the RSA's list of covered "vending facilities."[30] Unfortunately, the 1974 RSA amendments did not define cafeteria, providing an ambiguity as to whether Congress intended military mess halls to fall within the RSA's ambit.

Military Mess Hall Contract Litigation Stemming from the 1974 RSA Amendments

The 1974 amendment's undefined term "cafeteria" and concomitant strengthening of priority for blind vendors has resulted in litigation of military mess hall contracts on several fronts: (1) whether the RSA applies to military mess halls at all;[31] (2) the interrelationship of the RSA preference to other set-aside programs;[32] and (3) the discretion of an agency when administering the RSA preference.[33] The following sections address these areas of litigation.

Application of the RSA to Military Mess Halls

Agency Interpretation and Implementation

As discussed above, the RSA is silent on the definition of the term "cafeteria." The Departments of Education and Defense, however, did define cafeteria in their respective regulations promulgated to implement the RSA's provisions. Both Departments provide a "standard" definition of cafeteria, but neither definition expressly includes or excludes military mess halls.[34]

Given this statutory and regulatory background, in 1993 the Comptroller General, in *U.S. Department of the Air Force—Reconsideration* (*Keesler*),[35] determined that the Air Force properly applied the RSA to a contract for full food services at Keesler Air Force Base. Contractors KCA and Triple P Services protested the solicitation, in part, because "the [RSA] statute and [DOE's] implementing regulations . . . apply only to cafeteria operations, not food services at military dining halls such as the services required [by the Keesler solicitation]."[36] Further, the protestors argued that even if the procurement fell within the DOE's definition of cafeteria, provisions of *Department of Defense* (*DOD*) *Directive 1125.3*, *Vending Facility Pro-*

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29. *See* Randolph-Sheppard Act Amendments of 1974, § 202, 88 Stat. at 1623; U.S. Dep't of Air Force–Reconsideration, B-250465.6, B-250465.7, B-250783.2, 1993 U.S. Comp. Gen. LEXIS 530, at *16-17 (June 4, 1993) (citing S. REP. NO. 937, at 25 (1974)).

30. *See* 20 U.S.C. § 107e(7). The RSA defines "vending facilities," in full, to mean

> automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary [of Education] may by regulation prescribe as being necessary for the sale of the articles or services described in [20 U.S.C. § 107a(a)(5)] and which may be operated by blind licensees[.]

Id.

31. *See, e.g.*, NISH v. Rumsfeld, 188 F. Supp. 2d 1321 (D.N.M. 2002), *aff'd*, 2003 U.S. App. LEXIS 23290 (10th Cir. Nov. 14, 2003); NISH v. Cohen, 95 F. Supp. 2d 497 (E.D. Va. 2000), *aff'd*, 247 F.3d 197 (4th Cir. 2001); *U.S. Dep't of Air Force—Reconsideration*, 1993 U.S. Comp. Gen. LEXIS 530, at *16-17.

32. *See, e.g.*, Automated Communications Sys., Inc. v. United States, 49 Fed. Cl. 570 (2001); *In re* Intermark, Inc., B-290925, 2002 Comp. Gen. LEXIS 167 (Oct. 23, 2002); *U.S. Dep't of Air Force—Reconsideration*, 1993 U.S. Comp. Gen. LEXIS 530.

33. *See, e.g.*, Southfork Sys. v. United States, 141 F.3d 1124 (Fed. Cir. 1998); Oklahoma v. Oklahoma Dep't of Rehabilitative Servs., 1998 U.S. Dist. LEXIS 23041 (W.D. Okla. Jan. 7, 1998); Washington State Dep't of Servs. for the Blind v. United States, 2003 U.S. Claims LEXIS 381 (Fed. Cl. Dec. 17, 2003); *North Carolina Div. of Servs. for the Blind*, 53 Fed. Cl. at 147.

34. *See* 34 C.F.R. § 395.1(d) (LEXIS 2004) (DOE); 32 C.F.R. subpt. 260.6 (LEXIS 2004) (DOD). The DOE definition provides:

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

34 C.F.R. § 395.1(d). The DOD adopts the DOE definition virtually verbatim, then adds the following sentence: "DoD Component food dispensing facilities which conduct cafeteria-type operations during part of their normal operating day and full table-service operations during the remainder of their normal operating day are not 'cafeterias' if they engage primarily in full table-service operations." 32 C.F.R. subpt. 260.6. The DOD uses this same definition for cafeteria in its directive. *See* U.S. DEP'T OF DEFENSE, DIR. 1125.3, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY para. E1.1.1 (7 Apr. 1978) (C1 22 Aug. 1991) [hereinafter DOD DIR. 1125.3].

35. B-250465.6, B-250465.7, B-250783.2, 1993 U.S. Comp. Gen. LEXIS 530 (June 4, 1993).

36. *Id.* at *3. The Air Force initially solicited the contract as an 8(a) small business set-aside. KCA and Triple P, two 8(a) eligible firms, submitted bids by the original bid closing date. Subsequent to bid closing, the Air Force cancelled the original solicitation, re-soliciting the contract on an "unrestricted basis to comply with the [RSA]." *Id*. In addition to their position that the RSA did not apply to the procurement, KCA and Triple P also protested the subservience of the 8(a) program to the RSA. *Id*. This article discusses that aspect of the protest *infra* notes 100-12 and accompanying text.

gram for the Blind on Federal Property,[37] exclude "open messes and military clubs which engage primarily in full table-service operations."[38]

The Comptroller General denied the protest. First, he dismissed the protesters' narrow interpretation of the DOE regulations' definition of criteria. The Comptroller General opined that the DOE's definition of cafeteria, which focuses on the "salient characteristics of such a facility," logically encompassed the services the protesters argued the definition did not cover.[39] Second, upon review of the plain meaning of the RSA, the Act's legislative history, agency regulations, *DOD Directive 1125.3*, and DOD interpretations of its regulations, the Comptroller General determined that nothing in these sources precluded the application of the RSA to the Keesler dining hall procurement.[40] Both the agency charged with the implementation of the RSA program, DOE,[41] and the DOD General Counsel[42] agreed with the Comptroller General's interpretation.

Federal Court Decisions

NISH v. Cohen (NISH I)[43]

Relying on the above agency regulations, DOD directive, and agency head interpretations, a contracting officer at Fort Lee, Virginia, imposed an RSA preference on a military mess hall contract in 1997. The National Institute for the Severely Handicapped (NISH) sued, giving rise to the seminal RSA military mess hall case, *NISH v. Cohen*.[44]

NISH protested that the RSA did not apply to the Fort Lee mess hall procurement on two primary grounds. First, similar to the protester in *Keesler*, NISH argued that appropriated fund military mess halls do not fall within the RSA's definition of "normal" cafeterias. NISH argued that vending facilities, as defined by the RSA, require a point of sale transaction, an ability to set prices, or both.[45] Second, even if mess halls fall within the RSA definition of cafeteria, NISH argued that the RSA is inapplicable to the Fort Lee procurement because the RSA is not a procurement statute. Therefore, setting an RSA preference violates the full and open competition requirements of the Competition in Contracting Act (CICA).[46] Similarly, because the relevant provisions of the Federal Acquisition Regulation (FAR) omit mention of the RSA preference, NISH argued that the RSA is also not exempt from the FAR.[47]

On 25 April 2000, the District Court for the Eastern District of Virginia (EDVA) granted the defendants' (DOE and DOD) cross-motion for summary judgment. The district court determined that the *Chevron* analysis applied to NISH's claims:

> Where a statute is silent or ambiguous regarding a specific issue, a reviewing court considers whether the agency's interpretation is based on a permissible construction of the

37. DOD DIR. 1125.3, *supra* note 34.

38. *U.S. Dep't of Air Force—Reconsideration*, 1993 U.S. Comp. Gen. LEXIS 530, at *11. The protesters also argued that the DOE's regulations, which require the blind vendor to provide the services at a "'comparable cost,' impl[y] that the regulations were intended to apply only where the contractor will have discretion with regard to the cost of food and services." *Id.* at *10 (quoting 34 C.F.R. § 395.33(b)). The protesters argued that the contractor will not have such discretion because the Keesler dining hall caters primarily to customers who purchase meals on a "subsistence-in-kind . . . non-cash basis." *Id.* The Comptroller General quickly dismissed this argument, finding that "reasonable cost" in the regulations refers to the examination of proposals, not the examination of cash prices charged at the facility. *Id.* at *14-15.

39. *Id.* at *11-13.

40. *Id.* at *15-23.

41. Memorandum, Frederick K. Schroeder, Commission of Rehabilitative Services Administration, to the Committee for Purchase (Aug. 14, 1997), *quoted in* NISH v. Cohen, 95 F. Supp. 2d 497, 504 (E.D. Va. 2000) (NISH I) (DOE position).

42. Memorandum, Judith A. Miller, Department of Defense General Counsel, to General Counsels of the Military Departments 4 (Nov. 12, 1998), *quoted in NISH I*, 95 F. Supp. 2d at 504 (DOD position).

43. *NISH I*, 95 F. Supp. 2d at 497, *aff'd*, 247 F.3d 197 (4th Cir. 2001) (NISH II).

44. *Id.* Absent an RSA preference, the dining facility contract award would have been a JWOD procurement. NISH, as the statutory JWOD advocate, therefore challenged the contracting officer's decision to impose an RSA preference. *NISH II*, 247 F.3d at 199 (citing 41 C.F.R. § 51-3.1 (LEXIS 2004)). This articles discusses *NISH*'s treatment of the RSA preference in relation to the JWOD program *infra* notes 82-85 and accompanying text.

45. *NISH II*, 95 F. Supp. at 203.

46. *Id.* at 203-04 (citing the Competition in Contracting Act, 10 U.S.C. § 2304(a)(1) (2000)).

47. *NISH I*, 95 F. Supp. 2d at 504 (citing GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 6.302(b) (July 2003) [hereinafter FAR]). The FAR states that it does not apply "when statutes, such as the following, expressly authorize or require that acquisition be made from a specified source or through another agency." *Id.* at 6.302-5(b). The FAR does not explicitly list the RSA as exempt from the FAR. *See id.* NISH argued this omission meant that the RSA was not exempt from the FAR. *NISH I*, 95 F. Supp. 2d at 504. As discussed *infra* text accompanying notes 56-57, the court opined that the FAR's use of the term "such as the following" clearly indicated that the list of statutes explicitly exempted from the FAR was non-exclusive.

> statute. Accordingly, the agency's interpretation of the statute is afforded great deference by the courts and need not be the very best interpretation—so long as it is reasonable.[48]

Accordingly, the court held that the contracting officer did not act unreasonably when he applied an RSA preference to the dining facility contract.[49] Regarding the definition of cafeteria, "the [c]ourt held that, as a matter of law, addition of the term 'cafeteria' to the [RSA], when viewed in conjunction with corresponding regulations and available case law, supports the [RSA's] coverage of the military mess hall services at Fort Lee, Virginia."[50] The court found that the RSA did not violate the CICA's requirements,[51] but did not specifically address NISH's argument as to what qualified the RSA as a procurement statute.[52]

Reviewing the case de novo in 2001, the Court of Appeals for the Fourth Circuit, relying on the same authority as the district court, affirmed the lower court's grant of summary judgment for the government. Significantly, the Fourth Circuit also answered the question left unanswered by the EDVA, finding that the RSA was a procurement statute within the CICA's broad definition of procurement.[53]

NISH argued that 10 U.S.C. § 2304(a)(1)'s exception to full and open competition for "procurement procedures expressly authorized by statute" applied only to statutory procurement procedures.[54] The Fourth Circuit disagreed, determining that the CICA "broadly defines 'procurement' as including 'all stages of the process for determining a need for property or services and ending with contract completion and closeout,'" and that the RSA provisions "clearly fit this sweeping definition."[55] The Fourth Circuit responded similarly to NISH's claim regarding the applicability of the FAR to the RSA. NISH argued that the FAR's lack of explicit reference to the RSA was evidence that "the [RSA] does not involve government purchases of goods or services."[56] The Fourth Circuit dismissed this claim, determining that the FAR's saving clause at section 6.302-5(b)—"such as the following"—clearly encompassed the RSA.[57]

NISH v. Rumsfeld (Rumsfeld I)[58]

On facts "virtually identical" to *NISH v. Cohen*,[59] NISH sued the government in 2002 for awarding the mess hall contract at Kirtland Air Force Base under the RSA. In *NISH v. Rumsfeld*, NISH raised essentially the same arguments it raised in *Cohen*, and it met with the same results. The District Court for the District of New Mexico granted the defendant's motion for summary judgment.[60] In 2003, the Court of Appeals for the Tenth Circuit affirmed.[61]

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48. *NISH I*, 95 F. Supp. at 500 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

49. *Id.* at 505.

50. *Id.* at 499 (referring to the above-mentioned persuasive authority, *supra* notes 40-42 and accompanying text, and the Comptroller General's decision in *Keesler*).

51. *See id.* at 503-04.

52. Major John Siemietkowski et al., *2000 Contract Year in Review*, ARMY LAW., Jan. 2001, at 92-93. NISH based its argument on 10 U.S.C. § 2304(a)(1) (West 1998), which states in part, "[E]xcept in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conduction of a procurement for property or services . . . shall obtain full and open competition . . . ." *Id.* NISH further argued that the Fort Lee procurement violated 10 U.S.C. § 2304(k)(2) of the CICA, which states conditions under which provisions of law may be construed as "requiring a new contract to be awarded to a specified non-[f]ederal [g]overnment entity." *Id.* § 2304(k)(2). The District Court for EDVA found that § 2304(k)(2) was inapplicable to the RSA, but did not address § 2304(a)(1). *See NISH I*, 95 F. Supp. 2d at 503-04.

53. NISH II, 247 F.3d 197, 204 (4th Cir. 2001).

54. *Id.* (quoting 10 U.S.C. § 2304(a)(1)).

55. *Id.* (quoting 10 U.S.C. § 2302(3)(A)).

56. *Id.* at 204 n.7. The court noted that the adoption of a contrary position, "that the [RSA] is not a procurement statute pursuant to CICA[,] would require a misreading and misapplication of both statutes." *Id.* In other words, NISH's rationale would undermine the DOE's mandate to enforce the blind vendor provision as envisioned by the RSA.

57. *Id.* (quoting FAR, *supra* note 47, at 6.302-5(b) (1998)). *See supra* note 47.

58. 188 F. Supp. 2d 1321 (D.N.M. 2002), *aff'd*, 2003 U.S. App. LEXIS 23290 (10th Cir. Nov. 14, 2003) (Rumsfeld II).

59. *Id.* at 1326 n.7. Similar to *NISH v. Cohen*, *NISH v. Rumsfeld* also discusses the interrelationship of the RSA preference in relation to the JWOD program. *See* NISH I, 95 F. Supp. 2d 497 (E.D. Va. 2000), *aff'd*, 247 F.3d 197 (4th Cir. 2001). That aspect of these cases is discussed *infra* notes 79-86.

60. *Rumsfeld I*, 188 F. Supp. 2d at 1321.

61. *Rumsfeld II*, 2003 U.S. App. LEXIS 23290, at *4.

Although the New Mexico district court reached the same results as *NISH v. Cohen*, its logic differs. As in *Cohen*, NISH raised two primary arguments in *Rumsfeld* regarding the applicability of the RSA to military mess halls: (1) that the agency is not entitled to deference, therefore, nothing supports reading mess halls into the term cafeteria; and (2) even if mess halls fall within the definition of cafeteria, the RSA does not apply to the procurement because the RSA is not a procurement statute such that it qualifies as an exception to the CICA's requirement for full and open competition.[62]

In dismissing NISH's arguments, the New Mexico district court began its analysis on the same path as *Cohen*: it determined that the issue concerns an ambiguous statute, thus the correct standard of review for the agency action is *Chevron* deference.[63] When determining whether the agency acted reasonably, however, the *Rumsfeld* district court veered from *Cohen*. In *Cohen*, the district and appellate courts assessed the agency's reasonableness by examining the DOE and DOD RSA regulations and the authorities the agency considered in determining that the RSA applied to the procurement.[64] The New Mexico district court, in contrast, assessed agency reasonableness by looking at "the plain language of CICA and the definition of 'procurement' that applies to military procurement contracts."[65] In other words, the district court conflated NISH's two distinct arguments.

On appeal, the Tenth Circuit bifurcated NISH's arguments, as per *NISH v. Cohen*. Regarding the applicability of the CICA to the RSA, NISH renewed its argument that the "authorization of vending facilities on federal property is not 'procurement' because it does not involve the acquisition of properties or services."[66] The *Rumsfeld* court refused to adopt NISH's narrow definition. Instead, the court adopted the Fourth Circuit's analysis, determining that the CICA broadly defined procurement such that this term encompassed the provisions of the RSA.[67]

Regarding its contention that the agency is not entitled to *Chevron* deference, however, NISH raised several novel arguments on appeal. First, NISH contended that the district court failed to establish the first prong of the *Chevron* test, which requires establishing whether the statute evidences a clear congressional intent. NISH argued that the statute clearly expresses Congress's intent that the RSA definition of vending facility only include "places where a private individual runs a business selling food and services to the public for profit," thus excluding military mess halls.[68] The Tenth Circuit rejected this argument, finding that NISH failed to demonstrate that Congress's true intent differed from "that expressed in the plain meaning of the statute."[69] Second, NISH argued that *Chevron* deference requires a "[clear] textual commitment of authority" and that "the [RSA] does not grant the DOE authority to regulate military mess halls."[70] The court dismissed this argument, stating that it "did not believe the ramifications of bringing military mess halls within the purview of the [RSA] are so apparent that [the court] may impute to Congress an intention not to delegate this authority."[71]

The Relationship of the Blind Vendor Preference to Other Preferences

In addition to challenging the RSA's application to military mess halls, protesters have argued that even if the RSA does apply to such procurements, other set-aside programs have priority over the RSA preference. This section discusses litigation regarding the interrelationship of the RSA preference to the Javits Wagner O'Day Act (JWOD);[72] the Historically Underutilized Business Zone (HUBZone) Act;[73] the Small

62. *Id.* at *3.

63. *Rumsfeld I*, 188 F. Supp. 2d at 1324.

64. *NISH I*, 95 F. Supp. 2d at 505 (E.D. Va. 2000); NISH II, 247 F.3d 197, 202-06 (4th Cir. 2001).

65. *Rumsfeld I*, 188 F. Supp. 2d at 1327.

66. *Rumsfeld II*, 2003 U.S. App. LEXIS 23290, at *25. Essentially, NISH tried to parse the statutory definition of "procurement" according to the entity that ultimately receives the goods or services. NISH argued that "vending facilities provide goods and services to the general public, not to the federal government," *id.*; therefore, the government's contract for vending facilities was not an *acquisition* of goods and services.

67. *Id*. at *26-27 (citing *NISH II*, 247 F.3d at 204 (4th Cir. 2001)).

68. *Id*. at *10-11. Comically, to reach this "clear" expression of congressional intent, NISH implored the court to employ the relatively obscure Latin canons of construction *ejusdem generis* and *noscitur a sociis*. *See id*.; *see also* BLACK'S LAW DICTIONARY 535, 1084 (7th ed. 1999) (defining *ejusdem generis* as Latin for "of the same kind or class" and *noscitur a sociis* as Latin for "it is known by its associates").

69. *Rumsfeld II*, 2003 U.S. App. LEXIS 23290, at *14.

70. *Id.* at *17 (quoting Whitman v. American Trucking, 531 U.S. 457 (2001)).

71. *Id.* at *18.

72. 41 U.S.C. §§ 46-48c (2000).

Business preference; and the Small Disadvantaged Business 8(a) set-aside program.[74] As discussed below, the courts have interpreted the RSA to take precedence over all of these preferences.

Javits Wagner O'Day Act

The JWOD was enacted in 1971 to "provide training and employment opportunities for persons who are blind or have severe disabilities."[75] Under the Act, a committee representing JWOD interests annually publishes a procurement list that "consist[s] of commodities and services that it considers suitable for purchase by the government from qualified nonprofit agencies for the blind and disabled."[76] In general, the JWOD establishes the committee's list as a mandatory procurement source for the federal government.[77] Although both the JWOD and the RSA serve as preferences for the blind, the JWOD focuses on providing the blind and disabled with a "'sheltered' environment" to work, whereas the RSA extends to managerial opportunities.[78]

The *Code of Federal Regulations* designates NISH as the advocate for JWOD interests.[79] In *NISH v. Cohen*, although the mess hall replacement contract at Fort Lee was not yet on the JWOD procurement list, NISH "expressed interest" on behalf of certain non-profit agencies.[80] In *NISH v. Rumsfeld*, the services at the Kirtland dining hall had been on the JWOD procurement list and performed by JWOD contractors for several years.[81] Both cases required reconciliation of the two preferences.

In *NISH v. Cohen*, NISH argued that the JWOD applied to the procurement because the JWOD was an express exception to the CICA's full and open competition requirements, whereas the RSA was not. As discussed previously, this argument failed because the Fourth Circuit adopted a broad definition of procurement that encompassed the RSA.[82] The court, however, discussed the JWOD "absent the limitations imposed by the CICA."[83] The court recognized that both the RSA and JWOD applied to the procurement, but the RSA controlled because "[it] is a 'specific statute closely applicable to the substance of the controversy at hand'": the operation of cafeterias.[84] In comparison, "the JWOD Act is a general procurement statute."[85]

In *NISH v. Rumsfeld*, the Tenth Circuit adopted the Fourth Circuit's rationale. Although the Tenth Circuit recognized that the RSA and JWOD could co-exist under limited circumstances, the court determined it must decide which Act took

73. 15 U.S.C. § 632.

74. *See* 13 C.F.R. § 121.105(a) (LEXIS 2004).

75. NISH II, 247 F.3d 197, 201 (4th Cir. 2001) (citing Barrier Indus. v. Eckard, 584 F.2d 1074, 1076 (D.C. Cir. 1978)).

76. *Id.* (citing 41 U.S.C. § 47(a)(1)).

77. *Id.* (citing 41 U.S.C. § 47(d)).

78. *Id*. In a nutshell, the JWOD defines its preference in terms of "direct labor" performed by blind individuals, whereas the RSA extends the blind vendor preference to all facets of the "operation" of vending facilities, to include supervision and management. *Compare* 41 U.S.C. § 47(b)(3)(C), (b)(5) (JWOD), *with* 20 U.S.C. § 107(a) (RSA).

The JWOD establishes a preference for commodities and services provided by "qualified non-profit agencies for the blind." 41 U.S.C. § 47(a). The JWOD defines a "qualified non-profit agency for the blind" as an agency "which in the production of commodities and in the provision of services . . . employs blind individuals for [not lest than 75%] of *direct labor* required for the production or provision of the commodities or services." *Id.* § 48b(3)(C) (emphasis added). In defining what constitutes "direct labor," the JWOD explicitly excludes "supervision, administration, inspection, or shipping." *Id*. § 48b(5). In comparison, the RSA preference extends to the "operation of vending facilities by licensed blind vendors." 20 U.S.C. § 107(a). The term "operation" includes management and supervisory facets of employment in addition to direct labor. *See NISH II*, 247 F.3d at 201 (stating that the RSA "takes a slightly different tack [from the JWOD] by encouraging blind persons to be entrepreneurial and to run their own businesses"). Further, the RSA preference extends directly to blind persons (licensed by their respective state licensing agencies); unlike the JWOD, the RSA does not employ a "qualified non-profit agency for the blind" as a middle man when exercising the preference. *See* 20 U.S.C. § 107(a).

79. *See* 41 C.F.R. § 51-3.1 (LEXIS 2004).

80. *NISH II*, 247 F.3d at 199.

81. Rumsfeld I, 188 F. Supp. 1321, 1324 (D.N.M. 2002).

82. *See supra* note 55 and accompanying text.

83. *NISH II*, 247 F.3d at 205.

84. *Id.*

85. *Id.*

precedence. The Tenth Circuit found the RSA controls because "it is a general maxim of statutory interpretation that a statute of specific intention takes precedence over one of general intention."[86]

As one commentator observed, "[g]iven that the facts, rationale, and holdings of *NISH v. Cohen* and *NISH v. Rumsfeld* were strikingly similar, RSA and JWOD proponents may have fought their last round of food fights."[87] JWOD proponents, however, effectively moved their food fights from the court room to the floors of Congress. Section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year 2004, signed by President Bush on 24 November 2003, stabilizes certain existing military mess hall contracts, thus preserving the JWOD preference.[88] Entitled "Contracting With Employers of Persons With Disabilities,"[89] Section 852 renders the RSA inapplicable to current JWOD contracts for "the operation of a military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces."[90] Notably, JWOD proponents achieved a limited victory: the reprieve applies only to JWOD contracts and the options provided under those contracts "entered into before the date of the enactment of the [NDAA]; and . . . in effect on [that] date."[91] Consequently, the RSA provisions in the 2004 NDAA do not affect contracts entered on the date of enactment of the NDAA and thereafter.[92]

HUBZone Act

The Historically Underutilized Business Zone (HUBZone) Act was passed in 1997 "to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities."[93] Among the methods available to assist qualified HUBZone small business concerns (SBCs) is the requirement for "contracting officer[s] to provide HUBZone [SBCs] a price evaluation preference by adding a factor of 10% to all [other] offers."[94]

In *Automated Communications Systems, Inc. v. United States* (2001),[95] ACSI, a HUBZone SBC, protested the application of the RSA blind vendor preference to a full food services procurement at Lackland Air Force Base.[96] ACSI claimed that the government "eliminated the [HUBZone] preference for which ACSI applies by applying the [RSA blind vendor preference] without limitation."[97] Consequently, ACSI demanded that the Air Force waive the RSA preference under the authority of FAR section 1.403.[98]

The Court of Federal Claims (COFC) disagreed with ACSI's premise, determining that the two preferences were not incompatible. Specifically, the COFC agreed with the government that the procurement agency could give both preferences "full effect": the agency could accord all qualified HUBZone SBCs their price evaluation preference, then the agency could apply the RSA blind vendor preference if any SLA proposal fell within the competitive range. Furthermore, the COFC followed the logic of the Fourth and Tenth Circuits: if the prefer-

86. Rumsfeld II, 2003 U.S. App. LEXIS 23290, at *4 (10th Cir. Nov. 14, 2003).

87. Major Tom Modeszto, *RSA Continues to Score Knockouts*, *in* Major Tom Modeszto et al., *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan./Feb. 2003, at 77. Although this comment preceded the appellate court's decision in *NISH v. Rumsfeld*, the Tenth Circuit's decision further strengthens Major Modeszto's observation.

88. H.R. 1588, 108th Cong. (2003) (enacted).

89. The title for the initial Senate version of Section 852 (then Section 368) more explicitly described Congress's motivation for the legislation: "Stability of Certain Existing Military Troop Dining Facilities Contracts." NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2004, S. REP. NO. 108-046 (2003).

90. H.R. 1588 § 852(b).

91. *Id.*

92. *See id.*

93. 13 C.F.R. § 126.100 (LEXIS 2004).

94. *Id.* § 19.1307(b).

95. 49 Fed. Cl. 570 (2001).

96. *Id.* at 571.

97. *Id.* at 574.

98. *Id.* at 578. Section 1.403 of the FAR authorizes agency heads to deviate from the FAR subject to the policy restrictions of FAR section 1.402. *See* FAR, *supra* note 47, at 1.402-.403. Because the COFC "conclude[d] that the proposed procurement properly adhered to *DoDD 1125.3* and the RSA, [the court determined] it [was] not necessary to examine the reach of FAR 1.403." *Automated Communications Sys., Inc.*, 49 Fed. Cl. at 578-79.

ences conflicted, the more specific preference, the RSA, would control.[99]

Small Business and Small Disadvantaged Business 8(a) Set-Aside Programs

Congress enacted the Small Business Act[100] to "[p]lace a fair proportion of acquisitions with small business concerns" and to "[p]romote maximum subcontracting opportunit[ies] for small businesses."[101] Section 8(a) of the Act provides additional benefits for those small businesses predominantly owned or operated by socially and economically disadvantaged individuals.[102] For procurements that exceed $100,000, the FAR *mandates* that the contracting officer set aside the acquisition for a small business if "[1] the contracting officer reasonably expects to receive offers from two or more responsible small businesses; and [2] award will be made at a fair market price."[103] For small disadvantaged businesses, the FAR *permits* contracting officers to set aside contracts for eligible 8(a) firms.[104]

In *In re Intermark, Inc.* (2002),[105] the Army initially offered a mess hall services contract at Fort Rucker, Alabama, as a regular small business set-aside. Subsequently, the Alabama SLA expressed interest in the contract. Because the agency determined the SLA was not a small business, and therefore could not compete for the contract as currently solicited, it withdrew the initial solicitation and re-solicited the contract on an unrestricted basis. Intermark, a small business and the incumbent contractor, protested the withdrawal of the initial solicitation. Intermark argued that because the contracting officer had determined that the procurement met the conditions for a small business set-aside, the FAR mandated setting the acquisition aside.[106]

The Comptroller General agreed with Intermark that the agency had no basis to withdraw the small business set-aside.[107] Much to Intermark's chagrin, however, the Comptroller General did not find that the FAR thus mandated awarding the contract to a small business. Instead, the Comptroller General adopted the rationale of *Automated Communications*. He determined (1) that the RSA preference had priority over the small business preference; and (2) that the "solicitation [could] be fashioned in such a way to accommodate both preferences."[108] Accordingly, the Comptroller General opined that the solicitation could encompass a "'cascading' set of priorities . . . whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if . . . within the competitive range . . . ; otherwise, award will be made to an eligible small business."[109]

The Comptroller General distinguished *Intermark* from the earlier Comptroller General decision, *U.S. Department of the Air Force—Reconsideration* (*Keesler*).[110] In *Keesler*, the Air Force withdrew an 8(a) set-aside solicitation "for the purpose of reissuing the solicitation on an unrestricted basis to comply with the [RSA]."[111] The Comptroller General held that the withdrawal of the solicitation in *Keesler* was permissible

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99. *Automated Communications Sys., Inc*., 49 Fed. Cl. at 577-78.

100. Pub. L. No. 85-836, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631-650 (2000)).

101. CONTRACT LAW DESKBOOK, *supra* note 19, at 10-1 (construing Small Business Act § 2, 72 Stat. at 384).

102. 15 U.S.C. § 637(a); *see* 13 C.F.R. §§ 124.102-.104 (LEXIS 2004).

103. FAR, *supra* note 47, at 19.502-2(b).

104. *Id.* subpt. 19.8.

105. B-290925, 2002 Comp. Gen. LEXIS 167 (Oct. 23, 2002).

106. *Id.* at *3-4.

107. *Id.* at *4.

108. *Id.*

109. *Id.* at *6-7. The COFC's decision in *North Carolina Division of Services for the Blind v. United States* (*NCDSB*), 53 Fed. Cl. 147 (2002), is in accord with the "cascading" priorities in *Intermark*. *NCDSB* involved a full food and attendant services contract for the mess halls at Fort Bragg, North Carolina. *Id*. at 149. The contracting officer determined that the RSA did not apply to the contract and issued the solicitation as a small business set-aside. *Id*. at 154. The North Carolina SLA, NCDSB, submitted a proposal that the contracting officer subsequently determined was outside the competitive range. *Id*. at 153. Thus, Fort Bragg awarded the contract to a small business. *See id*.

Post-award, the NCDSB protested the solicitation, arguing that the contracting officer should have applied the RSA preference. *Id*. at 156. The COFC sided with the government, finding that NCDSB lacked standing: NCDSB was not an "interested party" because even if the Army had applied the RSA preference, NCDSB would not have had a substantial chance to receive award of the contract because it was outside the competitive range. Consequently, the COFC did not need to decide whether the RSA applied to the Fort Bragg procurement. *Id.*

110. B-250465.6, B-250465.7, B-250783.2, 1993 U.S. Comp. Gen. LEXIS 530 (June 4, 1993).

because, in contrast to the regular small business set-aside present in *Intermark*, the 8(a) set-aside was not mandatory.[112] Thus, the agency in *Keesler* had no obligation to set aside the procurement in the first place.

In dicta, the Comptroller General pointed out a problem with the COFC's logic in *Automated Communications*. As the Comptroller General noted, giving HUBZone SBCs their ten-percent evaluation preference could potentially "affect the ability of the SLA proposal to be included in the competitive range."[113] Such circumstances would prevent the contracting agency from giving "full effect" to the RSA preference. The Comptroller General, however, did not address the weakness of his own proposal: it does not distinguish between small and large blind vendor businesses, thus according the former no advantage.

The Scope of the Blind Vendor Preference

In addition to the above areas of litigation, the blind vendor program has also raised disputes regarding the scope of the priority. As discussed previously, the RSA preference is not without limits; the SLA's offer must be within the competitive range. Several cases discussed below explore the definition of competitive range and the contracting officer's discretion when evaluating SLA proposals in the RSA context. Further, the RSA preference only applies to the "operation" of vending facilities. *Washington State Department of Services for the Blind v. United States*[114] teaches that a contracting officer may correctly determine that certain military mess hall contracts, such as dining facility attendant services contracts, fall outside the RSA's penumbra, so long as the contracting officer's decision is not "arbitrary, capricious, or otherwise not in accordance with the law."[115]

Competitive Range

Southfork Systems v. United States[116]

In *Southfork Systems* (1998), Southfork, the incumbent operator of cafeteria services at Lackland Air Force Base, Texas, protested the government's pre-award decision to include the state SLA's proposal within the procurement's competitive range.[117] Among its claims, Southfork argued (1) that the Air Force should have excluded the SLA's proposal because "it failed to satisfy criteria in the [s]olicitation . . . directed to compliance with the RSA"; and (2) that in considering the SLA's proposal, the Air Force "misapplied [the] evaluation criteria in the [s]olicitation."[118] Specifically, Southfork argued that the SLA's proposal, which contemplated the use of a non-blind subcontractor to provide the blind cafeteria manager with training and experience, failed to satisfy how it would "[enlarge] economic opportunities for the blind."[119] Further, Southfork argued that the Air Force did not evaluate the SLA's proposal consistently with other offers because it had rejected another offer that did not meet the solicitation's management experience criteria.[120]

On appeal from the COFC, the Court of Appeals for the Federal Circuit (CAFC) affirmed the COFC's finding "that it could see no defect in the [SLA's] proposal or in the manner in which it was evaluated by the [g]overnment."[121] The CAFC noted the contracting officer's broad discretion when establishing the competitive range and in applying evaluation criteria.[122] Regarding RSA compliance, the CAFC stated that for the Air Force to have excluded the proposal on such grounds, it would have had to "reject out-of hand" the proposition that the employment of a single blind cafeteria manager could enhance the economic opportunities for the blind. "Such a choice," opined the CAFC, "was well within the discretion of the . . . contracting officer."[123] Regarding the consistency of criteria application, the CAFC determined that "the contracting officer had broad discretion to consider each factor [, including management experience,] as part of the totality of the circum-

111. *Id.* at *3.

112. *In re Intermark*, 2002 Comp. Gen. LEXIS 167, at *7.

113. *Id.* at *8 n.2.

114. 2003 U.S. Claims LEXIS 381 (Fed. Cl. Dec. 17, 2003).

115. *Id*. at *55; *see infra* notes 137-40 and accompanying text.

116. 141 F.3d 1124 (Fed. Cir. 1998).

117. *Id.* at 1127.

118. *Id*. at 1132-33.

119. *Id*. at 1138.

120. *Id.*

121. *Id.* at 1135.

stances, . . . [and] Southfork [failed to show] that the contracting officer abused that discretion."[124]

North Carolina Division of Services for the Blind v. United States[125]

In *North Carolina Division of Services for the Blind v. United States* (*NCDSB*) (2002), the contracting officer determined that the proposal from North Carolina's SLA, NCDSB, fell outside the competitive range for a full food and attendant dining services contract at Fort Bragg, North Carolina.[126] In making this determination, the contracting officer established the competitive range in accordance with FAR section 15.306, which provides that "the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals."[127] Among its protests, NCDSB argued that the RSA competitive range as defined by DOE's implementing regulations is much broader than the FAR currently provides.[128] According to NCDSB, agencies soliciting a vending facility contract must evaluate proposals in accordance with the definition of competitive range prevailing at the RSA's inception; that is, "a proposal must be regarded as being in the competitive range unless it is so deficient or out of line in price as to preclude further meaningful negotiations."[129]

Adoption of NCDSB's argument would significantly impact the contracting community. The broader the competitive range, the more likely an SLA's offer will fall into that range. Further, if an SLA's offer falls within the competitive range, the DOE's implementing regulations require the contracting agency to award the contract to the SLA.[130] Consequently, under NCDSB's rationale, SLAs may receive award for contracts they would otherwise not receive under application of FAR section 15.306.

The COFC held against NCDSB. Citing Cibinic and Nash's treatise *Formation on Government Contracts*,[131] the COFC recognized that the government's definition of competitive range had narrowed since the enactment of the RSA. The court found, however, that "[t]here is no precedent to support [NCDSB's] argument that the [RSA] regulations require the application of a competitive range definition that is different from that typically used in federal procurement law today [FAR § 15.306(c)(1)]."[132] The COFC, upholding the government's actions, determined that the contracting officer had correctly followed the FAR's provisions.[133]

Oklahoma v. Oklahoma Department of Rehabilitative Services[134]

Southfork and *NCDSB* both illustrate the great discretion contracting officers hold when determining the competitive range for a procurement. In contrast, *Oklahoma Services* (1998) illustrates that contracting officer discretion has its limits. In *Oklahoma Services*, the Oklahoma SLA submitted a proposal for a food services contract at Fort Sill, Oklahoma, that the contracting officer determined was within the competitive range along with five other offerors.[135] Subsequently, "written discussions ensued, and the [SLA and other offerors were]

122. *Id.* at 1138. For a recent GAO opinion describing the contractor's "broad discretion" when determining the competitive range, see Cantu Servs., Inc., Comp. Gen. B-289666.2, B-289666.3, Nov. 1, 2002, 2002 CPD ¶ 189, *described in* Major Steven Patoir, *The RSA's Preference for the Blind Wields a Visible Presence*, *in* Major Kevin Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review*, ARMY LAW., Jan. 2004, at 69-70.

123. *Southfork Sys.*, 141 F.3d at 1138.

124. *Id*. at 1139.

125. 53 Fed. Cl. 147 (2002).

126. *Id.* at 149.

127. FAR, *supra* note 47, at 15.306, *cited in NCDSB*, 53 Fed. Cl. at 166.

128. *NCDSB*, 53 Fed. Cl. at 166 (plaintiff's reply at 8 (quoting CACI Field Servs., Inc. v. United States, 13 Cl. Ct. 718 (1987))).

129. *Id.*

130. 34 C.F.R. § 395.33 (LEXIS 2004). Mandatory award to the SLA is subject to limited exceptions. The contracting officer may award to other than the SLA if he determines that award to the SLA would "adversely affect the interests of the United States" or that "the blind vendor does not have the capacity to operate a cafeteria 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." 32 C.F.R. § 260.3(g)(1)(ii) (LEXIS 2004). Such action requires the Secretary of Education's approval. *Id.*

131. JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 869 (3d ed. 1998).

132. *NCDSB*, 53 Fed. Cl. at 167.

133. *Id*.

134. 1998 U.S. Dist. LEXIS 23041 (W.D. Okla. Jan. 7, 1998).

asked to submit [their] best and final offers [BAFO]."[136] The contracting officer evaluated the SLA's BAFO lower than other BAFOs he received. Consequently, the contracting officer removed the SLA's bid from the competitive range because he determined the SLA had no chance of reasonably being awarded the contract.[137]

The District Court for the Western District of Oklahoma granted summary judgment for the SLA, determining that no authority supported the government's removal of the SLA's bid from the competitive range without prior consultation with the DOE.[138] The district court reasoned that the SLA's inclusion within the initial competitive range, and subsequent request for the SLA's BAFO, implied that the SLA's offer had a reasonable chance of receiving award. Consequently, the RSA regulations required the agency to consult with the DOE before removing the SLA from the competitive range.[139]

Application of the RSA to Dining Facility Attendant Services Contracts

In *Washington State Department of Services for the Blind* (*WSDSB*) *v. United States* (2003),[140] Washington's SLA, WSDSB, challenged Fort Lewis's decision not to apply the RSA preference to a dining facilities attendant [DFA] services contract. Under a DFA services contract, "military personnel cook the food in a mess hall, but an outside contractor provides other services, such as washing dishes."[141] In contrast to a full food services contract offered at the same time, the contracting officer determined that the RSA did not apply to the DFA contract.[142]

The issue in *WSDSB* turned on "whether the term 'operation of a vending facility' requires the application of the RSA to a DFA services contract."[143] As an initial matter, the COFC denied WSDSB's assertion that the DOE had primary jurisdiction to resolve this question. The COFC determined that this question was "a matter of statutory interpretation that [fell] within the [COFC's] conventional wisdom."[144] Subsequent to a mind-numbing exposition on the taxonomy of the term "operation,"[145] the COFC held for the government: the "[contracting officer's] interpretation of the term 'operation' of a vending facility' [was] not 'arbitrary, capricious, or otherwise not in accordance with law.'"[146]

Military Mess Hall Litigation in Light of the 2004 NDAA

As previously discussed,[147] Congress addressed the application of the RSA to military mess halls in the 2004 National Defense Authorization Act (NDAA).[148] Section 852 of the Act specifies that certain JWOD contracts are immune from the RSA:

> (a) *Inapplicability of the* [*RSA*]—The [RSA] does not apply to any contract described in subsection (b) for so long as the contract is in

135. *Id.* at *2-3.

136. *Id*. at *11.

137. *Id.* at *4-6. Before eliminating the SLA from the competitive range, the contracting officer asked counsel for advice on the matter. The contracting officer "felt that prior approval from the Secretary of Education was required." *Id*. at *4. The agency's counsel advised the contracting officer that such approval was unnecessary. *Id*. at *3-4. The opinion gives no further detail on counsel's rationale for this "advice."

138. *Id.* at *6.

139. *Id.* at *11.

140. 2003 U.S. Claims LEXIS 381 (Fed. Cl. Dec. 17, 2003).

141. *Id.* at *2.

142. *Id.* at *5 n.4.

143. *Id*. at *20.

144. *Id*. at *19-20. Fort Lewis initially solicited its mess hall contract such that it included both full food and DFA services. Upon request from the WSDSB, the DOE opined that the RSA applied to the solicitation. Consequently, Fort Lewis bifurcated its procurement into a full food services contract and a DFA services contract. The contracting officer determined that the RSA applied to the full food services contract, but not to the DFA services contract. *Id*. at *3-5. The WSDSB sought review again from the DOE for the re-solicitation of the DFA services contract, claiming the DOE had primary jurisdiction, but the COFC denied this claim. *Id*. at *19-20.

145. *See id.* at *55.

146. *Id*. (quoting 5 U.S.C. § 706(2)(A) (2000)).

147. *See supra* notes 88-92 and accompanying text.

148. *See* H.R. 1588, 108th Cong. (2003) (enacted).

effect, including for any period for which the contract is extended pursuant to an option provided in the contract.

(b) [*JWOD*] *Contracts*—Subsection (a) applies to any contract for the operation of a military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces that—

(1) was entered into before the date of the enactment of [the 2004 NDAA] with a nonprofit agency for the blind or an agency for the other severely handicapped in compliance with [JWOD § 3] and

(2) is in effect on such date.[149]

By its express provisions, Section 852 provides a narrow window that preserves certain existing JWOD contracts—the Act has no prospective effect.[150]

Perhaps of greater significance, however, are the implications of Section 852 on future military mess hall litigation. As discussed throughout this article, military mess hall litigation has proceeded along three fronts: (1) whether the RSA applies to military mess halls in the first place; (2) the relationship of the RSA to other set-asides; and (3) the scope of the blind vendor preference. Section 852 affects each of these areas.

Foremost, the NDAA for FY 2004 resolved whatever slim doubt remained about the direct application of the RSA to military mess halls following *NISH v. Cohen* and *NISH v. Rumsfeld*.[151] By creating an exemption from the RSA provisions for mess hall contracts, Congress implied the premise that the RSA applies to such contracts. Similarly, by creating an exemption that elevates the JWOD preference over the RSA, Congress implied that absent such an exemption, the RSA preference is superior. This logic extends to the other preferences (e.g., small business, HUBZone) and supports the courts' statutory maxim: when two preferences are applicable, the more specific controls.[152] Consequently, future military mess hall litigation will occur on the remaining area of dispute—the scope of the blind vendor preference.

Conclusion

Given the large values of the contracts involved and the tendency for the RSA preference to unseat the beneficiaries of other procurement preference programs, litigation over military mess hall contracts will continue. In light of the federal opinions and the express and implied provisions of the NDAA for FY 2004,[153] it is clear (1) that the RSA applies to contracts for the operation of military mess halls; and (2) that the RSA is superior to other less specific set-aside programs. Thus, protesters will focus their arguments on the third litigation area discussed above, the scope of the blind vendor preference.

Litigants have probed the RSA scope in disputes concerning (1) various aspects of competitive range; and (2) the applicability of the RSA to dining facility attendant services contracts. According to the above cases, so long as the contracting officer follows the FAR provisions for establishing a competitive range and evaluating proposals, the procurement should not be in jeopardy. In this regard, agencies should read *Southfork Systems*, which reprints the pertinent RSA preference and evaluation criteria in the agency solicitation.[154] Once the contracting officer determines an SLA proposal falls within the competitive range, however, he does not have the discretion to remove that proposal from the range absent the approval of the Secretary of Education.[155]

Finally, *WSDSB* teaches that an agency enjoys some discretion when interpreting what the RSA's provision "operate a vending facility" entails.[156] Agencies that consider *WSDSB* as a green light to exclude DFA services contracts from the RSA, however, should proceed with caution. The case was only at the district court level, and the district court narrowed its holding to the facts of the case.

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149. *Id.*

150. *See id*.

151. *See supra* note 87 and accompanying text.

152. *See, e.g*., Rumsfeld II, 2003 U.S. App. LEXIS 23290, at *4 (10th Cir. Nov. 14, 2003).

153. *See supra* notes 148-52.

154. *See generally* Southfork Sys. v. United States, 141 F.3d 1124 (Fed. Cir. 1998).

155. Oklahoma v. Oklahoma Dep't of Rehabilitative Servs., 1998 U.S. Dist. LEXIS 23041, at *11 (W.D. Okla. Jan. 7, 1998).

156. *See generally* Washington State Dep't of Servs. for the Blind v. United States, 2003 U.S. Claims LEXIS 381 (Fed. Cl. Dec. 17, 2003).