

Blind Vendor Priority

**Department of Defense's
Proposed Regulations Violate the Law
and Attempt to Circumvent the Priority**

Background

The Randolph-Sheppard Act was enacted 1936; the most recent amendment was in 1974, when Congress found that the program is “one of the most effective employment opportunity programs ever enacted by Congress” and that “blind vendors return in taxes and economic opportunity far in excess of the initial small investment required to establish their business operations.” Congress also found most Defense Department commanders “either hostile or indifferent to the Randolph-Sheppard program,” so gave the Department of Education responsibility for the program at all federal properties.

1974 Amendments

- Blind vendors have the prior right to operate cafeterias on federal property. “Vending facility” is defined to include cafeterias and the sale of other articles or services.
- Legislative history makes it clear that it is the obligation of all federal agencies to ensure that “one or more blind vendors have a ***prior right*** to do business on federal property.”

1974 Amendments (cont.)

Secretary of Education shall:

- prescribe regulations designed to ensure that the priority is given to blind persons.
- “Insure that the Rehabilitation Services Administration [of the Dep’t of Education] is the principal agency for carrying out” the R-S Act.
- designate State licensing agencies (SLAs) to license blind persons to operate vending facilities.

Proposed DoD Regulations

- DoD has no explicit Congressional authority to promulgate regulations regarding the application of the R-S Act.
- The Department of Education does. The Department of Education “shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees...” 20 U.S.C. § 107d-3(e)

Department of Education Regulations

- The regulations promulgated by this authority are located at 34 C.F.R. part 395.
- These are the dispositive regulations; courts grant no deference to Department of Defense interpretation of those regulations because the Department of Education is the agency charged with administration of the R-S Act.

Presidential Directive

January 20, 2012

“I direct all agencies that have property management responsibilities to ensure that agency officials, when pursuing the establishment and operation of vending facilities (including cafeterias and military dining facilities) as defined in 20 U.S.C. 107e, issue permits and contracts in compliance with the Randolph-Sheppard Program and consistent with existing regulations and law.”

Noncompliance by Federal Agency

- R-S Act authorizes SLAs to file complaints with Department of Education when federal agencies fail to comply with the R-S Act.
- Complaints are heard by a three member arbitration panel; decision of the panel is final and binding. If a violation is found, federal agency “shall cause such acts to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.”

R-S Act Applies to Contracts Pertaining to the Operation of a Cafeteria

- Department of Defense refuses to apply R-S Act priority to contracts for dining facility attendant (mess hall) (DFA) services.
- R-S Act requires vending facilities on all Federal properties “wherever feasible” and regulations require cafeteria operations to “provide maximum employment opportunities to blind vendors to the the greatest extent possible.”
- Regulations apply to “all contracts pertaining to the operation of cafeterias on Federal property.”
- Two recent arbitration decisions found that Department of Defense violated the R-S Act when it refused to apply the R-S Act priority to DFA contracts.

Department of Defense refuses to comply with Arbitration Decisions

- Dissent by Army designee in Kentucky and Georgia cases asserted that *Chevron* deference should be given to the contracting officer's decision as to whether R-S Act applies.
- This misstates the law. *Chevron* deference is only due to the agency charged with administering the R-S Act, the Department of Education.

Army Dissent in Georgia:

- While the Army can consider the analysis and decision of the panel as to whether or not corrective action is appropriate, it is not bound to take action based on the decision of the panel.
- This misstates the law: When the panel finds a violation of the R-S Act, the head of the federal agency “shall cause such acts or practices to be terminated promptly.”

Proposed DoD Regulations

- To circumvent the R-S Act priority, Department of Defense determined to issue its own regulations.
- These proposed regulations cannot conflict with R-S Act or its implementing regulations.
- If they do, it will increase litigation as SLAs will be required to challenge the application of the regulations in order to provide maximum employment opportunities to blind vendors.

2015 National Defense Authorization Act

- Published a document entitled Joint Explanatory Statement.
- Note from Director of Legislative Operations explained: “[t]his Act and the material found in this committee print are the product of an agreement between the Chairman and Ranking Member of the House Committee on Armed Services and the Chairman and Ranking Member of the Senate Committee on Armed Services.”

2015 National Defense Authorization Act

- Bill not brought to Senate Floor and therefore no formal conference with the House.
- There is no conference report and no formal joint explanatory statement.
- The document entitled Joint Explanatory Statement is not legally authoritative, and it does not provide legislative history as it was never voted upon by Congress or even a conference committee.

2015 National Defense Authorization Act

- Did not amend the R-S Act, only 10 U.S.C. § 2492 (JWOD Act)—to add food services to the authority of non-appropriated fund instrumentalities to enter into contracts with other federal agencies and instrumentalities.
- This back-door approach does not give Defense authority to enact regulations that contravene the R-S Act or its implementing regulations.

Defense Has Long Sought to Exempt Military Dining from the R-S Act

- *See NISH v. Cohen*, 191 F.R.D. 94, 97 (E.D. Va. 2000) (“the Army is currently pursuing legislative initiatives to exclude military dining facilities from the Act ... In both 1997 and 1998, the Department of Defense unsuccessfully sought legislation to exclude military dining facilities altogether” from the R-S Act.)

2015 National Defense Authorization Act

- Relies on 2006 Joint Report required by NDAA FY 2006, Committee for Purchase from People who are Blind or Severely Disabled (CFP), Department of Education, and Department of Defense.
- Only one recommendation in 2006 Joint Report was enacted by Congress: the “No Poaching” recommendation.

Joint Policy Statement: a Flawed Process

- Developed when there was no RSA Commissioner
- No involvement by RSA Randolph-Sheppard staff
- No blind consumer or state blind agency input. *See* 2006 letter of National Council of State Agencies for the Blind available at www.ncsab.org/Docs/letter-to-Enzi.pdf.

No Poaching Enacted in John Warner Act, § 856(a)(1)

- Protected CFP contracts for “full food services, mess attendant services” in effect on October 17, 2006 from R-S Act priority.
- Explicit acknowledgment by Congress that food service contracts were awarded under both JWOD (CFP) and R-S Act.
- Implicit acknowledgment by Congress that R-S Act **does** apply to such services if not on the procurement list as of that date.

2006 Joint Report Recommendations **Not** Enacted Due to Conflict with Existing Law

- **JR:** R-S Act only applies when contractor is decision-maker for overall functioning of a military dining facility; otherwise contracts are set aside for CFP.
- **Existing Law:** Vendor is defined as a “blind licensee who is operating a vending facility on Federal or other property” and R-S priority applies to “all contracts . . . **pertaining to the operation of cafeterias** on Federal property.”

2006 Joint Recommendations ***Not*** Enacted Due to Conflict with Existing Law

- **JR:** R-S Vendor must subcontract DFA services.
- **Existing Law:** All contracts or other existing arrangements ***pertaining to the operation*** of cafeterias on Federal property ... shall be renegotiated” to apply the R-S priority.

2006 Joint Recommendations **Not** Enacted Due to Conflict with Existing Law

- **JR:** Must assign at least one person per military dining facility in a management role
- **Existing Law:** The states administering the program are required to establish “the policies and standards governing the relationship of the State licensing agency to the vendors, including their selection, duties, supervision, transfer, promotion...”

2006 Joint Recommendations **Not** Enacted Due to Conflict with Existing Law

- **JR:** Would authorize regional contracts across state lines, with Defense discretion to designate SBA, CFP, or other programs. SLAs may bid.
- **Existing Law:** Blind persons are required to be afforded a prior right to do business on Federal property. Case law is that the R-S Act priority comes first, with “a ‘cascading’ set of priorities or preferences” to CFP (JWOD), SBA, and HUBZone if no R-S bid or R-S bid is outside competitive range.

2006 Joint Recommendations **Not** Enacted Due to Conflict with Existing Law

- **JR:** R-S bid may not exceed 5% of the “best value” or one million dollars, whichever is less.
- **Existing Law:** The prior right is granted when the R-S Act bid is within the competitive range and has a reasonable chance of being selected for final award.

Results sought

- Reject any regulations that do not affirm and implement the blind vendor priority as enacted by Congress.
- Recognition that the priority includes contracts that pertain to the operation of a cafeteria (DFA).
- Ensure blind vendors have a prior right to operate one or more vending facilities on all federal property, consistent with the Presidential Directive.