

# Inspector General

United States  
Department of Defense



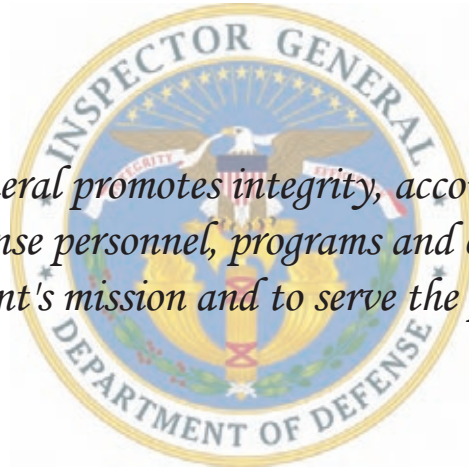
## **Inspections and Evaluations**

DoD Assessment of Contracting With Blind Vendors  
and Employers of Persons Who Are Blind or  
Have Other Severe Disabilities

DEPARTMENT OF DEFENSE  
OFFICE OF INSPECTOR GENERAL

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## **DoD Assessment of Contracting With Blind Vendors and Employers of Persons Who Are Blind or Have Other Severe Disabilities**

April 15, 2008

### **Who Should Read This Report and Why?**

Congressional stakeholders, as described in the John Warner National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007, Section 856. DoD civilian and military personnel responsible for solicitation and award of contracts for services associated with military dining facilities. Randolph-Sheppard Act (R-SA) and Javits-Wagner-O'Day (JWOD) Act program managers.

### **What We Did**

We assessed program execution top-down—from the Offices of the Secretary of Defense to the Military Departments. We reviewed competition, arbitration, and litigation. We collaborated with the Department of Education (DoED) Office of the Inspector General and included their review of management procedures in Appendix J. We also included information from nonprofit and independent Federal agencies as it relates to execution of the DoD program.

As stipulated in the NDAA for FY 2007, Section 856, this report includes:

- “Findings of the Inspectors General regarding the management procedures reviewed;” and
- “Such other information and recommendations as the Inspectors General consider appropriate.”

### **What Was Identified?**

All of the Military Departments contract for military dining facility services under these two Acts and other statutory contracting programs [e.g., Small Business Administration-Section 8(a), HUBZone]. Both Acts provide a legislative preference based on a socio-economic benefit to persons with disabilities.

Policy implementing the JWOD program is adequate. Additional guidance is required from the Office of the Secretary of Defense to facilitate implementation of the R-SA.

Knowledge of these programs existed at all levels reviewed, particularly at installations with a previous or existing military dining facility contract under one of the preferential programs. Interpretation and implementation of the two Acts vary, resulting in confusion, inconsistent execution, insufficient contract oversight, and arbitration/litigation.

### **How It Could Be Improved**

The Under Secretary of Defense for Acquisition, Technology, and Logistics [USD(AT&L)] should coordinate to establish a Defense Federal Acquisition Regulation Supplement rule to govern the R-SA contracting process and for the issue of appropriate procurement policy, regulations, and implementing procedures for R-SA contracting in military dining facilities. USD(AT&L) should coordinate to publish for public comment and interagency coordination appropriate policy and regulations to implement the joint policy agreed on and reported to Congress August 29, 2006, by the DoD, DoED, and Committee for Purchase. To resolve and clarify issues associated with contracting with employers of persons with disabilities, USD(AT&L) should forward a legislative change request to Congress. We made four recommendations for improvement in these areas.

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Forward questions or comments concerning the evaluation of the DoD Assessment of Contracting with Employers of Persons with Disabilities and other activities conducted by the Inspections & Evaluations Directorate to:

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## **REPORT TRANSMITTAL**

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We are providing this report for information and use. We considered management comments to our findings in preparing this final report. The Under Secretary of Defense for Acquisition, Technology, and Logistics comments and Military Department comments conformed to the requirements of DoD Directive 7650.3, "Follow-up on General Accounting Office (GAO), DoD Inspector General (DoD IG), and Internal Audit Reports," June 3, 2004. Therefore, additional comments are not required. The complete text of the comments is in the Management Comments section of this report. The DoDIG Follow-up/GAO Affairs Directorate will arrange follow-up actions on implementing the reports recommendations.



Wm Brem Morrison, III  
Assistant Inspector General  
for Inspections and Evaluations

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# Executive Summary

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## DoD Assessment of Contracting With Blind Vendors and Employers of Persons Who are Blind or Have Other Severe Disabilities

### Background and Overview

Section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Appendix B) directed the Department of Defense Inspector General (DoD IG) and Department of Education Inspector General (DoEDIG) to review management procedures under the Randolph-Sheppard Act (R-SA), sections 107-107f, title 20, United States Code (20 U.S.C. 107-107f) and the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. 46-48c).

The Department of Education is the executive agency responsible for overseeing policy implementation of R-SA activities and procedures within the Federal Government.

The Committee for Purchase from People who are Blind or Severely Disabled (CFP) is the independent Federal agency that administers the JWOD program, now called the "AbilityOne Program."

**The Randolph-Sheppard Act.** The purpose of the enactment of the R-SA in 1936 and subsequent legislative revisions in 1954 and 1974 was to:

- "...provide blind persons with remunerative employment,
- enlarge the economic opportunities of the blind, and,
- stimulate the blind to greater efforts in striving to make themselves self-supporting."

**Javits-Wagner-O'Day Act.** Enacted in 1938, the original Wagner-O'Day Act provided employment opportunities for people who are blind by allowing them to manufacture mops and brooms to sell to the Federal Government. In 1971, under the leadership of Senator Jacob Javits, Congress amended the Act to include people with severe disabilities and allow the program to provide services to the Federal Government. The goal of JWOD is to "provide training and employment opportunities for persons who are blind or have severe disabilities."

**The Interaction Between JWOD and R-SA.** JWOD's mission is to provide employment opportunities for people who are blind or have other severe disabilities in the manufacture and delivery of products and services to the Federal Government. The R-SA provides employment opportunities for the blind with emphasis on management opportunities. Advocates of each Act have argued their program applies to military dining facilities contracts. The acquisition process for these contracts has been controversial, requiring court rulings on various aspects of the relationship between JWOD and the R-SA.

## How Did We Get to Where We Are?

As DoD began outsourcing more food services positions following the Cold War, various groups sought advantage in gaining contracts under the R-SA and JWOD Acts. Each of the Military Departments developed different priorities for the use of DoD personnel in support of military dining facilities, based on Service-unique mission requirements. As military dining facility contracts evolved and expanded, the two conventions that emerged were legislative R-SA priority and JWOD preference. Regardless of the type of contract, DoD retains the overall management role for operation of military dining facilities.

**Observations on Management Procedures.** To identify findings and develop recommendations, we examined four issues under R-SA and JWOD Act programs, as they relate to military dining facilities, their relation to the cost of doing business, and compliance.

1. Application of R-SA/JWOD to Military Dining Facilities.
2. The Cost of Food Service and Military Dining Facilities.
3. Requirements—Contracting for Best Value Without Compromising Mission.
4. Policies—Multiple Sources.

**Application of R-SA and JWOD to Military Dining Facilities.** Congress clarified their intent about R-SA and JWOD relative to military dining facilities in the FY 2007 National Defense Authorization Act, Section 856(d). The Act defined the term “military dining facility” as “a facility owned, operated, leased or wholly controlled by the Department of Defense and used to provide dining services to members of the Armed Forces, including a cafeteria, 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.”

Given the applicability of R-SA/JWOD to military dining facilities, 41 U.S.C. Section 418b (a) requires that DoD develop and issue procurement guidance. The Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) contain JWOD guidance but no R-SA guidance. The Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (OUSD[AT&L]) is currently developing a Defense Federal Acquisition Regulation Supplement (DFARS) case for R-SA contracting.

**Recommendation 1.** Promulgate DFARS policy, procedures, and guidance, as well as appropriate solicitation provisions, to govern DoD’s contracting process for operation of a military dining facility under the R-SA. (Office of Primary Responsibility: OUSD[AT&L]).

**The Cost of Food Service and Military Dining Facilities.** During interviews for this report, the consensus among program managers and contracting officials was that application of the statutory JWOD mandate risks the possibility of monopolistic pricing. Program managers believe the law impedes competition of food service contracts. Analysis indicates costs vary



from a low of \$2.14 per meal for a contract awarded to a small business based on competition to a high of \$6.45 per meal for a JWOD contract. The JWOD Act stipulates that a JWOD vendor is a mandatory source for products and services on the Procurement List.

The DoD total budget for food service contracting is \$3.245 billion dollars for FYs 2005–2009. R-SA prime contracts comprised 45 percent or \$1.4 billion of this total. JWOD prime contracts comprised 15 percent or \$493 million and Small Business comprised 12.9 percent or \$418 million. Large Business comprised 27.1 percent or \$882 million of the total. R-SA and JWOD food service contractors account for approximately 60 percent of the total value of all such contracts. Any inflation of costs for these types of contracts will cause a disproportionate increase in overall contract costs. Because there is currently no DFARS rule for R-SA, tracking the actual cost of R-SA contracts across DoD is problematic: There is no DFARS-required R-SA field in the Federal Procurement System Data System-Next Generation.

**Recommendation 2.** Issue policy directing DoD contracting officers to obtain appropriate cost or pricing data and supporting information to determine whether any offer for a military dining facility solicitation presents a fair and reasonable price, as required by 10 U.S.C. 2306 and FAR Subpart 15.4. This policy should apply to contracts awarded through competitive procedures or without full and open competition. Coordinate to add an R-SA field to the Federal Procurement Data System-Next Generation to allow for reporting of R-SA contract actions. (Office of Primary Responsibility: OUSD[AT&L]).

**Requirements—Contracting for Best Value.** We identified three management concerns for complying with the requirement to operate military dining facilities in a cost-effective manner.

- Directed procurement requirements impede competition and the ability to implement cost avoidance solutions, such as Base Operation Support and Joint Basing initiatives.
- The introduction of an R-SA or JWOD offer into an otherwise competitive environment drives competitors from the field and effectively eliminates meaningful competition.
- R-SA contracts may cost more. The U.S. Army Audit Agency determined that at just four installations, the R-SA contracts cost about \$2,096,000 more than what non-R-SA contracts would cost.<sup>1</sup>

**R-SA Policies—Multiple Sources.** We identified three issues related to R-SA policies, guidance, and regulations.

- The Randolph-Sheppard Act policies are vague and allow for interpretations that benefit the purposes of the interpreter. Clarification is required to strengthen current R-SA policies across the board.
- Conflicting R-SA program guidance leads to inconsistent application of the law. Noncompetitive statutory preferences and competing priorities (JWOD and R-SA) inhibit

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<sup>1</sup> Army Audit Agency, Commentary on Dining Facility Contracts (AA 99-726).

creative solutions and flexibility in managing the cost of food service delivery. The Office of the Secretary of Defense has not sought legislative relief or clarification regarding JWOD and R-SA provisions as applied to military dining facilities.

- The Department of Education's R-SA arbitration policy and processes are unclear to the Office of the Secretary of Defense, the Military Departments, and the State Licensing Agencies.

**Joint Policy Recommendations.** As required by Section 848 of the National Defense Authorization Act for FY 2006, a working group of representatives from DoD, DoED, and the Committee for Purchase (CFP) submitted their report describing the joint statement of policy to specified Congressional committees on September 1, 2006 (Appendix K). This report provided a joint policy statement for the application of JWOD and R-SA to contracts for the operation and management of military dining facilities. Congress has implemented one of the recommendations made by the working group. Full implementation of the joint policy recommendations requires compliance with Administrative Procedures Act requirements and may require further legislative action by Congress, after appropriate coordination between DoD, DoED, CFP, and the Office of Management and Budget.

**Recommendation 3.** Coordinate to publish for public and interagency comment appropriate policy and regulations to implement the joint policy recommendations as reported to Congress on August 29, 2006, by DoD, DoED, and CFP. (Office of Primary Responsibility: OUSD[AT&L])

**Recommendation 4.** To resolve and clarify issues associated with contracting with employers or sponsors of persons who have disabilities or who are blind, consistent with military mission and quality of life programs, USD(AT&L) should forward a legislative change request through the Office of Management and Budget to Congress. This change request should enact the provisions of the DoD, DoED, and CFP joint policy recommendations. Appendix L provides proposed legislative language, originally developed by OUSD(AT&L), for this request. (Office of Primary Responsibility: OUSD[AT&L]; Office of Coordinating Responsibility: Office of the Under Secretary of Defense, Personnel and Readiness, DoD Legislative Affairs office, DoD Acquisition Resources and Analysis, DoD General Counsel).

## **Management Comments**

We provided the draft report to OUSD(AT&L) and the Services for review and comment on November 21, 2007. Additional coordination resulted in elimination of two of the original six recommendations and modification of others, as well as expansion of certain parts of the report.

OUSD(AT&L) and the Services concurred with the four recommendations in this report. The full versions of Management Comments are in Appendix M.

## **Background and Overview**

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Section 856 of the National Defense Authorization Act (NDAA) for Fiscal Year 2007 (Appendix B) directed the Department of Defense Inspector General (DoD IG) and Department of Education Inspector General (DoED IG) to review management procedures under the Randolph-Sheppard Act (R-SA), sections 107-107f, title 20, United States Code (20 U.S.C. 107-107f), and the Javits-Wagner-O'Day Act (JWOD) (41 U.S.C. 46–48c). This report documents the findings and recommendations of this joint review.

As required by Section 856, this report includes:

- “Findings of the Inspectors General regarding the management procedures reviewed;” and
- “Such other information and recommendations as the Inspectors General consider appropriate.”

On December 19, 2006, the Inspectors General of the DoD and DoED signed a memorandum of understanding (Appendix C) to review the program guidance and management procedures for R-SA and JWOD with respect to the operation of military dining facilities.<sup>1</sup> (See Appendix A—Scope and Methodology.)

The DoED is the executive agency with responsibility for overseeing policy implementation of R-SA activities and procedures within the Federal Government. The DoED “. . . shall conduct periodic evaluations of the program. . . and take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the [R-SA] provisions. . . .”<sup>2</sup>

The Committee for Purchase from People who are Blind or Severely Disabled is the independent Federal agency that administers the JWOD program.

### **The Randolph-Sheppard Act—Description**

The R-SA was enacted in 1936 (with revisions in 1954 and 1974) to provide employment opportunities for blind persons and business management opportunities for blind vendors.

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<sup>1</sup> Section 856 of the NDAA for FY 2007 defines the term “military dining facility” as “a facility owned, operated, leased or wholly controlled by the Department of Defense and used to provide dining services to members of the Armed Forces, including a cafeteria, 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.”

<sup>2</sup> 20 U.S.C., 107a(b).

The Act was to:

- “...provide blind persons with remunerative employment,
- enlarge the economic opportunities of the blind, and
- stimulate the blind to greater efforts in striving to make themselves self-supporting.”

The 1936 legislation stipulated blind vendors could operate vending outlets in Federal buildings. This legislation achieved limited success for blind vendors because agency officials had discretionary authority to approve blind vendor’s operations. The original legislative language did not specify R-SA had a “priority” provision.

The revisions in 1954 added additional language to cover vending machine operations and changed “Federal buildings” to “Federal properties.” However, the revisions did not change the discretionary authority of agency officials.

The 1974 amendment included the following provisions:

- Established the priority for blind vendors to operate vending facilities on Federal properties.
- Expanded the scope of blind vendor opportunities to include “operation of cafeterias” to the list of “vending facilities,” but did not define “cafeteria.”<sup>3</sup>
- Designated the Department of Health, Education and Welfare, now DoED, specifically the Commissioner of Rehabilitative Services Administration (CRSA) within the Office of Special Education and Rehabilitative Services (OSERS), as the Federal Government’s executive agent for R-SA.
- Established a Federal-State relationship that increased the role of DoED.
  - Stipulated that (1) CRSA represents the Federal Government in negotiating with and prescribing regulations affecting the States; (2) State Licensing Agencies (SLAs) represent the individual States and the State-licensed blind vendors.
  - Required the SLAs to cooperate with the CRSA in carrying out the objectives of the R-SA.
- Directed CRSA to publish regulations ensuring the priority of blind vendors in the “operation of vending facilities on Federal property.”
- Directed CRSA to prescribe regulations “to establish a priority for the operation of cafeterias on Federal property by blind licensees” when the Commissioner determines, in

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<sup>3</sup> 20 U.S.C. 107d-3(e).

consultation with the head of the affected installation, that such operation can be provided at a reasonable cost and high quality.

- Expanded the scope of the R-SA to include management functions previously considered beyond blind vendors' capabilities.

The legislative history (Congressional Record - House, November 20, 1974, pages 36614—36621) recorded the floor discussion that persuaded Congress to override the President's veto of the 1974 bill. The winning arguments stressed "the Randolph-Sheppard legislation requires appropriated funds only for administrative expenses" on the part of the DoED because "the stands operated by the blind are self-sustaining" (Congressional Record at 33616, third column). Arguably, no Defense appropriations or nonappropriated fund revenues were to be used to implement the 1974 amendment. However, such a reservation was not expressly included in the text of the statute, so it is equally arguable, at this point, that Defense funds can be used (and the courts have upheld this interpretation). The SLAs were to bear the cost of providing all training, food inventory, uniforms, equipment, equipment maintenance, and other resources for a licensee to operate a cafeteria or other vending facility.

With the 1974 amendment, the SLAs became responsible for implementing R-SA policies at the State level. Consequently, the SLAs and all Federal agencies look to DoED/OSERS/CRSA for policy, regulations, guidance, and oversight of their R-SA programs. However, each SLA operates under its own internal set of rules.

The result is that States, Territories, and the District of Columbia have more than 50 separate SLA programs, operating autonomously with different staffing levels, priorities, and procedures.

In publishing regulations to implement the 1974 amendment, specifically with regard to "operation of a cafeteria," the DoED emphasized standards by which to determine whether to grant a State priority in operating a cafeteria on Federal property. In the Federal Register, Vol. 42, No. 56, Wednesday, March 23, 1977, page 15809, the DoED regulations clearly contemplated the R-SA would apply only when the agency has decided to issue a solicitation for a private source to operate the cafeteria. Then, only when the State can demonstrate the "State licensing agency is capable of directly operating the cafeteria in a manner comparable to the operation of a cafeteria by a private firm within the food service industry." Additionally, the criteria for evaluating the State's capability included "sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices." (Title 34, section 395.33(b), Code of Federal Regulations [34 CFR 395.33(b)], July 1, 2002.) Such criteria ensure State-licensed blind vendors provide cafeteria services at a cost and quality comparable to that otherwise available to Federal employees.

## **The Javits-Wagner-O'Day Act—Description**

The Wagner-O'Day Act, enacted in 1938, provided employment opportunities for people who are blind in the manufacture of mops and brooms to sell to the Federal Government. In 1971, Senator Jacob Javits, sponsored an amendment to this act to include people who are severely

disabled and allow the program to provide services to the Federal Government. Hence, the Javits-Wagner-O'Day Act (JWOD), enacted in 1971, provided “training and employment opportunities for persons who are blind or severely disabled.”

The Committee for Purchase from People Who Are Blind or Severely Disabled (Committee or CFP) is the Federal independent agency that administers the JWOD program. The Committee is neither an advisory nor a regulatory entity. The CFP has 15 members appointed by the President—11 represent governmental agencies and four are private citizens. The Committee has long standing partnerships with NISH (not an acronym) and the National Industries for the Blind (NIB), who represents the local nonprofit organizations (NPOs) across the country. NISH and NIB are jointly referred to as Central Nonprofit Agencies. NISH and NIB provide the interface between the qualified local NPOs and the Committee. The local NPOs pay NISH or NIB a percentage of the value of Federal contracts that they receive.

The Committee currently works with over 600 NPOs across the country, as well as in Puerto Rico and Guam, to provide employment opportunities for people who are blind or severely disabled. Under the JWOD program, the Committee annually publishes a procurement list of commodities and services that it considers suitable for purchase by the Federal Government from qualified NPOs for the blind and disabled. To place any commodity or service on the procurement list, the Committee must engage in formal rule making under the Administrative Procedures Act,<sup>4</sup> including public comment and the concurrence of the affected Federal agency. Commodities and services appearing on the procurement list constitute a mandatory source of supply for all federal agencies (Title 41, section 51-5.2, Code of Federal Regulations [41 CFR 51-5.2], October 14, 2003).

In the November 27, 2006 Federal Register notice (71 FR 68492), the Committee changed “JWOD program” to “AbilityOne Program.” During the transition of the name change, the two terms have been used interchangeably.

## **The Interaction Between JWOD and R-SA**

AbilityOne (JWOD) focuses on providing blind and severely disabled persons with a “sheltered work environment.”<sup>5</sup> Because of the various “supports” (e.g., training, special equipment, transportation, medication, close supervision, and on-the-job assistance) provided to AbilityOne employees, a local NPO performs more services and incurs exceptional costs for “reasonable accommodation” of the workers’ disabilities under an AbilityOne contract than any other contractor would with a workforce that does not include persons who are severely disabled. The degree of disability or blindness covered by JWOD is more profound than under any other statute. The R-SA provides employment opportunities for persons who are blind with emphasis on entrepreneurial and management opportunities, with the goal of enabling these persons to become self-supporting. Since the early 1990s, advocates of each Act have argued their program applies to military dining facilities contracts. While hundreds of DoD dining facility contracts

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<sup>4</sup> 5 U.S.C. 553.

<sup>5</sup> *NISH v. Cohen*, 247 F.3d 197 (4<sup>th</sup> Cir. 2001).

perform to standard each year without controversy, a few applications for such contracts have led to court rulings on various aspects of the relationship between JWOD and R-SA.

For example, litigation proceedings addressed two questions:

- Is the R-SA a procurement statute that applies to military dining facility contracts?
- Which statute governs who gets the contract if a solicitation for “operation of a cafeteria” involves offers representing both JWOD and R-SA interests?

In November 1998, an arbitration panel convened by the DoED reviewed the legislative history of the R-SA and concluded the R-SA was never intended to apply to contracts using appropriated funds (*Hawaii Division of Vocational Rehabilitation Department of Human Services v. U. S. Department of Defense, Department of the Army*, Arbitration Case No. R-S/97-18. [See Appendix D.]). On November 12, 1998, the DoD General Counsel wrote a memorandum concluding the R-SA applied to contracts for “operation” of military dining facilities, but did not apply and could not be applied to contracts for mess attendants and other discrete dining support services when the DoD operates the cafeteria. (See Appendix E.)

The United States Court of Appeals for the Fourth Circuit, in *NISH v. Cohen*, 247 F3d 197, 204-205 (4<sup>th</sup> Cir 2001) ruled that:

*The provisions of the RS Act clearly fit this sweeping definition of procurement. Indeed, it authorizes the Secretary of DOE to secure “the operation of cafeterias on Federal property by blind licensees... whether by contract or otherwise.”*

The Court of Appeals also noted that:

*The RS Act deals explicitly with the subject at issue—the operation of cafeterias—whereas the JWOD Act is a general procurement statute. Because the RS Act is a “specific statute closely applicable to the substance of the controversy at hand,” it must control.*

Section 856(a)(1) of the John Warner NDAA for Fiscal Year 2007, Oct. 17, 2006, P.L. 109-364, Div A, Title VIII, Subtitle E, section 856(a), 120 Stat. 2347, 2349, provides:

*The Randolph-Sheppard Act (20 U.S.C. 107 et seq.) does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47).*

Therefore, DoD and DoED treat the R-SA as a procurement statute and the Military Departments can provide a priority for blind vendors when a contracting officer determines the contract will be for “operation of the dining facility.” However, the JWOD and other socio-economic preferences govern contracts for mess attendant services, dining support services, or other services supporting DoD operation of the cafeteria. Further, if there is a conflict between R-SA and JWOD, then the R-SA provisions are the dominating factors for the overall “operation” of the cafeterias, but the JWOD is controlling over the general services that support the operation.

## Nonprofit Organizations—Roles and Compensation

As previously noted, the Committee partners with NISH and NIB, who represent local nonprofit organizations (NPOs). The NPOs under the JWOD umbrella provide both products and services. The annual “Procurement List” specifies products and services suitable for procurement by specified entities of the Government. The list provides location-specific options and mandates a Federal contracting officer to sole source those products and services. Local NPOs can influence the products and services on the procurement list. For this review, we have restricted our discussion to JWOD services related to military dining facilities.

The NISH and NIB perform vastly different functions for JWOD than State Licensing Agencies (SLAs) do for R-SA. Under the JWOD program, the Committee renders decisions on which products are put on the Procurement List and provides policy guidance. The NISH and NIB work closely with NPOs to coordinate contracts, market their services, and assist the NPOs in business decisions. A State licensing agency is simply a governmental agency that processes, approves, and files paperwork (licenses). The States provide little or no hands-on participation in helping the blind vendor. Additionally, SLAs are revenue-generated functionaries. They are not “non-profit” in the same sense as the AbilityOne agency.

Under the JWOD program, the Central Nonprofit Agencies receive compensation under the provisions of 41 CFR 51-3.5, July 1, 2006.<sup>6</sup> This Part provides that “A central nonprofit agency may charge fees to nonprofit agencies for facilitating their participation in the JWOD Program. Fees shall be calculated based on nonprofit agency sales to the Government under the JWOD Program. Fees shall not exceed the fee limit approved by the Committee.” Currently, NISH may charge up to 3.75 percent of nonprofit organizations total annual revenue and NIB may charge up to 3.83 percent. These fees pay for community rehabilitation projects and other programs to benefit blind or severely disabled persons who are so profoundly blind or disabled that they cannot work.

Under R-SA, the DoED provides policy guidance while SLAs serve as a nexus between the blind vendors and the Federal agencies. In 40 states, the SLA also receives a percentage of the gross revenues from R-SA ventures. These percentages range from 1.5 percent to 50 percent on certain large contracts (Appendix F). DoD has no oversight of how the State spends or distributes these profits/fees.

The 1974 R-SA amendments also negatively affect the preferences afforded the small business community in other legislation, such as the Historically Underutilized Business Zone (HUBZone) Act, Section 8(a), and other Small Business Administration (SBA) set-aside programs. Assuming the R-SA applies to appropriated fund contracts, the Government Accountability Office (GAO) ruled in a bid protest (Department of the Air Force Reconsideration, B-250465.6, B-250465.7, B-250783.2, 72 Comp. Gen. 241, 93-1 CPD 431, June 4, 1993) that the R-SA takes “priority” over all small business laws, with respect to a particular procurement that is of a type to which the Act applies. In that case, the State of Mississippi displaced the incumbent small disadvantaged business owner from a set-aside under Section 8(a) of the Small Business Act.

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<sup>6</sup> 41 CFR, 51-3.5, “Public Contracts and Property Management, Central Nonprofit Agencies,” July 1, 2006.



## How Did We Get to Where We Are?

Historically, the military Services have operated dining facilities using in-house (active duty or DoD civilian) personnel. With the end of the Cold War and DoD's goals to downsize and reshape force structure, DoD began to outsource some of the services that support the operation of military dining facilities. The extent of contracted services varies installation by installation, and even varies among facilities at a single installation, to meet the military requirement to train and develop an adequate force of deployable food services managers, cooks, and servers.

Despite these contracting efforts, DoD retains the overall management role for operation of military dining facilities. Regardless of the nature of the contractor presence, Services Squadron Commanders, Installation Food Service Managers, or Base Supply Officers are ultimately accountable to their customers and the chain of command for the management of military dining facilities. The military retains the responsibility to operate the dining facilities primarily as a matter of troop readiness, carefully controlling the nutritional quality and content of a military member's diet. DoD also maintains responsibility to:

- plan all the menus;
- obtain raw food or identify the source from which to order raw food at DoD expense;
- plan the budget;
- bear the risk of loss associated with the operation;
- respond to customer complaints; and
- comply with environmental and health safety laws, and so forth.

Significantly, DoD:

- identifies and restricts those persons who can be served as "customers" in military dining facilities;
- issues identification cards or otherwise controls the list of eligible persons;
- saves the contractor from all the expense and effort of marketing the services; and
- performs all the strategic planning (including facility location, size, configuration, and upgrade, or replacement) associated with a food operation.

As DoD began outsourcing some of the dining facility services, various groups competed for contracts under the R-SA and JWOD Acts. Each of the Military Departments developed different priorities for the use of DoD personnel in support of military dining facilities, based on Department-unique requirements. During this review, we determined that Services' priorities typically resulted in two types of military dining facility contracts.

- **Full Food Service (FFS):** The contractor can be asked to provide all labor and management required to serve food in a military dining facility, including preparation of meals. Even in a dining facility where military food specialists and cooks ordinarily work, a contract might include a contingency capability to fill food-handling and cooking positions on a temporary basis when the military members deploy. If there is even one cook available to fill contingencies, the contract is characterized as FFS. Active duty or U.S. Government civilian personnel perform contract management and oversight

functions, as well as meal planning, strategic planning, and all the other food operation managerial functions detailed above.

- Dining Facility Attendant/Mess Attendant: The contractor provides the labor required to perform discrete support functions related to military dining facility operations, up to but not including meal preparation. Active duty personnel or U.S. Government civilians perform meal preparation and other higher-level management functions in-house.

As military dining facility contracts evolved and expanded, the two conventions that emerged were legislative R-SA priority and JWOD mandate. We note that the SBA programs enjoyed a set aside only when neither JWOD nor R-SA vendors had interest or capability to respond to a solicitation.

Because of the 1974 R-SA amendments and the addition of “operation of cafeterias” to the scope of “vending facilities,” members of the R-SA community are increasing their interest in the operation of military dining facilities. As previously described, this interest has led to litigation over the award of these contracts between R-SA and JWOD entities, as the two groups view the preferences established under the respective statutes as competitive. However, the courts have ruled that, “to the extent a conflict exists between [the] two statutes, the RS Act must control.” The R-SA must control as a “specific statute closely applicable to the substance of the controversy at hand.”<sup>7</sup> The only arguable “conflict” between these statutes is with regard to “operation of a cafeteria.”

After several rounds of litigation, it is conceivable some contracts for operation of a cafeteria had been awarded to a JWOD NPO, or contracts for mess attendants may have been awarded under the R-SA.

The basis for this litigation is the lack of clarity as to the intent of the R-SA as it relates to military dining facilities. This has led to differences in interpretation of key aspects of the R-SA.

To clarify these issues, Congress recently passed additional legislation.

- Section 853(a) of the NDAA for Fiscal Year 2005 (Public Law 108-36), “*Contracting with Employers of Persons with Disabilities*,” made the R-SA inapplicable to mess hall services under existing JWOD contracts. Section 853(b) made JWOD inapplicable to mess hall services under existing R-SA contracts. This provision is often referred to as the “no poaching” provision.
- Section 856(d) of the FY 2007 NDAA stated “The term ‘military dining facility’ means a facility owned, operated, leased, or wholly controlled by the Department of Defense and used to provide dining services to members of the Armed forces, including a cafeteria, 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.” This section made clear that R-SA applied to military dining facilities.

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<sup>7</sup> *NISH v. Rumsfeld*, 348 F. 3d 1263, 1272 ( 10<sup>th</sup> Cir 2003).  
*NISH v. Cohen*, 247F3d197, 205 (4<sup>th</sup> Cir. 2001).

# Observations on Management Procedures

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This part of the report examines the management procedures under the R-SA and JWOD Act as they apply to military dining facility contracting.

Application of the laws, policies, and regulations related to these two acts has resulted in eliminating the discretion of commanders, contracting staffs, and food service management personnel to execute best-value contracting decisions in the award of military dining facility contracts.

To identify findings and develop recommendations, we examined four issues under R-SA and JWOD Act programs, as they relate to military dining facilities, the cost of doing business, and compliance.

1. Application of R-SA/JWOD to Military Dining Facilities.
2. The Cost of Food Service and Military Dining Facilities.
3. Mission Requirements—Contracting for Best Value without compromising mission.
4. Policies—Multiple Sources.

## Section 1

**Application of the Randolph-Sheppard Act/Javits-Wagner-O’Day Act to Military Dining Facilities.** The R-SA and the JWOD Act are among the statutes that can be considered in developing solicitations for services on Federal property. The R-SA provisions are more specific, and in the context of this report, apply only to the “operation” of a military dining facility, if at all. The JWOD Act is more general and the “Nonprofit agencies designated by the Committee are mandatory sources of supply for all entities of the Government for commodities and services included on the Procurement List.” (See Table 1.)

Statutory Preference	
R-SA	JWOD
<b>Priority</b> in operating vending facilities on Federal property	<b>Mandatory</b> source for products and services on Procurement List

Table 1. Statutory Preference

## Randolph-Sheppard Act

This review revealed three management concerns related to military dining facility services contracting under the R-SA:

- Characterization of a military dining facility as a “vending facility” and references to “cafeteria.”
- Inconsistent application of the DoED and DoD “Vending Facility Program for the Blind” regulations governing the “operation of cafeteria” contracting proposals.
- No procurement guidance as required under 41 U.S.C. 418b (a), “Publication of Proposed Regulations.”

**Characterization of a Military Dining Facility as a “Vending Facility” and References to a “Cafeteria.”** In a November 12, 1998, memorandum, the DoD General Counsel stated the R-SA is generally applicable to contracts for “operation” of military dining facilities, but not to discrete services that support a DoD operation.<sup>8</sup> (See Appendix E.) Several Courts have opined that a contract for “operation” of a military dining facility could fall within the scope of the R-SA.<sup>9</sup> However, other opinions have determined the R-SA cannot legally apply to appropriated fund contracts for military dining facilities either because the contracts are not for “vending” (sales to customers who pay with their own funds) or because the services support a DoD “operation.”<sup>10</sup> To the extent that people are not cognizant of the distinctions in the fact patterns and the courts’ actual reasoning, the variations contribute to perceptions of inconsistent compliance.

The definition of “vending facilities” in the R-SA uses the specific term “for the sale of” which is contrary to the principal purpose of a military dining facility. For clarity, the principal purpose of military dining facilities is “to provide meal service for enlisted personnel who are not receiving either an allowance for subsistence or the meal portion of per diem.”<sup>11</sup> These personnel are commonly referred to as rations-in-kind or subsistence-in-kind patrons who do not pay for meals obtained at a military dining facility. Other authorized patrons can eat in a military dining facility on a cash basis; however, those sales are neither profit generating nor entrepreneurial activities.

Moreover, there is a distinction between the “operation of a cafeteria” at non-DoD sites (through a “concessionaire” type arrangement, a permit, or license) and a DoD contract for full food services or dining facility attendants. An analysis of the R-SA, as it applies to “vending facilities” and more specifically “operation of cafeterias,” infers that the intent of these retail operations is to give blind vendors with management experience entrepreneurial opportunities, and a stake in the management of risks associated with operating a business. As portrayed in Table 2, the blind licensee absorbs no risk, financial or otherwise, in operating a military dining facility and there is no requirement for entrepreneurial expertise. Service appropriations or the actual contracts defray all

<sup>8</sup> General Counsel of the Department of Defense letter of November 12, 1998, subj: Applicability of the Randolph-Sheppard Act to DoD Military Dining Facilities.

<sup>9</sup> *NISH v. Cohen*, 95 F. Supp. 2d 497 (E.D. VA 2000) and *NISH v. Rumsfeld*, 348 F. 3d 1263 (10<sup>th</sup> Cir. 2003).

<sup>10</sup> U.S. Dept of Education, Office of Special Education and Rehabilitation Services, Rehabilitation Services. Administration letter of March 13, 1992.

Dept. of Education Arbitration Panel Decision Under the Randolph-Sheppard Act of November 17, 1998, Hawaii Division of Vocational Rehabilitation, Department of Human Services v. U.S. Dept. of Defense, Dept. of the Army (Docket No. R-S/97-18).

<sup>11</sup> DoD Financial Management Regulation (FMR), Volume 12, Chapter 19.

costs, including the contractor’s labor requirements. Because of these conditions, the blind community refers to military dining facility contracts as “lucrative,”<sup>12</sup> yet they do not apply this adjective to other types of Federal agency cafeteria operations.

Factor	Non-DoD	DoD
Lease	No Risk	No Risk
Payroll	At Risk	No Risk
Inventory	At Risk	No Risk
Equipment	At Risk	No Risk
Consumables	At Risk	No Risk
Capital Replacement	At Risk	No Risk
Utilities	Maybe	No Risk
Pest Control	Maybe	No Risk
Trash Pick-Up	Maybe	No Risk

Table 2. Non-DoD “Concessionaire” vs. DoD “Contractor” Cafeteria Operations

As noted previously, this confusion prompted Congress to define the term ‘military dining facility’ as:

...a facility owned, operated, leased, or wholly controlled by Department of Defense and used to provide dining services to members of the Armed Forces, including a cafeteria, 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.<sup>13</sup>

**Inconsistent Application of the DoED and DoD “Vending Facility Program for the Blind” Regulations Governing the “Operation of Cafeteria” Contracting Proposals.** The Department of Education regulations<sup>14</sup> addressing the R-SA priority in award of contracts for “operation of cafeterias” do not specify whether they apply to military dining facilities. In general, the DoED regulations allow qualified R-SA proposals to receive the statutory “priority” if:

1. The proposal has been compared through a competitive solicitation against other commercial offers.
2. The proposal meets all the quality and performance criteria in the solicitation.
3. The proposal demonstrates the ability of the blind vendor to operate the cafeteria in a manner that will provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services.

<sup>12</sup> “2005 Resolutions of the National Federation of the Blind,” paragraph 2.

<sup>13</sup> FY 2007 NDAA), Section 856d.

<sup>14</sup> 34 C.F.R., section 395, July 1, 2002, DOE Vending Facility Program for the Blind on Federal and Other Property.

4. The proposal is within the competitive range.
5. The proposal has been ranked among other competitive proposals.
6. The proposal ranking is among those offers that have a reasonable chance of being selected for final award, AND;
7. The DoED consults with the installation commander before directing the agency to grant the priority.

Because the DoED regulations are not up-to-date with changes in terminology in procurement laws and regulations, a debate has arisen about whether an agency must make award without discussions if the SLA's initial proposal is put into the "competitive range." SLAs interpret the DoED definition to assert R-SA priority if their bid falls into the competitive range at any stage of a solicitation. Their interpretation would bar DoD from opening discussions with any other offeror or performing any comparative analysis of quality or price. DOD has asserted, with DoED and CFP agreement, that the R-SA priority shall be determined upon the evaluation of Final Proposal Revisions (the final competitive range).<sup>15</sup> Arbitration panels under the R-SA have upheld the DoD interpretation. After the substantial rewrite of FAR Part 15, the "competitive range" is established based on initial proposals solely for the purpose of deciding with whom to open negotiations. The initial proposals have not been ranked or evaluated when they are put into the "competitive range." In fact, proposals can be in the competitive range even if they are technically unacceptable, if the contracting officer wishes to conduct discussions to see if the proposal can be made acceptable. An initial proposal could get into the "competitive range" even if it represents a "worst value" and unreasonable price. Qualifying for the "competitive range" means only that the contracting officer wants to talk to the offeror to find out if the initial proposal is or can be made acceptable. Cost has not been compared at the time of setting the competitive range. Therefore, it is not useful to focus on the phrase "competitive range" to the exclusion of all the other criteria set out in DoED's regulations and the factors in the solicitation.

The resolution to the "competitive range" issue lies in the R-SA (rather than a stray term in a regulation) and in the FAR processes for achieving "best value." The R-SA states that the SLA offer will take priority only if it is of "comparable" high quality and reasonable price, and only in "consultation" with the affected installation head. The installation head has a voice in whether or not an offer is of sufficient value to have a reasonable chance for final award. Under the FAR, the contracting officer must hold "meaningful discussions" with all offerors in the competitive range. After discussions, only the best and final proposal revision among all offers can win the contract. Therefore, the R-SA priority is established when the SLA's final proposal revision (after the conclusion of discussions) is ranked among those having a reasonable expectation of selection for the final award, after discussions and evaluation (ranking) of the final proposal revisions.

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<sup>15</sup> Joint Policy Recommendations, paragraph 8, "Method of Providing the Randolph-Sheppard Priority," Appendix K of this report.

**No Procurement Guidance as Required Under 41 U.S.C. 418b(a), “Publication of Proposed Regulations.”** Because the R-SA is traditionally viewed as an entrepreneurial or educational program affecting “concessions” or licenses for making sales to private customers, rather than a statute applying to appropriated fund contracts, procurement regulations do not guide these contracts.

In *NISH v. Rumsfeld*, 348 F. 3d at 1271, the U.S. Court of Appeals ruled, “Plaintiffs correctly note that obtaining mess hall services constitutes procurement action under these statutory definitions.” This determination by the Court enforces the requirements of 41 U.S.C. 418b(a), which states:

...no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has

- (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or
- (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register....

Under the Office of Federal Procurement Policy Act (41 U.S.C. 405, “Authority and Functions of the Administrator”), the only legally authorized procurement regulations are contained in Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS). Neither the FAR nor the DFARS contain R-SA guidance.

The Department of Education, Commissioner of Rehabilitative Services, Office of Special Education and Rehabilitative Services (DoED/CRSA/R-SA) is responsible for issuing policy guidance to the states and their designated SLAs. DoED is also responsible for publishing regulations explaining the criteria for establishing the R-SA priority. DoED cannot write procurement regulations regarding DoD source selection processes, acquisition planning, contract formation, or contract administration. Under 41 U.S.C. 421, “Federal Acquisition Regulatory Council,” only DoD can issue procurement regulations unique to DoD contracting officers and DoD appropriated fund contracts. Under 41 U.S.C. 418b, “Publication of Proposed Regulations,” no procurement regulation, policy, procedure, rule, or form can take effect unless it is published and the public has an opportunity to comment. Therefore, policy letters issued by any other agency without following the rules in sections 418b and 421 cannot bind DoD.

DoD opened DFARS case 2006-D064 in November 2006 to incorporate the agreements reached in the joint policy statement into the Defense procurement regulations. The DFARS Committee for this case made significant progress until early February 2007, when the case could not move forward without the R-SA regulation update, an opinion reinforced by the DoD Office of General Counsel.<sup>16</sup> The DoED provided draft R-SA regulations pertaining to military dining facilities in April 2007. The DoD provided comments on the draft R-SA regulations to the

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<sup>16</sup> E-mail, DoD OGC, February 28, 2007, Subject: R-S Implementation.

DoED in July 2007.<sup>17</sup> The parties met in August 2007 to discuss the update to the R-SA regulations and agreed to a version of the draft R-SA regulations. DoED stated they would proceed with internal DoED coordination of the regulations.<sup>18</sup> The DFARS Committee is shaping the proposed rule to the DFARS based on DoED's R-SA regulations. The DFARS Committee is waiting to see the latest DoED version of the update to the R-SA regulations the parties agreed to at the end of August 2007.

In response to the section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-163), the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (OUSD[AT&L]) issued a memorandum on March 16, 2007, to DoD procurement officials, directing them to implement section 856. (See Appendix G.) This memo enacted and addressed the applicability of the JWOD Act and the R-SA to the operation of military dining facility contracts and military dining support services.

**Observation 1.** DoD has not published any procurement policy, regulation, procedure or form related to the obtaining and awarding of military dining facility contracts within the scope of the R-SA. OUSD(AT&L) is currently developing a DFARS case for R-SA contracting.

**Recommendation 1:** Promulgate DFARS policy, procedures, and guidance, as well as appropriate solicitation provisions, to govern DoD's contracting process for operation of a military dining facility under the R-SA. (Office of Primary Responsibility: OUSD[AT&L]).

**Management Comments:** OUSD(AT&L) and the Services concurred with Recommendation 1. The full versions of Management Comments are in Appendix M.

## Javits-Wagner-O'Day Act

This review revealed two management concerns related to military dining facility services contracting under the JWOD Act:

- JWOD is a mandatory source of supply, but food services managers think R-SA has priority for "operation" of military dining facilities.
- The JWOD mandate has led to perceived monopolistic pricing practices.

**JWOD is a Mandatory Source of Supply but R-SA has Priority.** The Procurement List of products and services available from qualified JWOD suppliers, mandated under 41 U.S.C. Section 51-5.2 governs mess attendants, dining support services and all other food-related services that support the operation of a military dining facility, whether that operation is by DoD or a contractor. As a matter of policy since November 1978, the DoD has taken the position that the R-SA took priority over JWOD for "operation of a cafeteria." Possible "conflict" between JWOD and the R-SA could have arisen with regard to contracts awarded to a JWOD source, but

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<sup>17</sup> E-mail w/attachment OSD-ATL, July 30, 2007, Subject: DoD Revisions to Dept of Education Draft R-SA Regs.

<sup>18</sup> E-mails, OSD-ATL, January 9, 2008, through March 20, 2008, Subject: Status of R-SA Regs.



which qualify as “operation” of the dining facility. A similar situation could occur with regard to contracts that were mistakenly awarded to an SLA for support services on the Procurement List or suitable for performance by a JWOD NPO. Section 856 of the NDAA for FY 2007 resolved this potential conflict by establishing a permanent “no poaching” rule to maintain the status quo with regard to such contracts.

The Courts in *NISH v. Rumsfeld*, 348 F 3d at 1272 took steps to resolve future conflict:

It is a general maxim of statutory interpretation that a statute of specific intention takes precedence over one of general intention...Here the RS Act prescribes a priority for blind vendors in the operation of cafeterias on Federal property, whereas the JWOD is a more general procurement statute. We find, therefore, that to the extent a conflict exists between these two statutes, the RS Act must control.

Case law supports the R-SA priority with regard to operation of military dining facilities, except for those “status quo contracts” awarded to either a JWOD source or to an R-SA State Licensing Agency (SLA) if the contract was entered into before September 30, 2005, and either is in effect on September 30, 2005, or was in effect on November 24, 2003.<sup>19</sup> Attorneys for the Military Departments use the guidance from the Office of the Secretary of Defense, General Counsel (OSD/GC) in defending arbitration and litigation. Because USD(AT&L) has already issued policy memoranda about the “no-poaching” provisions of Section 856 and about the mandatory subcontract for services on the Procurement List, no further recommended action is needed at this time, pending the publication of the DFARS rule. (See Recommendation 1.)

## Section 2

### The Cost of Food Service and Military Dining Facilities

**The JWOD Act Mandate has led to Monopolistic Pricing Practices.** During interviews for this report, the consensus among program managers and contracting officials was that application of the statutory mandate risks the possibility of monopolistic pricing. Program managers believe the law impedes competition of food service contracts.

Table 3 compares food service contracting costs among various types of contracts, such as HUBZone, 8(a), a hybrid, or JWOD, in the Air Mobility Command. (Similar data for R-SA contracts were not available. Upon completion of the DFARS rule, such data will be available through the appropriate procurement automated databases.)

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<sup>19</sup> FY 2005 NDAA, Sec. 853 (a) and (b). Also FY 2007 NDAA, Sec. 856 (a) and (b).

	SBA HUBZone	SBA 8(a)	SBA HUBZone & 8(a)	JWOD
<b>Navy Region Southwest</b>	<b>\$2.14</b>			
<b>Malmstrom AFB</b>		<b>\$4.14</b>		
<b>Tyndall AFB</b>		<b>\$3.62</b>		
<b>Shaw AFB</b>		<b>\$2.76</b>		
<b>Dover AFB</b>			<b>\$2.19</b>	
<b>Scott AFB</b>				<b>\$6.45</b>
<b>Travis AFB</b>				<b>\$5.94</b>
<b>McGuire AFB</b>				<b>\$6.45</b>

Table 3. Average Unit Cost per Meal for Different Contract Types

Source: Air Mobility Command Food Services Contract Cost Comparison (Est. FY 06 – FY 08)

These costs are not indicative of the total cost of putting a meal on the table. The JWOD contracts were mandatory, sole-source instruments. The Small Business Administration (SBA) costs were competitive contract awards.

The cost per meal differential between SBA-managed programs and mandated JWOD programs Provides insight into the pricing effects of procurement mandates. As illustrated, costs vary from a low of \$2.14 per meal for an SBA competed contract to a high of \$6.45 per meal for a JWOD contract. The JWOD Act provides that:

The Committee [for Purchase] shall determine the fair market price of commodities and services which are contained on the procurement list and which are offered for sale to the Government by any qualified nonprofit agency...The Committee shall also revise from time to time in accordance with changing market conditions its price determinations with respect to such commodities and services.<sup>1</sup>

On January 26, 2007, the Committee released their latest revision of Pricing Memorandum Number 3 (PR3). The purpose of the memorandum was to prescribe policies and requirements for recommending the Fair Market Price for an AbilityOne (formerly JWOD) service contract. This memorandum should help quell dissatisfaction from the field over pricing discrepancies between competed and directed procurements.

The Federal Acquisition Regulation, Part 8, establishes JWOD contracting and procurement policies. When applicable, DoD acquisition and contracting officials comply with the FAR requirements. In some instances, this compliance has led to significantly higher “per meal” costs.

<sup>1</sup> 41 U.S.C. section 47(b).

**The Bigger Picture.** DoD’s estimated contracted costs for food service in continental United States (CONUS—includes Alaska and Hawaii) military dining facilities is projected to be \$3.245 billion from FY 2005—FY 2009. Approximately \$3.193 billion of that cost results from multiyear prime (full food service) contracts that were already in place at the end of FY 2005 (most recent available).<sup>2</sup>

Figure 1 shows end of FY 2005 costs.

- R-SA
  - 45 percent of total dollars or \$1400 million
  - 23 percent of total food service contracts or 46 contracts
- JWOD
  - 15 percent of total dollars or \$493 million
  - 28 percent of total food service contracts or 58 contracts
- Small Business
  - 13 percent of total dollars or \$418 million
  - 48 percent of total food service contracts or 96 contracts
- Large Business
  - 27 percent of total dollars or \$882 million
  - 1 percent of total food service contracts or 2 contracts

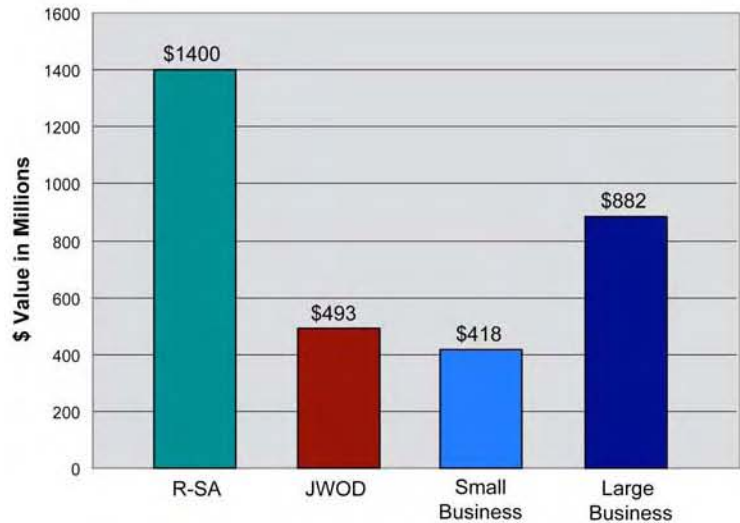


Figure 1. Value of Food Service Prime Contracts – FY 2005

Source: OUSD(AT&L)

Note: The large business contracts represent the U.S. Marine Corps’ two CONUS regional food service contracts. The other contracts represent actions awarded at the installation level. (The information above and in Figure 1 on food service cost was derived from Appendixes H1 and H2, which were provided by OUSD[AT&L], as of September 2005.)

<sup>2</sup> Total Cost of Food Service Contracting, September 2005, OUSD(AT&L).

In addition to food service costs, there are operational and maintenance costs for military and DoD labor, inventory (food), consumable supplies, capital equipment, phased replacement of capital equipment, utilities (electricity/gas/water), preventive/corrective maintenance, pest control, and the brick and mortar. Our analysis of the available data suggests that DoD paid about \$1.569 billion in FY 2005 for these operational costs—above the cost of the actual food service contracts. These DoD-paid operational costs represent cost/risk avoidance for the DoD food service contractor vice what would be required for a non-governmental operation.

Contractor	DoD
Contract Labor	Military Labor
	DoD Civilian Labor
	Inventory (Food)
	Consumables
	Capital Equipment
	Phased Replacement
	Utilities
	Maintenance (PM/CM)
	Pest Control
	Brick and Mortar

Table 4. Cost Factors – DoD Military Dining Facility (Who Pays for What)

The DoD, as a steward of public funds, should comply with law, while seeking “best value” in all of its contracting efforts.

**Observation 2.** R-SA and JWOD food service contractors account for approximately 60 percent of the total value of all such contracts. Any inflation of costs for these types of contracts will cause a disproportionate increase in overall contract costs. Cost or pricing data and supporting information (for example, per meal costs, executive compensation/overhead) must be considered during source selection and contract formation. Contract administration should include monitoring for excess costs, poor cost control, and loss of quality.

**Recommendation 2.** Issue policy directing DoD contracting officers to obtain appropriate cost or pricing data and supporting information to determine whether any offer for a military dining facility solicitation presents a fair and reasonable price, as required by 10 U.S.C. 2306 and FAR Subpart 15.4. This policy should apply to contracts awarded through competitive procedures or without full and open competition. Coordinate to add an R-SA field to the Federal Procurement Data System-Next Generation to allow for reporting of R-SA contract actions. (Office of Primary Responsibility: OUSD(AT&L)).

**Management Comments:** OUSD(AT&L) and the Services concurred with Recommendation 2. The full versions of Management Comments are in Appendix M.

## Section 3

### Requirements–Contracting for Best Value

DoD is obligated to provide quality, cost-effective in-house food service for military members and eligible DoD civilians. The Secretaries of the Military Departments, as defined in 10 U.S.C.

101(a)(9), “have discretion to define requirements and make procurement decisions for contracting military dining facility support. This support includes the operation of military dining facilities and the ability to ensure that procurement decisions support the readiness of the armed forces.”

This review identified three management concerns for complying with the mission requirement to operate military dining facilities in a cost-effective manner.

- Directed procurement requirements impede competition and the ability to implement cost avoidance solutions, such as Base Operation Support and Joint Basing Strategies.
- The introduction of an R-SA or JWOD offer into an otherwise competitive environment drives competitors from the field and effectively eliminates meaningful competition.
- R-SA contracts may cost more.

**Directed Procurement Requirements Impede the Ability to Implement Cost Avoidance Solutions.** Increasing costs of doing business have led the military Services to pursue new cost saving measures. The Services require flexibility to execute cost saving measures. The R-SA and JWOD provisions make it difficult to achieve cost reduction targets regarding military dining facility operations.

Two principal cost saving programs identified during this review were:

- Base Operating Support Contracts
- Joint Basing Strategies

**Base Operating Support Contract.** Some military installations have opted for Base Operating Support (BOS) contracts. BOS contracts provide a single all-inclusive contract for the operation of installations, bases, camps, posts, and stations. These contracts are awarded to promote integrated and seamless quality-of-life and infrastructure support. Under a BOS contract, all support requirements, to include food service, are bundled under one contract. The purpose of the BOS contract is to reduce overall cost through economies of scale and associated reduction in overhead.

When directed procurements such as JWOD and R-SA provisions enter the equation, costs increase. During our fieldwork at a BOS installation, the contracting officer estimated that the additional outside contractor, in his case an R-SA offeror, would drive his food service contracting costs up by about 40 percent. This mark-up results from the prime BOS contractor having to negotiate with the respective SLA who then subcontracts with a blind vendor. The blind vendor partners with a commercial food service vendor that actually operates the dining facility. Table 5 illustrates the possible additional layers of non-value-added food service overhead after carving food service out of a BOS contract, often to accommodate an R-SA or JWOD vendor.

BOS	BOS + Food Service Subcontract
Prime Contractor	Prime Contractor
	SLA
	Blind Licensee
	Food Service Teaming Partner

Table 5. Base Operating Support Overhead Costs Comparison

**Joint Basing Strategies.** Similarly, R-SA and JWOD programs potentially hamper execution of Joint Basing Programs. The joint basing program is designed to create efficiencies and eliminate redundancy among co-located or geographically proximate installations, consistent with the common output level standards (COLS).<sup>23</sup>

Because the missions at co-located or geographically proximate installations may vary, the COLS program may be impractical for some base support requirements. However, regardless of unique mission requirements, “feeding the troops” is a routine and standard function at all installations. Therefore, the cost savings and efficiencies attributed to joint basing programs applies to operation of military dining facilities. The presence of an R-SA and/or JWOD vendor at these installations, or their introduction into the contract process, could eliminate any joint basing efficiencies gained in the food service area by increasing costs.

**The Introduction of an R-SA or JWOD Offer Into an Otherwise Competitive Environment Drives Competitors From the Field.** As previously discussed, the R-SA priority and JWOD preference affects the commander’s ability to make value-based financial decisions about military dining facility contracts. This occurs because:

- potentially competitive bidders choose not to participate if they think an SLA or a JWOD vendor will be bidding on a contract; and
- the commander feels pressure from the SLA to enter into direct negotiations with, or to award to, the SLA so as to avoid costly and time-consuming protest, arbitration, or litigation.

Standard contractual language appearing in most food service contract solicitations calls for full and open competition, even if an SLA or JWOD vendor submits a proposal. However, based on our interviews with program managers, we conclude that there is a perception within the food service contracting community that, once an installation engages with an SLA, the contract will go to the SLA and an R-SA vendor. Potential competitors are reluctant to compete against the

<sup>23</sup> Briefing, IMNE-EUS-PA, 20 Sep 2006. COLS is a DoD initiative intended to create common language and toolsets for common delivery of installation support applicable across all U.S. military installations in a host-tenant relationship. The COLS framework is intended to assist DoD Components in assessing risk while apportioning and managing limited resources.

R-SA priority and JWOD preference. Non-R-SA/JWOD bidders believe that the R-SA or JWOD vendor will receive the contract. Because this condition reduces real competition, installations are potentially paying more for food service contracts.

A 1999 review of U.S. Army dining facility contracts by the Army Audit Agency supports this perception:

...competition may have been blunted because original solicitations for proposals stated that the provisions of the act (R-SA) would apply. Potential offerors therefore knew of the preference for the blind vendor, and may not have submitted proposals.<sup>24</sup>

During this 1999 review, a contracting officer stated that he was directed to forego direct negotiation with the incumbent R-SA vendor in favor of a full and open competition process. Once that decision was published, his office was repeatedly contacted, not by the blind licensee, but by the blind vendor's commercial teaming partner who "encouraged" the contracting officer to revisit his position and "threatened" to contact his congressional representatives.

**R-SA Contracts May Cost More.** Food service contracts, traditionally awarded as a base year plus three to four option periods, have resulted in escalating annual contract costs versus declining annual contracting budgets.<sup>25</sup> (See Table 6.) Military installations, caught in this resource dilemma, face decisions regarding how to best use their available funding. Should this trend continue, installations may not be able to fund their contracts nor will they have the organic personnel to provide an effective food service operation. Installation commanders must be able to get the most from their contracting dollars. However, the best food service operation for the best price requires competition. The Army Audit Agency review stated:

Our review showed that dining facility contracts awarded to State licensing agencies for blind persons (under provisions of the Randolph-Sheppard Act) cost more than contracts awarded using Federal Acquisition Regulation's best-value practices. Interviews with contracting office personnel, contracting officer's representatives, and contractor personnel indicated that the blind persons associated with the contracts added no value to the contract and the profits they received resulted in additional contract costs.<sup>26</sup>

Table 6 cites examples of the additional costs of R-SA contracts (blind licensee and assistant), above what a non-R-SA contract would cost.<sup>27</sup>

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<sup>24</sup> AA 99-726.

<sup>25</sup> HQ, Air Mobility Command (AMC) memo, March 27, 2007, Subject: Contract Reductions. "Specifically, Air Force contract services support reductions total \$700M in FY07 and \$6.2B across the FY07-11 time frame."

<sup>26</sup> AA 99-726.

<sup>27</sup> AA 99-726.

Location	Base Yr	Option 1	Option 2	Option 3	Option 4	Total
<b>Redstone Arsenal</b>						
Blind Licensee	43,200	43,200	43,200	43,200	43,200	216,000
Assistant	N/A	N/A	N/A	N/A	N/A	N/A
<b>Fort McClellan</b>						
Blind Licensee	86,400	86,400	86,400	86,400	86,400	432,000
Assistant	18,260	18,260	18,260	18,260	18,260	91,300
<b>Fort Campbell</b>						
Blind Licensee	200,000	200,000	200,000	200,000	200,000	1,000,000
Assistant	39,600	39,600	39,600	39,600	39,600	198,000
<b>Fort Sam Houston*</b>						
Blind Licensee	72,200	36,700	N/A	N/A	N/A	108,700
Assistant	30,000	20,000	N/A	N/A	N/A	50,000
<b>Subtotal</b>						
Blind Licensees	401,600	366,300	329,600	329,600	329,600	1,756,700
<b>Subtotal</b>						
Assistants	87,860	77,860	57,860	57,860	57,860	339,300
<b>Combined Total</b>	<b>489,460</b>	<b>444,160</b>	<b>387,460</b>	<b>387,460</b>	<b>387,460</b>	<b>2,096,000</b>
*The Government terminated the Fort Sam Houston contract during May 1998						

Table 6. Additional Costs in Contracts Awarded Under the Randolph-Sheppard Act  
Source: Army Audit Agency (AA-726)

Military food service operations are a vital part of DoD's morale and welfare mission and, hence, integral to the readiness of the armed forces. Installation commanders struggle to manage budget reductions while finding alternative methods to provide services. For example, in FY 2007, Headquarters, Air Mobility Command (AMC) established command-wide standards for common contracts throughout the command with the goal of reducing costs and ensuring equitable standards of service.<sup>28</sup> On one hand, the installations must attempt to provide quality services with reduced expenditures. On the other hand, R-SA and JWOD vendor involvement reduces competition and drives costs up.

Additionally, as the Buckley arbitration (discussed in Appendix I) demonstrates, the R-SA can present a conflict with the DoD decisions about use and closure of military facilities, allocation of military appropriations among competing functions, and mission accomplishment. It may be more cost-effective to close a military dining facility and provide increased Basic Allowance for Subsistence in military pay, rather than continue to incur the expenses associated with facilities operation and maintenance, procurement of raw food, civilian or military managers of the operation, and any services contracts. Operation of a military dining facility involves much more than just the services contract. The costs of the facility, utilities, and raw food often exceeds the cost of the food services contracts. The military Services need to be able to decide whether to contract out for dining services at all.

<sup>28</sup> Memorandum, Air Mobility Command, April 16, 2006, Subject: AMC Command-Wide Contract Standards.



The R-SA substitutes an SLA for DoD in selecting and overseeing the vendor and team partners who actually perform the services. Under the R-SA, DoD enters a “prime” contract with the State. The blind vendor is a “subcontractor” to the State. There is no “privity” of contract between the DoD and the blind vendor. The State can terminate and replace a blind vendor or team partner without notifying or consulting the DoD. If the blind vendor has performance issues, the DoD must work that with the State. Such a scenario makes DoD contract administration, oversight, and cost control problematic.

OUSD(AT&L) is developing a legislative proposal to address these issues. However, to date, OSD has not sent this proposal to Congress. (This proposal is addressed in a subsequent Observation and Recommendation.)

## Section 4

### Randolph Sheppard Act Policies—Multiple Sources

This review identified three issues related to R-SA policies, guidance, and regulations.

*(Other sections of this report discuss the status of procurement regulations and policies.)*

- The Randolph-Sheppard Act policies are vague and lack measures of success.
- Conflicting Randolph Sheppard Act program guidance leads to inconsistent application of the law.
- The Randolph-Sheppard Act arbitration process should be more transparent to all stakeholders.

**The Randolph-Sheppard Act Policies are Vague.** DoD and the Military Departments have promulgated guidance that implements the R-SA.<sup>29</sup> The departmental directives mirror the DoD directive, which mixes guidance for property managers, appropriated fund contracting officers, and nonappropriated fund instrumentalities. The directives do not use the term “military dining facility” but rather the term “cafeteria,” which can lead to various interpretations about whether the directives apply specifically to military dining facilities.<sup>30</sup> Additionally, the criteria and timing outlined in the directives for granting “priority” under the R-SA are unclear because they are based on processes and concepts that were removed from the FAR in 1996. The R-SA regulations are out-of-date, and this can produce confusion.

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<sup>29</sup> DoD Directive 1125.3, Vending Facility Program for the Blind on Federal Property, April 7, 1978 with latest Change 1 of August 22, 1991.

Army Regulation (AR) 210-25 of 30 June 2004.

Secretary of the Navy Instruction 4535.3A of August 1, 2005.

Air Force Instruction 34-206 of 5 August 1994.

<sup>30</sup> The FY 2007 NDAA, Section 856(d) stated that “cafeteria” included mess halls and military troop dining facilities (See Table 7.)

On July 31, 2007, the DoED issued their report, “Management Procedures under the Randolph-Sheppard Act and Javits-Wagner-O’Day Act” (Appendix J) as their response to the tasking in Section 856 of the NDAA for Fiscal Year 2007. In their report, they stated that they concurred with the applicable findings of GAO Report GAO-07-236: “Federal Disability Assistance: Stronger Oversight Could Help Assure Multiple Programs’ Accountability.” GAO found that no performance goals or measures currently exist for the R-SA program and DoED conducted little oversight of the program. As a result, GAO recommended that DoED establish goals for the R-SA program and strengthen program monitoring and guidance.

DoED R-SA program guidance is limited to the guidance contained in 32 C.F.R. Chapter 1, Part 395, July 1, 2002. Additionally, the DoED IG report states the following.<sup>31</sup>

- DoED plans to issue to SLAs an inventory of policy directives, technical assistance circulars, and other written guidance previously issued by DoED relevant to the R-SA program. The DoED staff stated that they would place policy guidance on its Web site so it will be readily available to program participants, State Government agencies, Federal procurement officials, and property-management agencies.
- DoED is working to improve their effort to provide clear guidance. They plan to issue new regulations and procedures regarding SLA/R-SA vendor responsibilities and to clarify program requirements with regard to military dining facilities. These regulations are currently being coordinated through DoD and the Committee for Purchase From People Who Are Blind or Severely Disabled (CFP or Committee).

**Conflicting Randolph Sheppard Act Program Guidance Leads to Inconsistent Application of the Law.** The Congress, DoED, DoD, and the Military Departments have issued conflicting guidance to the Military contracting community. The available guidance is contradictory and lacks clarity. Because of the language in R-SA and JWOD statutes, DoD contracting officers face the JWOD/R-SA dilemma.

- R-SA vendors have priority.<sup>32</sup>
- JWOD vendors are a mandatory source.<sup>33</sup>

The R-SA does not define “cafeteria.” The DoED regulations, however, at 32 CFR Chapter 395, Part 395.1, July 1, 2002, do contain a definition of “cafeteria.” There is no clear link to “military dining facilities.” Only in the last year did Congress define the term “military dining facility” to include “cafeteria,” as used in the law (FY 2007 NDAA, Section 856(d)). *NISH v. Cohen* settled the question of R-SA priority to perform contract “operation” of a military dining facility. The JWOD clearly has priority over all services contracts other than “operation of a cafeteria.”

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<sup>31</sup> United States Department of Education, Office of Inspector General report of July 31, 2007, Control Number ED-OIG/A19H0001. (See Appendix F.)

<sup>32</sup> 20 U.S.C. Section 107.

<sup>33</sup> 41 C.F.R. Section 51-5.2.

Table 7 summarizes congressional provisions on R-SA and JWOD in various NDAA's.

<p><b>FY 2005 NDAA</b> - Section 853(a) of the National Defense Authorization Act (NDAA) for Fiscal Year 2005 (Public Law 108-36), "<i>Contracting with Employers of Persons with Disabilities</i>," made the R-SA inapplicable to mess hall services under existing JWOD contracts. Section 853(b) made JWOD inapplicable to mess hall services under existing R-SA contracts. (No poaching.)</p>
<p><b>FY 2006 NDAA</b> – Section 848 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 108-375), directed DoD, DoED, and CFP to develop a joint statement of policy concerning application of the JWOD and R-SA to contracts for operation and management of military dining facilities and contracts for food services, mess attendant, and other services and for supporting the operation of military dining facilities. (See Appendix K-- DoD / DoED/ CFP Joint Policy Recommendations.)</p>
<p>FY 2007 NDAA – Section 856(a) of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), repealed the "No poaching" provisions in the FY 2005 NDAA, again establishing them with slightly different wording.</p> <p>Section 856(c) directed the Inspectors General of DoD and DoED to review the management procedures under both R-SA and JWOD.</p> <p>Section 856(d) defined "military dining facility" as "a facility owned, operated, leased, or wholly controlled by the Department of Defense and used to provide dining services to members of the Armed Forces, including a cafeteria, 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." (Expressed congressional intent that R-SA applied to military dining facilities.)</p>
<p>Table 7. NATIONAL DEFENSE AUTHORIZATION ACT (NDAA) Randolph-Sheppard / Javits-Wagner-O'Day Provisions</p>

**Joint Policy Recommendations.** As required by section 848 of the NDAA for FY 2006, a working group comprised of representatives from DoD, DoED, and CFP submitted their report describing the joint statement of policy to specified congressional committees on September 1, 2006 (Appendix K). This report provided a joint policy statement on August 29, 2006, for the

application of JWOD and R-SA to contracts for the operation and management of military dining facilities. The joint policy statement:

- developed consensus on issues where there had been long-standing confusion or disagreement among parties;
- established consistency among R-SA, JWOD, and DoD's missions, and the needs of the military services, including cost containment;
- provided more job opportunities for disabled individuals under the R-SA and JWOD;
- made application of the R-SA priority more understandable and workable for the Military Departments, base commanders, contracting officers, and R-SA and JWOD entities; and
- reached policy agreement on definition of key terms and concepts, reducing ambiguity and uncertainty in the distribution of military food service contracts to R-SA and JWOD offerors.

Congress, DoD, and DoED have not fully implemented the recommendations made by the working group. To date, Congress implemented only Paragraph 3 of the joint policy statement of August 29, 2006, establishing a "no-poaching" provision with respect to existing JWOD and R-SA contracts in place on the date of enactment of Section 856. Even with the issuance of the joint policy and Section 856, there is still confusion among the Military Departments about the current applicability of the joint policy recommendations. At the urging of DoED, OUSD(AT&L) issued a memorandum on March 16, 2007, to the procurement community stating that the joint policy statement was not in effect until implemented in regulations (Appendix G). One exception was Section 856(a), which was effective the date of enactment of the NDAA for FY 2007 (no poaching).

Additional specific recommendations in the joint policy statement (Appendix K) that have not been implemented include:

- Paragraph 1: The ultimate primacy of the use of Defense appropriations to accomplish the national defense mission, including the military mission to maintain an in-house food service capability, and the need to spend Defense appropriations wisely while supporting socio-economic programs to the extent practicable (e.g., by requiring any contract provide high quality food to the troops at a cost-effective price).
- Paragraph 2: The essential discretion the Secretaries of the Military Departments must exercise in defining requirements, assigning tasks among the workers in a facility, and making procurement decisions that support the readiness of the Armed Forces and the morale of the military community.
- Paragraph 4: A bright-line standard that R-SA covers only contracts for the "operation of a military dining facility" (where DoD has no role other than contract administration

under FAR Part 42) and that the JWOD Act governs all other food services and dining support services contracts.

- Paragraph 5: Recognition that the mandatory subcontract provisions of the JWOD Act apply to SLAs and their licensed blind vendors, just as the JWOD Act applies to any other contractor. States are not exempt from the Federal requirement to provide jobs through AbilityOne nonprofit organizations to blind and severely disabled workers when States seek contracts that would require any other contractor to hire those same workers.
- Paragraph 6: Require States to assign at least one blind person per military dining facility in a management role in multifacility contracts and provide adequate education, training, and on-the-job opportunities for a large number of blind persons to gain and exercise skills as food service managers.
- Paragraph 7: Ensure DoD has the authority to use best commercial practices and regional business models, including the ability to designate individual dining facilities for subcontracting under the Small Business Act, JWOD Act, or other preferential procurement programs. SLAs are already eligible under the R-SA to bid on contracts under the regional, commercial model. The inability of some States to prepare a suitable proposal under such a solicitation should not deter the DoD's ability to use best business practices.
- Paragraph 8: Require maximum competition for contracts in order to assure high quality and reasonable price comparable to what DoD could obtain from commercial market sources. Accordingly, the R-SA "priority" must be determined based on the best and final proposal revisions after discussions with all offerors in the competitive range, in accordance with FAR 15.307. DoED's regulations should not be misconstrued to permit sole-source negotiations without discussions with other offerors or to eliminate other competitors from the competitive range based only on initial proposals, unless there is a documented justification and approval to use noncompetitive procedures. Appropriate cost or pricing data (certified or uncertified) and additional supporting information shall be obtained to enable the DoD contracting officer to make prudent business decisions and determine whether the offer presents a fair and reasonable price.
- Paragraph 9: Enable DoD to award contracts to other than the States when it is in the best interests of the Federal Government.
- Paragraph 10: Promptly issues rules codifying the 2006 joint policy.

Full implementation of the joint policy recommendations requires compliance with Administrative Procedures Act requirements and may require further legislative action by Congress, after appropriate coordination between DoD, DoED, CFP, and the Office of Management and Budget. (This is addressed in a subsequent Observation and Recommendation.)

**The DoED Randolph-Sheppard Arbitration Process Adversely Affects DoD Decision-Making and Mission Accomplishment.** Another issue affecting management procedures is the

arbitration process for settling disputes under the R-SA. In general, when a military installation issues a solicitation for bids on a contract for military dining facility services and the SLA enters the bidding process, the R-SA rules trigger mandatory provisions for any prospective blind vendor who meets the contract criteria and bids within the competitive range. However, DoD has experienced SLAs petitioning for arbitration to DoED alleging violations of R-SA, even though the Act was not applicable to the issues at hand.

In at least one instance, the DoD was not afforded an opportunity to challenge a request for arbitration prior to the DoED rendering a decision on whether or not to grant a hearing. This process denies the DoD due process at this point in the proceeding.

A recent example at Buckley Air Force Base, Colorado, illustrates this point (Appendix I). A summary of the case follows.

An Air Force Major Command issued guidance directing all of its installations to review contracting activities to identify opportunities to reduce overall budget expenditures. One installation determined it could eliminate the R-SA-operated military dining facility, where very few enlisted members were stationed and eligible to eat. By closing the facility, the Air Force could save almost \$1 million in real property expenses, as well as save \$1.4 million per year. The installation notified the SLA, and advised them that the contract would not be extended beyond the current period of performance. The installation explored a number of alternative uses for the building, including opening an in-house snack bar or sports pub operated by non-appropriated fund (NAF) Government employees or turning the closed facility over to the State to operate a food concession under the R-SA. Prior to any final decisions and without determining the installation's final intent, the SLA claimed the base was violating their R-SA priority. However, the installation advised the SLA that the planned facility was not a vending facility operation within the definition of a cafeteria since the Services Division, as a nonappropriated fund (NAF) activity, would operate it internally. As a result, the Air Force did not plan to contract out the food service and, therefore, the R-SA priority would not apply.

The SLA sought relief in the Court of Federal Claims. The SLA requested a preliminary injunction to prohibit the Air Force from continuing its plans to renovate the dining facility while the arbitration process took place. The SLA filed two alternative proposed orders:

- 1) Require the Air Force to complete renovations in a timely manner and when completed, install plaintiffs (SLA) as operators of the new facility;
- 2) Enjoin the Air Force from "entering into or performing under contract or other arrangement for food services (including, but not limited to, operating the facility in-house) at the building...that contained [the cafeteria]...unless and until the Air Force has applied the Randolph-Sheppard Act's priority to that contract or other arrangement.

The court ruled that it lack subject matter jurisdiction to hear the case and dismissed it, advising that the SLA must first submit a formal request for arbitration to the Secretary of Education as provided under the R-SA. The Secretary of Education granted the arbitration hearing, but did not afford the Air Force any prior notice or opportunity to dispute the merits of the case. More than 18 months have passed. Because of the ongoing arbitration, the Air Force has not been able to

renovate or make any decisions about a new use for the closed facility. This example illustrates an attempt by an SLA to challenge military commanders on non-procurement matters that are firmly within the military's authority and outside the scope and congressional intent of R-SA. The actions taken by the Air Force to close a facility that had become too expensive to operate did not involve the R-SA. Therefore, the action did not constitute a violation.

In another case, the Air Force relies on its share of nonappropriated fund revenues generated by vending machine sales of cold drinks to defray the costs of operating the post restaurant. The SLA expressed interest in taking over the vending machines or claiming all of the nonappropriated revenues (rather than share with the Air Force). The Air Force was willing to step aside and let the State operate all the food and vending facilities, but the State declined the opportunity to operate the cafeteria. Then the State filed an arbitration request, which DoED granted.

Because of cases such as these, the question is whether the SLAs or the military Services should have the right to operate food and vending facilities on a military installation for the benefit of military members and their families. Stated another way, the question is whether the States should be allowed to use the R-SA to divert Defense appropriations into State programs and profit for their commercial teaming partners. In the interest of keeping Defense appropriations useful for the bona fide needs and the purposes for which such funds were appropriated, a legislative solution is needed. (Addressed in a subsequent recommendation.)

The Secretaries of the Military Departments should have discretion to define requirements and make procurement decisions concerning contracting for military dining support and the operation of a military dining facility. The Secretaries should have the discretion to make decisions about the best use for buildings under their control and to ensure decisions support the readiness of the armed forces, and the best use of taxpayer dollars to accomplish national defense. The Secretaries should also be able to make decisions about whether and how to provide activities on-base for the morale, welfare, and recreation of military members and their families, especially when the families are left behind during a deployment. Decisions integral to the armed forces and the military families should be made by DoD, not DoED nor the SLAs.

**Observation 3.** Current policies, across the board, should be strengthened and clarified.

**Recommendation 3.** Coordinate to publish for public and interagency comment appropriate policy and regulations to implement the joint policy recommendations as reported to Congress on August 29, 2006, by DoD, DoED, and CFP. (Office of Primary Responsibility: OUSD[AT&L])

**Observation 4.** Noncompetitive statutory preferences and competing priorities (JWOD and R-SA) inhibit creative solutions and DoD's flexibility in managing the cost of food service delivery. This negatively affects mission accomplishment, troop readiness, and the morale, welfare, and recreation programs of the military community. OSD has not sought legislative relief/clarification regarding JWOD and R-SA provisions, as applied to military dining facilities.

**Recommendation 4.** To resolve and clarify issues associated with contracting with employers

or sponsors of persons who have disabilities or who are blind, consistent with military mission and quality of life programs, USD(AT&L) should forward a legislative change request through the Office of Management and Budget to Congress. This change request should enact the provisions of the DoD, DoED, and CFP joint policy recommendations. Appendix L provides proposed legislative language, originally developed by OUSD(AT&L), for this request. (Office of Primary Responsibility: OUSD[AT&L]; Office of Coordinating Responsibility: Office of the Under Secretary of Defense, Personnel and Readiness, DoD Legislative Affairs office, DoD Acquisition Resources and Analysis, DoD General Counsel).

**Management Comments:** OUSD(AT&L) and the Services concurred with Recommendations 3 and 4. The full versions of Management Comments are in Appendix M.

## Conclusions

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Our review found numerous gaps, redundancies, flaws, and risks associated with contracting for military dining facility services within the DoD. The overall goal for both the R-SA and JWOD Acts is to provide meaningful jobs for disabled individuals. R-SA and JWOD program managers can better achieve that goal by developing complementary regulations, as stated in the joint policy recommendations (Appendix I).

DoED states that they are working to provide clearer guidance.

Neither the FAR nor the DFARS currently contain guidance to DoD contracting personnel to help them determine when and how to apply the R-SA priority. If DoD is successful in incorporating the joint policy provisions into the DFARS, this will allow contracting officers to negotiate fair and reasonable prices for all military dining facility contracts.

USD(AT&L), in coordination with DoED and CFP, should develop an appropriate proposal for legislative change to address issues associated with the JWOD, the R-SA, and their affect on contracting for food services in military dining facilities.

We made four recommendations to OUSD(AT&L) to resolve and clarify issues associated with contracting with employers of persons with disabilities. OUSD(AT&L) and the Services concurred with these recommendations.



## Appendix A—Scope and Methodology

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### Scope

This program assessment examined the management procedures associated with implementation of the Randolph-Sheppard Act (R-SA) (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (JWOD) (41 U.S.C. 46 et Seq.) within the Department of Defense (DoD) as they specifically apply to military dining facilities. The review evaluated the degree to which policies and procedures were established and followed within the DoD to ensure compliance with the existing guidance in the administration and award of contracts for military dining facilities. It evaluated the applicability of the R-SA priority to military dining facility contracting

By this assessment, the DoD OIG team answered the following questions:

- Has the Department of Defense published adequate policy for balancing the requirements of the R-SA and JWOD in food service contracting with Federal statutes governing competition in contracting? If not, what can be done to accomplish this?
- Do the Service contracting agencies understand and follow the policy?

We limited our examination to a review of the procedures in place for management of dining facilities within the DoD in compliance with R-SA and JWOD. Since the GAO was tasked to make an in-depth analysis of DoD contracts for food services, we did not evaluate the military dining facility contract operations. We examined the management policy guidance in place for R-SA/JWOD and other contract awards for appropriated and non-appropriated fund (NAF) activities. We examined the DoD memoranda on program management and the basis for contract award under both programs and the DoED guidance sent to State agencies on administration of the programs. Our ability to review the SLAs and blind vendors was limited by the access or information we could obtain through our DoED team-members.

To the maximum extent possible, we avoided duplication of effort with the GAO, which has been tasked under Section 856 of the 2007 National Defense Authorization Act to conduct a similar, but more specific review of food service contracts under R-SA and JWOD and to report on:

- The differences in operational procedures and administration of contracts awarded by the Department of Defense under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) on a State-by-State basis with regard to the relationship between State licensing agencies and blind vendors;
- The differences in competition, source selection, and management processes and procedures for contracts awarded by the Department under the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act, including a review of the average total cost of contract awards and compensation packages to all beneficiaries;

- The precise methods used to determine whether a price is fair and reasonable under contracts awarded by the Department under the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act, as required under the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement (DFARS).

We coordinated our activities with the GAO to minimize any inconvenience to DoD commands. However, we visited a sufficient number of military commands to get a representative view of DoD's management practices with respect to R-SA and JWOD.

## Methodology

**Site Visits.** We met with the following organizations to gain an understanding of statutory and policy issues affecting military dining facility contracting through R-SA and JWOD:

- OSD:
  - Director of Defense Procurement and Acquisition Policy (AT&L)
  - Director of Resale Activities and NAF Policy (P&R)
- Deputy Assistant Secretary of the Army for Policy and Procurement
- Deputy Assistant Secretary of the Navy for Acquisition Business Management
- Deputy Commandant of the Marine Corps for Installations and Logistics
- Deputy Assistant Secretary of the Air Force for Contracting
- United States Army Installation Command
- Committee For Purchase From People Who Are Blind Or Severely Disabled
- National Council of State Agencies for the Blind
- Blind Entrepreneurs Alliance
- National Federation of the Blind

We conducted announced visits to eight military installations, including three Army, two Navy and three Air Force installations:

- Ft. Lewis (R-SA)/ McChord AFB (Small Business). Ft. Lewis and McChord AFB represent collocated interservice facilities with differing food service contracts. The bases were used in the Joint Basing Implementation Roadmap Study (JBIRS) and believed to offer insight as a possible model for joint contracting.
- Fort Dix, NJ (R-SA) / McGuire AFB NJ (JWOD). These bases were another JBIRS site.
- Fort Lee, VA (R-SA with JWOD subcontractor). R-SA contract using a JWOD as a subcontractor.
- Vandenberg AFB, CA (JWOD). Vandenberg AFB represented a facility where award of the JWOD food service contract was challenged unsuccessfully by the California State Licensing Agency
- Navy Region Southwest (Small Business). Navy Region Southwest is a regionalization model being adopted by the Navy to consolidate Base Operating Support (BOS)

contracts. This region covers facilities in San Diego and southern California, as well as NAS Fallon Nevada. The current food service contract exceeds \$20M. We examined the challenges or opportunities regionalization offers for consolidation of food service contracting. We also considered how the contracting process addressed R-SA and JWOD before final award.

## **Standards**

The assessment was conducted from March through November 2007. We derived general standards from the “Quality Standards for Inspections” (January 2005-“Blue Book”). Standards specific to this evaluation were set forth in the project design plan.

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## Appendix B–FY 2007 National Defense Authorization Act, Section 856

### John Warner National Defense Authorization Act (FY 2007), Section 856

#### SEC. 856. CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES.

##### (a) Inapplicability of Certain Laws-

(1) INAPPLICABILITY OF THE RANDOLPH-SHEPPARD ACT TO CONTRACTS AND SUBCONTRACTS FOR MILITARY DINING FACILITY SUPPORT SERVICES COVERED BY JAVITS-WAGNER-O'DAY ACT- The Randolph-Sheppard Act (20 U.S.C. 107 et seq.) does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47).

##### (2) INAPPLICABILITY OF THE JAVITS-WAGNER-O'DAY ACT TO CONTRACTS FOR THE OPERATION OF A MILITARY DINING FACILITY-

(A) The Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) does not apply at the prime contract level to any contract entered into by the Department of Defense as of the date of the enactment of this Act with a State licensing agency under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) for the operation of a military dining facility.

(B) The Javits-Wagner-O'Day Act shall apply to any subcontract entered into by a Department of Defense contractor for full food services, mess attendant services, and other services supporting the operation of a military dining facility.

(3) REPEAL OF SUPERSEDED LAW- Subsections (a) and (b) of section 853 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375; 118 Stat. 2021) are repealed.

##### (b) Review and Report by Comptroller General of Randolph-Sheppard and Javits-Wagner-O'Day Contracts-

(1) IN GENERAL- The Comptroller General shall conduct a review of a representative sample of food service contracts described in paragraph (2) and determine in writing the following:

(A) Differences in operational procedures and administration of contracts awarded by the Department of Defense under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) on a State-by-State basis with regard to the relationship between State licensing agencies and blind vendors.

(B) Differences in competition, source selection, and management processes and procedures for contracts awarded by the Department under the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act, including a review of the average total cost of contract

(C) Precise methods used to determine whether a price is fair and reasonable under contracts awarded by the Department under the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act, as required under the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.

(2) CONTRACTS COVERED- For purposes of the review under paragraph (1), a food service contract described in this paragraph is a contract--

(A) for full food services, mess attendant services, or services supporting the operation of all or any part of a military dining facility;

(B) that was awarded under either the Randolph-Sheppard Act or the Javits-Wagner-O'Day Act; and

(C) that is in effect on the date of the enactment of this Act.

(3) REPORT- Not later than March 1, 2007, the Comptroller General shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the review conducted under this subsection, with such findings and recommendations as the Comptroller General considers appropriate.

(c) Requirements for Inspectors General of Department of Defense and Department of Education-

(1) REVIEW OF MANAGEMENT PROCEDURES- Not later than March 1, 2007, the Inspector General of the Department of Defense and the Inspector General of the Department of Education shall jointly review the management procedures under both the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.). In carrying out this paragraph, the Inspectors General shall each have access to the following:

(A) Memoranda on program management and the basis for contract award under the programs.

(B) Guidance sent to State agencies on administration of the programs.

(C) Names of participating vendors, as well as qualifying experience and educational background of such vendors.

(2) MEMORANDUM OF UNDERSTANDING BETWEEN INSPECTORS GENERAL- Not later than 60 days after the date of the enactment of this Act, the Inspector General of the Department of Defense and the Inspector General of the Department of Education shall enter into a memorandum of understanding with each other to carry out paragraph (1).

(3) REPORT- Not later than one year after the date of enactment of this Act, the Inspector General of the Department of Defense and the Inspector General of the Department of Education shall jointly submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the review required by paragraph (1). The report shall include--

(A) findings of the Inspectors General regarding the management procedures reviewed; and

(B) such other information and recommendations as the Inspectors General consider appropriate.

(d) Definitions- In this section:

(1) The term `State licensing agency' means any agency designated by the Secretary of Education under section 2(a)(5) of the Randolph-Sheppard Act (20 U.S.C. 107a(a)(5)).

(2) The term `military dining facility' means a facility owned, operated, leased, or wholly controlled by the Department of Defense and used to provide dining services to members of the Armed Forces, including a cafeteria, 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.

## House Conference Report 109-702

### **Contracting with employers of persons with disabilities (sec. 856)**

The Senate amendment contained a provision (sec. 873) that would extend for 1 year the status quo for continuation and completion of existing contracts, including any options, awarded under the Javits-Wagner- O'Day Act (41 U.S.C. 46 et seq.) and the Randolph- Sheppard Act (20 U.S.C. 107 et seq.) programs for the operation of military troop dining facilities, military mess halls, and other similar military dining facilities.

The House bill contained no similar provision.

The House recedes with an amendment that would establish a permanent policy regarding the award of contracts and subcontracts for food services, mess attendant services, and other services supporting the operation of a military dining facility under the Javits-Wagner-O'Day and Randolph-Sheppard Acts. The amendment would require a review and report by the Government Accountability Office on operational procedures, competition, and determinations regarding fair and reasonable pricing for contracts awarded under both Acts. The amendment would also require a joint report from the Inspectors General of the Departments of Defense and Education on management procedures implemented under the two Acts.

## House Armed Services Committee Report

### **One-year extension of inapplicability of certain laws to contracting with employers of persons with disabilities (sec. 873)**

The committee recommends a provision that would extend for 1 year section 853 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) to ensure the continuation and completion of existing contracts, including any options, awarded under the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) and the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) programs for the operation of military troop dining facilities, military mess halls, and other similar military dining facilities.



# Appendix C—Department of Defense and Department of Education Memorandum of Understanding

## MEMORANDUM OF UNDERSTANDING BETWEEN THE INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF EDUCATION TO CONDUCT A JOINT REVIEW OF MANAGEMENT PROCEDURES UNDER THE RANDOLPH-SHEPPARD ACT (20 U.S.C. 107 ET SEQ.) AND THE JAVITS-WAGNER-O'DAY ACT (941 U.S.C. 46 ET SEQ.)

### I. REFERENCES

- A. Fiscal Year (FY) 2007 National Defense Authorization Act (NDAA), Section 856, "Contracting With Employers of Persons With Disabilities."
- B. Inspector General Act of 1978, as amended (5 U.S.C., Appendix 3).
- C. Department of Education Organization Act (20 U.S.C. 3475, 3479).
- D. Randolph-Sheppard Act (20 U.S.C. 107 et seq).
- E. Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq).

### II. BACKGROUND AND PURPOSE

The purpose of this Memorandum of Understanding (MOU) is to clarify the roles, responsibilities, and relationship between the Department of Education Inspector General (DoE OIG) and the Department of Defense Inspector General (DoD OIG) in accomplishing the joint review of management procedures announced in Reference A.

The FY 2007 NDAA, Section 856 (Reference A) explains the requirements for DoD OIG and DoE OIG, and states, in part:

*Not later than March 1, 2007, the Inspector General of the Department of Defense and the Inspector General of the Department of Education shall jointly review the management procedures under both the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.).*

*Not later than one year after the date of enactment of this Act [October 17, 2006], the Inspector General of the Department of Defense and the Inspector General of the Department of Education shall jointly submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the review . . . .*

In compliance with Reference A, the Inspectors General of the Department of Defense (DoD OIG) and Department of Education (DoE OIG) will review jointly the program guidance provided by DoE and the management procedures employed by the DoD in conforming with the Randolph-Sheppard Act and the Javits-Wagner-O'Day Act with respect to the operation of military dining facilities.

### III. SCOPE

This MOU describes the responsibilities of DoD OIG and DoE OIG associated with accomplishment of the joint management review directed by Reference A.

### IV. AGREEMENT

- A. Under this MOU, the DoD OIG will assume the lead for the management review, and assistance will be provided by the DoE OIG.
- B. The scope, objectives, focus, and design of the management review will be mutually coordinated and agreed upon by both agencies.
- C. The DoD OIG and the DoE OIG will agree upon what is considered acceptable, marginal, or unacceptable internal controls or performance regarding compliance with FAR and DFARS procedures.
- D. Each agency will designate a team for the review, including team leader. The DoD OIG team leader will be the project leader for this review, and the DoE OIG team leader will be the project deputy. The team leaders will be responsible for overseeing the work performed by the team members from their respective agency, and will maintain close coordination with one another. The team leaders will collectively develop plans and objectives for the review.
- E. Each agency will be responsible for funding the travel and associated expenses for team members from its respective agency. Insofar as possible, team travel will be coordinated to ensure team integrity and to minimize the demands placed on entities or facilities selected for review.
- F. The DoD OIG and DoE OIG will archive working papers associated with this project. All work papers will be made available to each OIG as necessary.
- G. The DoD OIG and the DoE OIG will issue announcement letters initiating this project.

H. As required, the team leaders may hold separate in-process reviews and brief the review results and tentative conclusions to their respective Inspectors General, Deputy Inspectors General, and appropriate agency management personnel.

I. Drafting and editing of the report for this management review will be a collaborative effort overseen by the team leaders. The format for the report will be mutually agreed upon. DoD OIG assumes responsibility for publication of the report. The respective agencies will have responsibility for distribution, as each deems appropriate; however, plans for distribution will be coordinated to avoid duplication.

J. The final interagency report will be approved by both Inspectors General prior to issuance and will be co-signed by them. The report will acknowledge the joint effort involved.

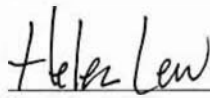
#### V. CONTACTS

Stanley Meyer  
Chief, Joint Operations Defense Agencies  
and Services IG Division  
Inspections & Evaluations  
U.S. Department of Defense  
Office of Inspector General  
400 Army Navy Drive  
Arlington, VA 22202-4704  
703-604-9130

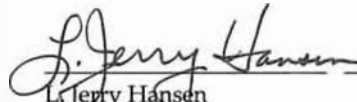
Michele Weaver-Dugan  
Director, Operations Internal Audit  
U.S. Department of Education  
Office of Inspector General  
400 Maryland Avenue, SW  
Washington, DC 20202-1510  
202-245-6941

#### VI. EFFECTIVE DATE.

This Memorandum of Understanding is required by Reference A and will be effective upon signature by both parties below and will expire 6 months after publication of a final report.

  
\_\_\_\_\_  
Helen Lew  
Assistant Inspector General  
Audit Service  
Department of Education

12/19/06  
Date

  
\_\_\_\_\_  
L. Jerry Hansen  
Deputy Inspector General  
for Policy and Oversight  
Department of Defense

12/19/06  
Date

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# Appendix D–Hawaii (Army) Arbitration Report (Docket No. R-S/97-18)

05/03/00: Arbitration Panel Decision Under the Randolph-Sheppard Act {OSERS}

Page 1 of 3

[Federal Register: May 3, 2000 (Volume 65, Number 86)]  
[Notices]  
[Page 25710-25711]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr03my00-46]

DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration panel decision under the Randolph-Sheppard Act.

**SUMMARY:** Notice is hereby given that on November 17, 1998, an arbitration panel rendered a decision in the matter of Hawaii Division of Vocational Rehabilitation, Department of Human Services v. U.S. Department of Defense, Department of the Army (Docket No. R-S/97-18). This panel was convened by the U.S. Department of Education pursuant to 20 U.S.C. 107d-1(b) upon receipt of a complaint filed by petitioner, Hawaii Division of Vocational Rehabilitation, Department of Human Services.

**FOR FURTHER INFORMATION:** A copy of the full text of the arbitration panel decision may be obtained from George F. Arsnow, U.S. Department of Education, 400 Maryland Avenue, SW., room 3230, Mary E. Switzer Building, Washington DC 20202-2738. Telephone: (202) 205-9317. If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 205-8298.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the Federal Register, in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites:

<http://ocfo.ed.gov/fedreg.htm>  
<http://www.ed.gov/news.html>

To use the PDF you must have the Adobe Acrobat Reader, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

**Note:** The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available on GPO

<http://www.ed.gov/legislation/FedRegister/other/2000-2/050300c.html>

7/10/2007

[[Page 25711]]

Access at: <http://www.access.gpo.gov/nara/index.html>

**SUPPLEMENTARY INFORMATION:** Pursuant to the Randolph-Sheppard Act (the Act), (20 U.S.C. 107d-2(c)), the Secretary publishes in the Federal Register a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

#### Background

This dispute concerns the alleged failure of the U.S. Department of Defense, Department of the Army (Army), to award a priority under the Act to the Hawaii Division of Vocational Rehabilitation, Department of Human Services, the State licensing agency (SLA), for a contract to operate a cafeteria at Schofield Barracks, Wahiawa, Oahu, Hawaii.

A summary of the facts is as follows: On October 29, 1996, the SLA requested a meeting with the Army's Contracting Officer (CO) and Army staff to discuss the possibility of direct negotiations under the Act regarding the operation of a cafeteria facility at the Schofield Barracks in Wahiawa, Oahu, Hawaii.

Subsequently, on November 6, 1996, a meeting was held between the SLA and the Army's CO. At the meeting, the CO mentioned that the previous cafeteria contract had been solicited pursuant to the Small Business Administration Section 8(a) set-aside program. In a May 6, 1997 letter from the Army, the SLA was informed that the Army would continue to rely upon a memorandum from the Office of the Assistant Secretary, Research Development and Acquisition, dated April 15, 1997. This memorandum stated that, because the Act did not apply to appropriated-fund contracts, military mess hall contracts would be awarded based upon general procurement principles, including preferences under the Section 8(a) set-side program. On May 6, 1997, the Army solicited proposals under these general procurement principles, thereby not awarding a priority under the Act to the SLA. By letter dated August 21, 1997, the SLA filed with the Secretary of Education a request for arbitration of this dispute. A Federal arbitration hearing on this matter was held on July 9 and 10, 1998.

#### Arbitration Panel Decision

The central issue before the arbitration panel was whether the Randolph-Sheppard Act, 20 U.S.C. 107d-3(e), is applicable to appropriated-fund contracts covering military dining facilities, which are basically used by military personnel. If so, is the Army then required to permit the SLA an opportunity to bid on a contract covering military dining facilities in Hawaii on an unrestricted basis under the priority provisions of the Act?

The majority of the panel ruled that, as defined in the regulations of the Department of Education and Department of Defense, all of the facilities covered under the agreement provide cafeteria services, which include a broad variety of prepared foods and beverages. These foods are dispensed primarily through the use of a serving line where the customer serves or selects food items for himself or herself from displayed selections.

In this case, the military dining facilities covered under the Hawaii contract used contractor personnel to provide full food service, including food preparation, serving, and cleanup services. The use of the facilities was limited to authorized military personnel. On the other hand, Randolph-Sheppard vending facilities, whether a stand,

<http://www.ed.gov/legislation/FedRegister/other/2000-2/050300c.html>

7/10/2007

automatic food dispensing machine, or cafeteria, are open for use by the general public. However, they are used most frequently by the employees working at the facility and are not supported by appropriated funds, but rather by payments for goods and services.

Further, the majority of the panel noted that the Federal Government's procurement process for goods and services to be paid for by appropriated funds is subject to procurement laws and regulations. These laws and regulations seek to standardize procedures for awarding contracts, thereby assuring quality in meeting specifications and economy of price. Exceptions are permitted by Congress for certain groups, such as those who qualify under the Small Business Administration or those who employ severely handicapped or blind individuals under the Javits-Wagner-O'Day Act.

The 1974 amendments to the Act expanded the opportunities for blind persons to operate vending facilities, including vending machines and cafeterias on Federal property, and required Federal agencies to provide locations for vending facilities to be operated by blind licensees.

The panel ruled that if Congress had intended the Act to apply to appropriated-fund contracts, it would have included very specific language authorizing those contracts because such a reading would substantially change the administration of Federal procurement law. Because that language is not included, the best reading of the statute is that it was not intended. Thus, while not entitled to assert a priority under the Act in bidding on an appropriated-fund contract for dining facilities, the SLA would not be precluded from applying for a preference under the Javits-Wagner-O'Day Act.

One panel member dissented.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S. Department of Education.

Dated: April 28, 2000.

Judith E. Heumann,  
Assistant Secretary for Special Education and Rehabilitative Services.  
[FR Doc. 00-11015 Filed 5-2-00; 8:45 am]  
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# Appendix E—Department of Defense, Office of the General Counsel Randolph-Sheppard Act Letter—November 12, 1998



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
1600 DEFENSE PENTAGON  
WASHINGTON, D. C. 20301-1600

12 NOV 1998

## MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS

SUBJECT: Applicability of the Randolph-Sheppard Act to DoD Military Dining Facilities

The applicability of the Randolph-Sheppard Act ("Act")<sup>1</sup> to contracts for the operation of military dining facilities involving appropriated funds has recently been the subject of discussion within the Department of Defense. This memorandum is issued to reiterate this office's opinion on this matter. As discussed below, it is my opinion that the Act is generally applicable to contracts involving military dining facilities. This opinion is based upon the plain meaning of the statute, Department of Education (DOE) guidance, and Comptroller General opinions.

The Act was enacted in 1936 as a program to provide opportunities for blind individuals to become economically self-sufficient. The original Act was very limited in scope and extended a priority to contracts in federal buildings for newsstands, snack bars, and the like. The Act was amended in 1974 to expand significantly the scope of contracts subject to the Act's priorities. The 1974 amendment specifically included "cafeterias" in the definition of vending facilities subject to the Act.<sup>2</sup> DOE, the agency charged with the administration and enforcement of the Act,<sup>3</sup> has determined that, generally, military dining facilities are cafeterias and are indeed included within the scope of, and subject to, the Act.<sup>4</sup> As recently as November 9, 1998, DOE confirmed the continuing vitality of its position in a letter to the Department of the Army.<sup>5</sup>

<sup>1</sup> Chapter 6A of Title 20, U.S.C.

<sup>2</sup> 20 U.S.C. 107(e)(7).

<sup>3</sup> 20 U.S.C. 107(a).

<sup>4</sup> See Commissioner, Rehabilitation Services Administration, Department of Education memorandum of August 14, 1997 to Committee for the Purchase from the Blind and Other Severely Handicapped; Commissioner, Rehabilitation Services Administration, Department of Education ltr of March 13, 1992 to Executive Director, Committee for Purchase from the Blind and Other Severely Handicapped ("Carney letter").

<sup>5</sup> See Commissioner, Rehabilitation Services Administration, Department of Education ltr of November 9, 1998 to Assistant Secretary of the Army for Research, Development and Acquisition.



Multiple Comptroller General decisions and arbitral awards have supported this interpretation.<sup>6</sup> For example, the Comptroller General held in a June 4, 1993 opinion that the military dining halls at Keesler Air Force Base were subject to the Act and dismissed protests made by a company seeking the contract under section 8(a) of the Small Business Act.<sup>7</sup> Upon reconsideration, the Comptroller General specifically ruled that the Randolph-Sheppard Act trumps the Small Business Act.<sup>8</sup> Later Comptroller General decisions assume that the Act is applicable to all contracts and do not distinguish between appropriated or nonappropriated funding.<sup>9</sup> The Act itself does not refer to this distinction as germane to its applicability.

While DOE has consistently taken the position that military dining facilities are cafeterias and are generally subject to the Act, it has recognized that the Act may not be applicable in those instances where the contracts are for discrete services rather than the overall "operation" of the dining facilities.<sup>10</sup> As the then-DOE Rehabilitation Services Administration Commissioner stated, "[I]f the food service contract calls upon the contractor to provide a limited number of discreet [sic] food services, and DOD personnel play an important role in the overall functioning of the cafeteria, DOD would be viewed as operating the cafeteria on an 'in-house' basis and, as a result, the food service contract would not conflict with the Randolph-Sheppard Act."<sup>11</sup> The

<sup>6</sup> E.g., Grants Initorial and Food Services, Inc., B-275157, Comp. Gen. (January 27, 1997); Triple P. Services, Inc.—Reconsideration, B-250465.8 et. al., Comp. Gen. (December 30, 1993); Department of the Air Force—Reconsideration, 72 Comp. Gen. 241 (1993); Louisiana Department of Social Services, Rehabilitation Services v. U.S. Department of Defense, Department of the Air Force, Case No. R-S/97-3 (1998)(Barton, Filker, Mayer, Arb.).

<sup>7</sup> Department of the Air Force—Reconsideration, 72 Comp. Gen. 241 (1993).

<sup>8</sup> Triple P. Services, Inc.—Reconsideration, B-250465.8 et. al., Comp. Gen. (December 30, 1993).

<sup>9</sup> See, e.g., Grants Initorial and Food Services, Inc., B-275157, Comp. Gen. (January 27, 1997); Mississippi State Department of Rehabilitation Services, B-250783.8, Comp. Gen. (September 7, 1994); Good Food Service, Inc.—Reconsideration, B-256526.3, Comp. Gen. (July 11, 1994) (The Comptroller General noted in this opinion that in a prior decision he determined that the Act was applicable to appropriated fund procurements and stated, "We did not distinguish between appropriated and non-appropriated funds in the above decision because the procurement was conducted with appropriated funds. Thus, we were not called upon to discuss the application of the Randolph-Sheppard Act to a procurement not involving the expenditure of appropriated funds.")

<sup>10</sup> Carney letter, Commissioner, Rehabilitation Services Administration, Department of Education undated let to Assistant Secretary of Defense (Force Management and Procurement).

<sup>11</sup> Carney letter, at page 3.

Commissioner noted that such determinations are fact-specific and must be made on a case-by-case basis.<sup>12</sup> A recent arbitration case involving the Air Force dining facilities at Brooksdale Air Force Base is illustrative of such case-by-case decisions.<sup>13</sup> The arbitrators determined that although the Air Force contracted out certain mess attendant functions, it retained the overall "operation" of the dining facility and operated it on an in-house basis.<sup>14</sup> Thus, the contract was not subject to the priority provisions of the Act.<sup>15</sup>

In addition to the consistent advice of this office,<sup>16</sup> on at least two occasions the Office of the Assistant Secretary of Defense (Force Management Policy) has issued policy statements that military dining facilities are indeed subject to the priority provisions of the Act.<sup>17</sup> As the then-Deputy Assistant Secretary of Defense for Personnel Support, Families & Education stated in a January 19, 1993 letter to Congressman H. Martin Lancaster:

"After considerable review and discussions with DOE, I have concluded that, on balance, the provisions of the Randolph-Sheppard Act pertaining to cafeterias are applicable to the Keesler AFB dining facilities solicitation... Also, the priority given to blind vendors in the operation of cafeterias on federal property by the statute and DOE's regulations is not

<sup>12</sup> Carney letter, at page 2.

<sup>13</sup> Louisiana Department of Social Services, Rehabilitation Services v. U.S. Department of Defense, Department of the Air Force, Case No. R-S/97-3 (1598)(Barron, Hülker, Mayer, Arb.)

<sup>14</sup> *Id.* at page 11.

<sup>15</sup> *Id.* at page 14.

<sup>16</sup> See Deputy General Counsel (Personnel and Health Policy) memorandum of June 11, 1993 for Assistant General Counsel (Military Affairs), Department of the Air Force and Chief, General Litigation Division, Office of The Judge Advocate General of the Air Force; Deputy General Counsel (Personnel and Health Policy) memorandum of February 17, 1993 for Assistant General Counsel (Military Affairs), Department of the Air Force and Chief, General Litigation Division, Office of The Judge Advocate General of the Air Force.

<sup>17</sup> See Deputy Assistant Secretary of Defense (Personnel Support, Families & Education) ltr of January 19, 1993 to Representative H. Martin Lancaster, Director, Personnel Support Policy & Services, ODASD (PSF&E) memorandum of August 7, 1992 for Associate Deputy Assistant Secretary of the Air Force (Contracting).

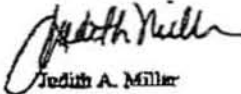
dependent on whether the cafeteria is an appropriated fund activity or a nonappropriated fund activity."<sup>18</sup>

The then-Director, Personnel Support Policy & Services (Personnel Support, Families & Education), Office of the Assistant Secretary of Defense (Management and Personnel) made the same point in an August 7, 1992 memorandum for the Associate Deputy Assistant Secretary of the Air Force (Contracting):

"The position advanced in your memorandum that the Randolph-Sheppard Act does not apply to the acquisition of contractual food services at military dining facilities is not supportable in light of the statute...and the implementing regulations...The provision in the Randolph-Sheppard Act for establishing a priority for the operation of the cafeterias by blind licensees is implemented whenever a solicitation for a cafeteria contract is contemplated by a federal manager. With the expansive definition of cafeteria in the regulations, the dining hall food service contracts are most definitely cafeteria contracts. Further, since the present issue concerns military dining halls, these contracts meet the other criteria of being contracts contemplated by federal property managers."<sup>19</sup>

Thus, the assertion that the Act does not apply to military dining facilities cannot withstand analysis. Accordingly, I request that, to the extent that your respective Military Departments may have taken contrary positions in pending arbitral or other proceedings, you promptly withdraw that position in favor of the DoD legal position set forth in this memorandum. Additionally, please take steps to ensure that your clients are advised of the Department's position and that all of your Service issuances and activities conform to that position.

Your cooperation is appreciated. If this office can provide further assistance, please contact Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, or Commander M. D. Newman of his staff at (703) 697-9341.

  
Judith A. Miller

<sup>18</sup> Deputy Assistant Secretary of Defense (Personnel Support, Families & Education) letter of January 19, 1993 to Congressman H. Martin Lancaster at page 1.

<sup>19</sup> Director, Personnel Support Policy & Services, ODASD(PSP&E) memorandum of August 7, 1992 for Associate Deputy Assistant Secretary of the Air Force (Contracting)

Copy to:  
Acting ASD(FMP)  
Executive Director, MWR & Resale Activities  
Director, Defense Procurement, OUSD(A&T)  
Judge Advocate General of the Military Departments  
Counsel to the Commandant of the Marine Corps  
Staff Judge Advocate to the Commandant of the Marine Corps

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## Appendix F—State Licensing Agency Set-Asides

### RANDOLPH-SHEPPARD STATE LICENSING AGENCIES—FUNDS SET-ASIDE FROM THE NET PROCEEDS

STATES THAT DO NOT HAVE SET-ASIDE	STATES THAT DO HAVE SET-ASIDE	AMOUNT OF SET-ASIDE PERCENTAGE	DATE OF RECENT DETERMINATION
REGION I CONNECTICUT	MAINE MASSACHUSETTS NEW HAMPSHIRE RHODE ISLAND VERMONT	10% 0% (authority, but not choosing to collect) 10% 1.5% 0% (authority, but not choosing to collect)	10/20/1997 6/4/1985 1/14/1999 6/25/1997

STATES THAT DO NOT HAVE SET-ASIDE	STATES THAT DO HAVE SET-ASIDE	AMOUNT OF SET-ASIDE PERCENTAGE	DATE OF RECENT DETERMINATION
REGION II NEW JERSEY	NEW YORK PUERTO RICO	\$18,000 + = 20% 5%	
REGION III WEST VIRGINIA	DELAWARE DISTRICT OF COLUMBIA MARYLAND PENNSYLVANIA VIRGINIA	\$0-5,000 = 10% 5-10,000 = 15% 10,000+ = 20% 21% (actual) \$0-36,000 = 28% (approved, but not collecting at this time) 36,000+ = 33% (approved, but not collecting at this time) 3% 15% of 20% of the net proceeds 5% of vending machine income 2% of lottery sale income figured monthly, \$0-1,500 = 0% (below fair min.) 0-1,500 = 5% (made fair min.) 1,500.01-3,000 = 20% 3,000.01-4,000 = 30% 4,000.01-10,000 = 40% 10,000.01+ = 45%	7/10/1991 8/31/1995 9/19/1977

STATES THAT DO NOT HAVE SET-ASIDE	STATES THAT DO HAVE SET-ASIDE	AMOUNT OF SET-ASIDE PERCENTAGE	DATE OF RECENT DETERMINATION
REGION IV SOUTH CAROLINA	ALABAMA FLORIDA GEORGIA KENTUCKY MISSISSIPPI NORTH CAROLINA TENNESSEE	11% 5% 12% 5% 18% 17% figured monthly \$0-300 = 10% 300+ = 13% 14% effective 7/1/2005 approved in 2004	11/17/1999 4/2/2001 11/3/1995 3/29/1998 (initial approval 1989) 9/20/1996  1983

STATES THAT DO NOT HAVE SET-ASIDE	STATES THAT DO HAVE SET-ASIDE	AMOUNT OF SET-ASIDE PERCENTAGE	DATE OF RECENT DETERMINATION
REGION V INDIANA	ILLINOIS MICHIGAN MINNESOTA  OHIO  WISCONSIN	12% 10% Figured monthly 1 <sup>st</sup> \$100 = 2% 2 <sup>nd</sup> 100 = 4% 3 <sup>rd</sup> 100 = 6% 4 <sup>th</sup> 100 = 8% 5 <sup>th</sup> 100 = 10% 6 <sup>th</sup> 100 = 12% 7 <sup>th</sup> 100 = 14% over \$700 = 16%  0-1,000= 10% 1,000-2,500-15% 2,500 + = 20%	9/6/1990 original approval - 1978 12/27/1990



STATES THAT DO NOT HAVE SET-ASIDE	STATES THAT DO HAVE SET-ASIDE	AMOUNT OF SET-ASIDE PERCENTAGE	DATE OF RECENT DETERMINATION
REGION VI LOUISIANA	ARKANSAS NEW MEXICO OKLAHOMA TEXAS	15% 5% figured annually \$0-4,999 = 0% 5,000-14,999 = 6% 15,000-24,999 = 10% 25,000+ = 12%  figured monthly \$1-999 = 2% 1,000-1,499 = 3% 1,500-1,999 = 4% 2,000-5,999 = \$80+18% 6,000+ = \$800+24%	9/16/1993 1997 1997 10/29/2003
REGION VII IOWA	KANSAS MISSOURI NEBRASKA	20% 13% 13%	11/5/1999 1/27/1995 8/18/2003

STATES THAT DO NOT HAVE SET-ASIDE	STATES THAT DO HAVE SET-ASIDE	AMOUNT OF SET-ASIDE PERCENTAGE	DATE OF RECENT DETERMINATION
REGION VIII MONTANA NORTH DAKOTA	COLORADO SOUTH DAKOTA UTAH	First \$100 = 10% Max. 13%  Figured monthly \$0-200 = 0 201-400 = 10% 401-600 = \$20+15% over 400 601-800 = \$50+20% over 600 801-1,000 = \$90+30% over 800 1,000+ = \$150+40% over 1000  10%	2/25/1981 3/17/1975 2001
REGION IX HAWAII	ARIZONA CALIFORNIA NEVADA	Figured monthly First \$400 = 2% 401-500 = \$8+5% 501-600 = \$13+10% 601-700 = \$23+15% 701+ = \$38+20%  6% max.  figured monthly \$0-1,100 = 2% of net proceeds 1,101-1,350 = \$25+5% over 1100 1,351-1,800 = \$35+10% over 1350 1,801-2,250 = \$80+15% over 1800 2,251-2,800 = \$150+20% over 2250 2,801-3,600 = \$260+30% over 2800 3,601-5000 = \$500+40% over 3600 5,000+ = \$1045+50% over 5000	7/29/1990 6/1/2004 8/17/2001

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# Appendix G—Applicability of the Javits-Wagner-O’Day Act and Randolph-Sheppard Act to Military Dining Facilities— March 16, 2007



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MAR 16 2007

DPAP/P

MEMORANDUM FOR DIRECTORS, DEFENSE AGENCIES

DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(POLICY AND PROCUREMENT), ASA(ALT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(ACQUISITION MANAGEMENT), ASN(RDA)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING), SAF/AQC  
EXECUTIVE DIRECTOR, ACQUISITION, TECHNOLOGY  
AND SUPPLY DIRECTORATE (DLA)  
DIRECTOR, ADMINISTRATION AND MANAGEMENT  
DIRECTOR, ARMY CONTRACTING AGENCY

SUBJECT: Applicability of the Javits-Wagner-O’Day Act and the Randolph-Sheppard Act to Military Dining Facility Contracts

Pursuant to section 848 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163), the Department of Defense (DoD), the Department of Education (ED), and the Committee for Purchase From People Who Are Blind or Severely Disabled (CFP), submitted a report describing the joint statement of policy to specified congressional committees on September 1, 2006. This joint statement of policy represents the agreement between DoD, ED, and the CFP concerning the application of the Javits-Wagner-O’Day (JWOD) Act (41 U.S.C. 48 *et seq*) and the Randolph-Sheppard Act (R-SA) (20 U.S.C. 107 *et seq*) programs to contracts for the operation and management of military dining facilities and to contracts for food services, mess attendant and other services supporting the operation of military dining facilities. The joint policy should not be cited in individual solicitations until it is implemented in complementary regulations by the ED and DoD. The exception is the provision of the joint policy, which was enacted as section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364).


Section 856, entitled “Contracting with Employers of Persons with Disabilities,” repeals subsections (a) and (b) of section 853 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375), and addresses the applicability of the JWOD Act and R-SA to the operation of military dining facility



contracts and military dining facility support services as of the date of enactment (October 17, 2006). The law states ---

- (1) The R-SA does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under section 2 of the JWOD Act.
- (2) The JWOD Act does not apply at the prime contract level to any contract entered into by the DoD as of the date of the enactment of this Act with a State licensing agency under the R-SA for the operation of a military dining facility.
- (3) The JWOD Act shall apply to any subcontract entered into by a DoD contractor for full food services, mess attendant services, and other services supporting the operation of a military dining facility.

My staff point of contact for the above is Ms. Susan Pollack, (703) 697-8336 or [susan.pollack@osd.mil](mailto:susan.pollack@osd.mil).



Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

## Appendix H1–Total Cost DoD Food Service Contracts

Data provided by OUSD (AT&L)/DPAP

Prime Contract Data (Base Contract Plus Option Years) Provided by the MILDEPS - As of September 2005									
MILDEP	JWOD	# of JWOD Contract	R-SA	# of R-SA Contracts	Small Business	# of Sm Bus Contract	Large Business	# of Lg Bus Cont.	TOTAL
Navy	\$99,004,305	16	\$23,750,341	5	\$104,883,616	16	\$0	0	\$227,638,262
Air Force	\$309,395,751	23	\$220,355,545	13	\$151,918,287	24	\$0	0	\$681,669,583
Army	\$85,464,742	19	\$1,206,528,217*	28	\$161,759,982	56	\$1,298,068	1	\$1,455,051,009
Marine Corps	\$0(Ref Note 1)	0	\$0	0	\$0(Ref Note 2)	0	\$880,911,609	1	\$880,911,609
Total	\$493,864,798	58**	\$1,450,634,103	46***	\$418,561,885	96	\$882,209,677	2	\$3,245,270,463
Total % of \$	15%		45%		12.9%		27.1%		100%
Total % of #		28%		23%		48%		1%	

Includes Update to Fort Benning Contract provided on April 21, 2006.

\*\*JWOD prime contracts employ approximately 3200 blind or disabled workers.

\*\*\*R-SA prime contracts employ some number below 46 blind vendors, this number has not been confirmed by the DoED.

**NOTE 1:** The USMC Regional Food Service Contracts (RGFSCs) provide subcontracting opportunities for seven JWOD non-profit entities at 19 mess halls, earning approximately \$24,400,000.00.

**NOTE 2:** The USMC RGFSCs provide subcontracting opportunities for four small business concerns at 33 mess halls, earning approximately \$28,350,000.00.

### Analysis Summary:

- R-SA prime contracts comprise 45% of Total DoD Food Service Contract Dollars or \$1.4 billion dollars, and 23% of total number of food service contracts.
- JWOD prime contracts comprise 15% of Total DoD Food Service Contract Dollars or \$493 million dollars, and 28% of total number of food service contracts.
- Small Business prime contracts comprise 12.9% of Total DoD Food Service Contract Dollars or \$418 million dollars, and 48% of total number of food service contracts.
- Large Business prime contracts comprise 27.1% of Total DoD Food Service Contract Dollars or \$882 million dollars, and 1% of total number of food service contracts.

## Appendix H2–Summary of DoD Food Service Contracts

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Data provided by OUSD (AT&L)/DPAP

### Department of Defense Prime Contracts for Military Dining Facilities

Current as of September 2005

	Army	Air Force	Navy	Marine Corps	Total
<b>JWOD</b>	<b>19</b>	<b>23</b>	<b>16</b>	<b>0</b>	<b>58</b>
<b>R-SA</b>	<b>28</b>	<b>13</b>	<b>5</b>	<b>0</b>	<b>46</b>
<b>Small Business</b>	<b>56</b>	<b>24</b>	<b>16</b>	<b>0</b>	<b>96</b>
<b>Large Business</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>1*</b>	<b>2</b>
<b>Total</b>	<b>104</b>	<b>60</b>	<b>37</b>	<b>1</b>	<b>202</b>

\*Contract divided into two regional efforts for the East and West coasts.

## **Appendix I–Buckley Air Force Base Analysis**

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### **R-SA Mission Creep, A Case Study**

With the movement of Randolph-Sheppard Act (R-SA) interest into the military dining facility arena, we have observed the phenomenon usually associated with military operations of “mission creep.”

Recent attempts have been observed where State licensing agencies (SLAs) have asserted a R-SA priority where none exists. In a recent, and as yet unresolved case, the Colorado Department of Vocational Rehabilitation (DVR), the SLA for Colorado, asserted a R-SA priority at Buckley Air Force Base, Colorado. This assertion put forward where in a situation where the R-SA priority does not attach.

**Buckley AFB CO:** In 1999, the Air Force awarded a full food service military dining facility contract under the Randolph-Sheppard program to the Colorado Department of Vocational Rehabilitation (DVR) to operate the High Frontier Dining Facility (“cafeteria”) at Buckley Air Force Base (“Buckley”) in Colorado<sup>34</sup>. Colorado DVR, in turn, assigned a blind vendor to operate the cafeteria. During the period that Colorado DVR operated the cafeteria, it was funded with appropriated funds. Military personnel and select civilians with meal cards were authorized to obtain food at the cafeteria. Also, as at most military bases, other than initial entry points or dedicated training facilities, military personnel were permitted to opt out of the meal plan and instead received a meal stipend they could use to purchase food wherever they chose.

In March of 2006, the Comptroller for the Air Force, issued a memorandum forecasting future budgetary reductions, he directed all Air Force Space Command units, including Buckley, to review their current contracting activity with a view toward reducing the amount of money that the Air Force was spending on contracting. In response to this directive, Buckley officials identified contracts that they determined would have the “least effect” on the Air Force’s mission if eliminated. Overall, Buckley determined that it could reduce spending by \$2.1 million by eliminating certain identified contracts, including the contract for the operation of the cafeteria, which alone was projected to generate savings of \$1.4 million. Accordingly, the Air Force notified Colorado DVR by letter dated July 25, 2006, that it did not intend to exercise any further options under the cafeteria contract and that the contract would thus expire by its terms on September 30, 2006. The Air Force represented that the closing was “due to lack of funding and not because of any other reason.”

Concurrent with its decision to allow the Colorado DVR contract to expire by its terms, the Air Force began to explore the idea of establishing some other type of food service outlet in the same space. Under the proposal, Air Force Services would operate the facility on an “in-house” basis, i.e., with Government employees.

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<sup>34</sup> State of Colorado, Department of Law, Office of the Attorney General letter of February 14, 2007, subj: Request expeditious appointment of an arbitration panel regarding the cafeteria at Buckley Air Force Base.

The Air Force conducted focus groups and explored various concepts for the proposed dining facility. The Air Force considered concepts ranging from a “casual dining” restaurant and bar to what was described as a “food court.” The Air Force elected to proceed to the extent that it undertook planning to renovate the space and, at one point, estimated that the new facility would re-open on October 27, 2006.<sup>35</sup>

After discovering the plans to establish another type of a food service facility, Colorado DVR contacted the Air Force, advising it that Colorado DVR sought to invoke its statutory priority in the operation of the facility. Colorado DVR indicated that it was amenable to the Air Force’s proposed concepts and offered to operate what it understood to be a “sports bar” for the Air Force. Colorado DVR also indicated that it had available funds to assist the Air Force in paying for the facility renovations and for any necessary equipment.

In view of previous interpretations of the application of the R-SA to military dining facilities, the follow-on food service operation planned for Buckley AFB did not constitute a “cafeteria.” The Department of Education’s (DoED) own regulations at 34 C.F.R. part 395 provide the following definition:

*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...

The contemplated Sports Bar concept would not have met DoEDs basic criteria of a cafeteria as indicated above.

The Air Force responded to Colorado DVR on September 18, 2006, advising that the planned facility would not be a vending facility operation. The envisioned facility would be operated “in-house” by the Services Division as a Nonappropriated Fund (NAF) activity and would not be contracted out. As this was not a contract operation or a vending facility within the meaning of the provisions of the Randolph-Sheppard Act, the priorities of the act do not apply.

On September 20, 2006, Colorado DVR formally requested that the Department of Education (“DOE”), the agency responsible for administering the Randolph-Sheppard Act, institute arbitration to determine the applicability of the Randolph-Sheppard Act to the proposed operation of the new dining facility. The Colorado DVR also filed a motion with the Court of Federal Claims (COFC) for a preliminary injunction “requiring the Air Force to take action allegedly necessary to maintain the status quo until such time as the Randolph Sheppard arbitration...is complete.”<sup>36</sup> Colorado DVR requested such a preliminary injunction because they alleged that “Randolph-Sheppard arbitrations almost always take over a year to complete” and they further alleged that, without an injunction, “Colorado DVR and the vendor will be irreparably harmed” in the meantime.

<sup>35</sup> Colorado Department of Human Services, Division of Rehabilitation, et. al. v. United States, 74 Fed CL. 339 (2006).

<sup>36</sup> 74 Fed CL. at 342.



In its request for arbitration to DoED Colorado DVR's claims were based upon:

1. The Air Force's alleged failure to accord the statutory priority required by the Randolph-Sheppard Act in favor of blind vendors, and
2. The Air Force's undertaking to renovate a Federal building without providing space for a Randolph-Sheppard vending facility, allegedly in violation of 20 U.S.C. § 107a(d)(1). On October 26, 2006, after hearing oral argument, the Court requested that plaintiffs submit proposed orders setting forth the precise terms of preliminary injunction they seek. On November 2, 2006, plaintiffs filed two alternative proposed orders. The first order would require the Air Force to complete the renovations in a timely manner and, when completed, install plaintiffs as the operators of the new facility. In the Court's view, such an order appeared to go beyond preservation of the status quo pending the outcome of the arbitration. The second proposed order would enjoin the Air Force "from entering into or performing under any contract or other arrangement for food services (including, but not limited to, operating the facility 'in-house') at the building . . . that contained [the cafeteria] . . . unless and until the Air Force has applied the Randolph-Sheppard Act's priority to that contract or other arrangement." The Court interpreted the intent of the second proposed order to be to require the Air Force to either cease its plans to renovate and re-open the dining facility, or to proceed as if the Randolph-Sheppard Act priority applied notwithstanding the Air Force's intention to operate the proposed facility on an in-house basis rather than pursuant to contract. Under the second order, the Court understood that the Air Force would have the option to: (1) leave the space unoccupied, (2) negotiate a contract with Colorado DVR for the operation of the facility, 34 C.F.R. § 395.33(d),
3. That the Air Force elected not to formally solicit bids or offers for the operation of the facility and award the contract to Colorado DVR if its proposal was judged to be in the competitive range, *id.* § 395.33(b), or
4. Request that the Secretary of the DOE approve a "limitation" on the Randolph-Sheppard priority. See 20 U.S.C. § 107 ("Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary .

The COFC declined to provide injunctive relief determining that the Colorado DVR had not exhausted administrative remedies (arbitration) under the R-SA.

Via letter of March 5, 2007, the Department of Education notified Buckley AFB that they had approved the Colorado DVR arbitration request.<sup>37</sup>

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<sup>37</sup> U.S. Department of Education, Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration letter of March 5, 2007, subj: Colorado Department of Human Services, Division of Vocational Rehabilitation v. United States Department of Defense, Department of the Air Force, Case No. R-S/06-13.

In response, the Air Force provided a reclama to DoED challenging the decision to grant Colorado DVR arbitration in this case. The basic arguments presented by the Air Force were<sup>38</sup>:

- That the operation in question was not a “cafeteria” within the meaning of the R-SA – It was a bar/pub operation.
- That the state, in its request, sought to displace the Air Force from internally running the newly-opened, temporary, week-ends only, bar/pub operation on the base.
- That the Air Force had offered the State the opportunity to serve breakfast and lunch meals in a building on an interim basis until they (AF) could determine the best long-term arrangement. An offer that the State declined stating that they did not have the funds to cover the high costs of such an operation

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<sup>38</sup> Department of the Air Force, Headquarters Air Force Legal Operations Agency (HQ AFLOA), letter of March 7, 2007, subj: State of Colorado’s 14 February 2007 Request for Appointment of an Arbitration Panel – Buckley Air Force Base (AFB).

# Appendix J—Department of Education Inspector General Report—July 31, 2007



## UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF INSPECTOR GENERAL

July 31, 2007

Control Number  
ED-OIG/A19H0001

John H. Hager  
Assistant Secretary  
Office of Special Education and Rehabilitative Services  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

Dear Mr. Hager:

This **Final Report**, entitled *Management Procedures Under the Randolph-Sheppard Act and Javits-Wagner-O'Day Act*, presents the results of our review. The purpose of the inspection was to review the Department of Education's (Department) oversight of the Randolph-Sheppard and Javits-Wagner-O'Day (JWOD) programs.

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### BACKGROUND

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The Randolph-Sheppard program provides blind persons with opportunities for remunerative employment and self-support through the operation of vending facilities on federal and other properties. The Randolph-Sheppard Act gives priority to blind persons in the operation of vending facilities on federal property, to include cafeterias, snack bars, and automatic vending machines. The program is voluntary, with 49 of 50 states opting to operate the program.

Under the Randolph-Sheppard program, state licensing agencies (SLAs) recruit, train, license and place blind individuals as operators of these vending facilities. By law, SLAs are agencies providing vocational rehabilitation (VR) services to individuals who are blind in each state. These agencies receive grant funds for VR services from the Department. The Rehabilitation Services Administration (RSA) within the Office of Special Education and Rehabilitative Services (OSERS) administers the program.

The Javits-Wagner-O'Day (JWOD) program, in part, provides employment opportunities to individuals who are blind or have other severe disabilities. The Federal Government purchases commodities and services from nonprofit agencies employing such individuals through the JWOD program. The Committee for Purchase From People Who Are Blind or Severely Disabled (CFP) is an independent Federal agency that administers the JWOD program. It is comprised of 15 Presidentially-appointed members—11 represent Governmental agencies; 4 are private citizens. The Department is represented on the CFP.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

Section 856(e) of the *John Warner National Defense Authorization Act for Fiscal Year 2007* required the Inspectors General of the Department of Defense (DoD-OIG) and the Department of Education (ED-OIG) to jointly review the management procedures under both the Randolph-Sheppard Act and the JWOD Act. This report includes the results of the ED-OIG review only. DOD-OIG will be issuing a separate report at a later date that will provide the results of its management review of the Department of Defense's (DOD) implementation of the two Acts with regard to military facilities.

On January 26, 2007, the Government Accountability Office (GAO) issued a report entitled, "Federal Disability Assistance: Stronger Federal Oversight Could Help Assure Multiple Programs' Accountability." GAO reviewed four employment-related programs aimed at helping people with disabilities obtain jobs, including the Randolph-Sheppard and JWOD programs. Specifically, GAO assessed the extent to which (1) performance goals and measures have been established for these programs and (2) the agencies responsible have established adequate procedures for overseeing program implementation and assuring laws and regulations are followed. GAO found that no performance goals or measures currently exist for the Randolph-Sheppard program, and the Department conducted little oversight of the program. As a result, GAO recommended that the Department establish goals for the Randolph-Sheppard program and strengthen program monitoring and guidance.

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## INSPECTION RESULTS

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We determined GAO recently reviewed the Department's oversight of the Randolph-Sheppard program.<sup>1</sup> As such, we considered the duplication of effort when planning our inspection in accordance with the President's Council on Integrity and Efficiency (PCIE) Quality Standards for Inspections (2005).<sup>2</sup> In addition, we determined the Department is not responsible for the administration of the JWOD program; therefore, we did not review and cannot comment on that program's management procedures.

Overall, our review of management procedures under the Randolph-Sheppard Act did not identify concerns beyond those recently reported by GAO. To address these concerns, we found the Department is developing goals and objectives to improve the program's management, accountability, and performance. In addition, we found the Department is currently engaged in rulemaking to clarify program requirements in the key area of military food service contracting. The Department has been working with DoD and the CFP to clarify how the priority afforded blind individuals under the Randolph-Sheppard Act must be applied to the operation of DoD cafeterias. Because our results were similar to those reported by GAO, we have no new recommendations for the Department.

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<sup>1</sup> GAO-07-236, "Federal Disability Assistance: Stronger Federal Oversight Could Help Assure Multiple Programs' Accountability," issued January 2007.

<sup>2</sup> Page 12 of the PCIE Quality Standards for Inspections (2005) states the standard for inspection planning includes coordinating inspection work and avoiding duplication.

In its response to the draft report, OSERS concurred with the finding. The complete text of the response is included as an attachment to this report.

**FINDING- Improvements Are Needed in Management Procedures Under the Randolph-Sheppard Act**

Lack of Performance Goals for the Randolph-Sheppard Program

The GAO report found the Department did not have Government Performance Results Act goals for the Randolph-Sheppard program, and neither the Randolph-Sheppard Act nor its implementing regulations require them. In its report, GAO stated that according to Department officials, no formal performance goals currently exist, but they were under development.

During our review the Department provided an internal workplan, which describes the goals and objectives it is developing to improve the management, accountability, and performance of the Randolph-Sheppard program. These goals and objectives include: demonstrating efficient and effective administration of the Randolph-Sheppard Act; determining the cost, benefits and effectiveness of the Randolph-Sheppard program; obtaining detailed information on military food service contracts; and engaging in rulemaking to clarify program requirements in the area of military food services. The Department has obtained input from stakeholder groups to assist with determining performance goals and outcome measures, and the state data collection forms will be revised to collect information necessary to support and measure the program goals established.

Limited Oversight of the Randolph-Sheppard Program

The GAO report found the Department provided little oversight of the Randolph-Sheppard program. Specifically, GAO determined that the Department had no formal procedures for evaluating state programs and had performed few on-site monitoring reviews of SLAs in recent years.

In response to the GAO report, the Department stated it would develop an annual monitoring plan, to include on-site monitoring of a minimum of four programs per year. Randolph-Sheppard program monitoring will be coordinated with activities to monitor VR programs. At the time of our review, the Department was completing final monitoring reports for four states and the District of Columbia. Department staff informed us they had previously tried to perform four to five site visits per year, but due to a lack of staff and funds, the site visits had not been a priority.

GAO also reported the Department relied primarily on self-reported state data for its monitoring of the Randolph-Sheppard program and did not test the accuracy or routinely analyze the data it collects. As a result, the GAO report concluded the Department could not assess trends in performance, identify possible best practices, or help states that may need assistance.

Department staff informed us that in the past, a grantee of the Department was collecting and reporting on the Randolph-Sheppard program data submitted by the states. The Department informed us that it learned the grantee's data was incomplete and did not include information on large contracts, and therefore it began collecting the information in-house. Department staff said

a comprehensive report has been compiled for the FY 2003 data, and it has the data for FYs 2004 through 2006. However, the Department has not yet cleared the FY 2003 report for release.

GAO also reported that the Department had not provided clear guidance to states on emerging issues that could have nationwide implications. Instead, GAO said the Department responded to individual state concerns, which results in states having different policies.

During our review, one area we noted where states had differing policies was with regard to vendor eligibility and training. We reviewed the websites of states with prime contracts for military dining facilities and found disparity among state requirements. For example, not all states listed the same requirements for a high school diploma or equivalent, minimum-age, or minimum reading and math level. We also noted differences among the states with regard to the length of vendor training. One state's website stated the training program was 12-weeks, whereas another state's program was approximately 30-weeks.

States are not currently required to have identical policies and requirements for vendors. The regulations implementing the Randolph-Sheppard Act allow each state to establish and maintain objective criteria for licensing qualified applicants. According to *Code of Federal Regulations* (CFR) Title 34, section 395.7, (2006) "The issuance and condition of licenses," the criteria must include provisions to assure that licenses will be given only to individuals who are determined by the SLA to be: 1) blind; 2) a U.S. citizen; and 3) certified by the state VR agency as qualified to operate a vending facility. In addition, the regulations do not specify the length of training that must be provided to blind individuals. According to 34 CFR 395.11, "Training program for blind individuals," the SLA "shall ensure that effective programs of vocational and other training services...shall be provided to blind individuals as vocational rehabilitation services."

In May 1997, the RSA Commissioner issued training performance standards to the state VR agencies. The standards incorporated the National Restaurant Association's programs that provide the national training and certification requirements for the restaurant industry. The National Automatic Merchandising Association provided input and support through its well-established training program and certification requirements. RSA encouraged their use to facilitate overall program improvement, to reduce the need for training of vendors who move from one state to another, and to promote uniformity in the administration of the program by the states. However, there was no requirement that the standards be adopted in whole or in part.

Department staff stated the true operation of the Randolph-Sheppard program is at the state level, and noted that some states would claim a hardship if RSA imposed new training standards, because it did not offer grants specifically for this purpose. States would likely need to move funds from other VR programs to support more extensive training. Staff also said they believe flexibility is exactly what was desired when the program was created, in part due to states having different regulations with respect to food safety certifications. The training, in theory, is intended to produce the skills perceived necessary to be successful in a particular program.

The Department has been working to improve its efforts to provide clear guidance. On August 29, 2006, the Department, DoD, and CFP submitted a Joint Report to Congress, as required by Section 848 of the *National Defense Authorization Act for FY 2006*. This report provided a joint policy statement for the application of the JWOD Act and Randolph-Sheppard Act to contracts

for the operation and management of military dining facilities. The joint analysis was performed to reach an agreement on issues where there had been long-standing confusion or lack of agreement among parties. The Department is in the process of drafting new regulations to implement the joint policy report and clarify program requirements with regard to military food service facilities. These regulations are currently under review at DoD. DoD has been tasked with drafting complementary regulations.

In addition, the Department plans to issue to SLAs an inventory of policy directives, technical assistance circulars, and other written guidance previously issued by the Department relevant to the Randolph-Sheppard program. Department staff stated policy guidance will also be placed on the [ed.gov](http://ed.gov) website, so it will be easily available to program participants, state government agencies, federal procurement officials and property-managing agencies.

### **Conclusion**

As a result of its findings, GAO recommended that the Secretary of Education provide more effective leadership of the Randolph-Sheppard program by: establishing performance goals; being more proactive in disseminating clear, consistent, and routine guidance; and strengthening monitoring of SLA and Randolph-Sheppard program performance. Because our findings were similar to those of GAO, we have no new recommendations for the Department.

### **OSERS Comments**

In its response to the draft report, OSERS concurred with the finding.

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## **OBJECTIVE, SCOPE, AND METHODOLOGY**

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The objective of our inspection was to review the Department's oversight of the Randolph-Sheppard and JWOD programs. We subsequently determined the Department is not responsible for the administration of the JWOD program; therefore, we did not perform any further review of this program.

To accomplish our objective, we conducted interviews with Department officials to gain an understanding of how the Randolph-Sheppard program is administered and monitored. We reviewed federal regulations that established and implemented the program as well as Department guidance provided to SLAs. We reviewed prior GAO and Congressional reports. We also reviewed documentation maintained by OSERS relating to the Randolph-Sheppard program. This included site visit reports, annual reports, information memoranda, and a technical assistance circular. Further, we reviewed the websites of 25 states identified as having prime contracts for military dining facilities as of September 2005. Of these 25 states, 11 had information on their websites pertaining to vendor eligibility and/or training requirements.

The fieldwork for our inspection was conducted at Department offices in Washington, D.C., during the period December 2006 through March 2007. Our inspection was performed in accordance with PCIE Quality Standards for Inspections.

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### ADMINISTRATIVE MATTERS

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In accordance with the Freedom of Information Act (5 U.S.C. § 552), reports issued by the Office of Inspector General are available to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

We appreciate the cooperation given us during this review. If you have any questions, please call Michele Weaver-Dugan at (202) 245-6941.

Sincerely,

**George A. Rippey /s/**  
**Acting Assistant Inspector General**  
**for Audit**

**Attachment**

cc: Edward Anthony, Acting Commissioner, Rehabilitation Services Administration  
Melanie Winston, Audit Liaison Officer





UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

JUL 13 2007

Michele Weaver-Dugan  
Director, Operations Internal Audit Team  
U.S. Department of Education  
Office of Inspector General  
400 Maryland Avenue, S.W.  
Washington, DC 20202

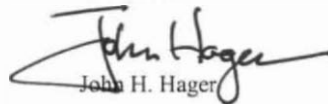
Dear Ms. Weaver-Dugan:

Thank you for the opportunity to review the Draft Report--Management Procedures Under the Randolph-Sheppard Act and Javits-Wagner-O'Day Act, ED-OIG/A19H0001. We concur with the draft report. My office provided technical and editorial suggestions we understand will be incorporated into the final report.

Your report contains no new recommendations for the Department because of your recognition of the prior related work done by the Government Accountability Office and the management improvements the Office of Special Education and Rehabilitative Services is presently implementing for the Randolph-Sheppard program.

We appreciate your interest in improving the effectiveness of the Department's program providing services to individuals with disabilities.

Sincerely,



John H. Hager

cc: Edward Anthony

400 MARYLAND AVE., S.W., WASHINGTON, D.C. 20202-2500  
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**Appendix K—Department of Defense, Department of Education, and  
Committee for Purchase Joint Policy  
Recommendations (with Analysis)**

SECTION 848 OF THE NATIONAL DEFENSE AUTHORIZATION  
ACT FOR FISCAL YEAR 2006 JOINT POLICY STATEMENT:  
APPLICATION OF THE JAVITS-WAGNER-O'DAY ACT AND THE  
RANDOLPH-SHEPPARD ACT TO THE OPERATION AND THE  
MANAGEMENT OF MILITARY DINING FACILITIES CONTRACTS

ANALYSIS REQUESTED AT THE SEPTEMBER 19, 2006, MEETING  
WITH THE SENATE HELP COMMITTEE AND PARTICIPATING  
AGENCIES:

DEPARTMENT OF DEFENSE, MR. SHAY D. ASSAD, DIRECTOR,  
DEFENSE PROCUREMENT AND ACQUISITION POLICY

DEPARTMENT OF EDUCATION, MR. JOHN H. HAGER,  
ASSISTANT SECRETARY FOR SPECIAL EDUCATION AND  
REHABILITATIVE SERVICES

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND  
OR SEVERELY DISABLED, MR. LEE WILSON, EXECUTIVE  
DIRECTOR

•

The following provides analysis of the Section 848 joint policy report, produced in response to a Senate HELP Committee request made on September 19, 2006. This analysis of the policy report was developed jointly by the Department of Defense, the Department of Education, and the Committee for Purchase From People Who Are Blind or Severely Disabled. Each of the ten sections of the report is followed by an analysis designed to provide background information on the reason or reasons for the section, the thinking behind the approach chosen, and the effect of the section. New policy is identified. Existing statutory and regulatory provisions are discussed and clarified, because it has become apparent through comments on the policy report that there may be some misunderstandings in the field about current requirements, particularly in differentiating among statutory, regulatory, subregulatory and policy domains and provisions.

#### **CONTRACTING FOR MILITARY DINING FACILITY OPERATION, FOOD SERVICES AND OTHER SUPPORT SERVICES**

Section 848 of the National Defense Authorization Act of Fiscal Year 2006 (Public Law 109-163) requires the Department of Defense (DOD), the Department of Education (ED), and the Committee for Purchase From People Who Are Blind or Severely Disabled (CFP) to develop a joint statement of policy concerning application of the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. 48 *et seq*) and the Randolph-Sheppard Act (R-SA) (20 U.S.C. 107 *et seq*) to contracts for operation and management of military dining facilities and contracts for food services, mess attendant and other services supporting the operation of military dining facilities. A taskforce comprised of representatives from DOD, ED, and the CFP met weekly and engaged in almost daily discussions by electronic mail and telephone to develop a joint statement of policy pursuant to Section 848. The taskforce also solicited public comments through a notice in the Federal Register, and approximately 240 comments were received. The taskforce memorialized their agreement in the following joint statement of policy.

#### **Analysis Overview**

The goals of the Section 848 joint policy report were to:

- Provide a responsive report to Congress as required by Section 848 of the National Defense Authorization Act for Fiscal Year 2006.

- Reach as much multi-Departmental administrative agreement as possible on issues where there had been long-standing confusion, or lack of agreement among the parties. The history of high-level debate on these conflicts in military food service contracting extends back to the 1990's, including discussions at the Office of Federal Procurement Policy. No solutions were obtained at that time.

- Develop a policy statement that is consistent with the Randolph Sheppard Act (R-SA), the Javits-Wagner-O'Day Act (JWOD), DoD's mission, and the needs of the military services, including cost containment.

- Provide more job opportunities for blind individuals (R-SA) and individuals with severe disabilities or who are blind (JWOD).

- Make the application of R-SA priority more understandable and workable for the military departments, base commanders, contracting officers, and R-SA and JWOD entities.

- Reach policy agreement to define key terms and concepts and reduce ambiguity and uncertainty in the distribution of military food service business to R-SA and JWOD offerors.

The parties agreed to draft regulations that will implement the terms of the Joint Policy Statement.

#### JOINT STATEMENT OF POLICY

It is the joint policy of the DOD, ED and the CFP (hereinafter "the Parties") that ---

1. Defense appropriations shall be used to accomplish the defense mission. This mission shall be carried out by providing value and accountability to the taxpayers as well as supporting socioeconomic programs to the maximum extent practicable under the law. The DOD has a military mission to maintain some level of in-house food service and military dining facility managerial capabilities to enable forward deployment operations, training, rotation and career progression. Contract services must enable DOD to feed the troops high quality food at a cost effective price.

## Analysis

- Section 1 describes the conceptual framework within which DoD expends its appropriations to meet the needs of the warfighter while also satisfying the requirements of the R-SA and JWOD programs.

- Section 1 states that the military departments have inherent authority to define their requirements and that procurement decisions must support the readiness of the Armed Forces. It reflects the reality that food services are a major DoD operational cost item and DoD is subject to budgetary constraints, while also recognizing that DoD complies with various set-aside, priority, and socioeconomic preference programs. Section 1 emphasizes that military food service needs may vary in timing and volume at given locations due to troop deployments and other operational reasons. The references to high quality and cost-effectiveness paraphrase the Randolph-Sheppard Act and the regulations concerning "Operation of cafeterias by blind vendors" at 34 CFR 395.33(a). Section 1 reflects no change in policy.

2. The Secretaries of the Military Departments concerned, as defined in 10 U.S.C. §101(a)(9), shall have the discretion to define requirements (e.g., contract statements of work, assignment of tasks and functions among workers in a facility) and make procurement decisions concerning contracting for military dining support services and the operation of a military dining facility and shall ensure that procurement decisions support the readiness of the Armed Forces.

## Analysis

- This section is an extension of the first section and provides the legal basis for the role of the service Secretaries. Section 2 reflects no change in policy. The Title 10 distinctions are important to DoD.

3. The Parties recommend that legislation (See Attachment 1) should be submitted that creates a "no-poaching" provision maintaining the current distribution of contract opportunities as outlined in this paragraph. The Procurement List protects the jobs of

people who are blind and/or severely disabled, and does not conflict with the R-SA opportunities of blind vendors who may employ these workers through a JWOD nonprofit agency. The R-SA shall not apply to any requirement for military dining support services identified on the Procurement List, or to any contract, purchase order, agreement or other arrangement for operation of a military dining facility that is a requirement identified on the Procurement List and was being provided by a JWOD nonprofit agency as of the date of enactment of the “no-poaching” provision. The JWOD shall not apply at the prime contract level to any contract for operation of a military dining facility entered into with a State licensing agency as of the date of enactment of the “no-poaching” provision, for example, Fort Lee, Fort Carson, and Kirtland AFB prime contracts. As contracts with State licensing agencies expire, the DOD will solicit competitive proposals under the R-SA.

## Analysis

- Section 3 may have been overtaken in part by statutory change. The John Warner National Defense Authorization Act for Fiscal Year 2007 (NDAA FY07) provides “no poaching” protections to R-SA military food service contracts in effect on the date of enactment, and commits DoD to ensuring the continued opportunity for State R-SA agencies to compete for future contracts and maintain existing work. The NDAA FY07 also clarifies that the “no-poaching” protection for current JWOD military food service contracts applies to those services on the Procurement List at the time of enactment.

- Section 3 establishes new policy protection for existing R-SA food service contracts by specifying that JWOD will not seek that work as a prime contractor even if the requirement is on the Procurement List. This includes specific mention of several locations where former JWOD prime contractors were displaced by R-SA agencies. Public comment taken during the development of the policy report supported the “no poaching” provision (i.e., the maintenance of existing market share), and these sentiments were expressed by both R-SA and JWOD sources.

4. For contracts not covered by the “no-poaching” provision:

a. The contracts will be competed under the R-SA when the DOD solicits a contractor to exercise management responsibility and day-to-day decision-making for the overall functioning

of a military dining facility, including responsibility for its staff and subcontractors, where the DOD role in the contract is generally limited to contract administration functions described in the Federal Acquisition Regulation (FAR) Part 42 (48 CFR, Chapter 1, Part 42).

b. In all other cases, the contracts will be set aside for JWOD performance (or small businesses if there is no JWOD nonprofit agency capable or interested) when the DOD needs dining support services, (e.g., food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendants, or other services that support the operation of a dining facility) where DOD food service specialists exercise management responsibility over and above those contract administration functions described in FAR Part 42.

c. The presence of military personnel performing dining facility functions does not necessarily establish the inference that the Government is exercising management responsibility over that particular dining facility.

## Analysis

- Section 4.a recognizes DoD's legal obligation to foster competition in contracting, while recognizing the SLAs' right to compete for new contracts for operation of military dining facilities. This is an explicit recognition that the R-SA applies to such new work. Section 4.a. reflects an important policy agreement concerning what constitutes "operation of a cafeteria," a term not currently defined in Randolph-Sheppard regulations or heretofore agreed to by ED and DoD. Lack of agreement concerning what constitutes operation of a cafeteria has created confusion when applying the R-SA. The parties believe that when Federal regulations incorporate the definition, courts should grant it deference if litigated, since both ED and DoD established the definition pursuant to the policy statement of the Section 848 Report mandated by Congress.

- Section 4.b describes JWOD and SBA set-asides for contractual services provided to DoD when the R-SA priority does not apply.

- Section 4.c is designed to safeguard the R-SA priority for operation of a cafeteria by clarifying that, in some cases, military personnel may be present, and working in the facility, without



compromising the ability of an R-SA agency to compete for the prime contract for the operation of the cafeteria. This is new policy.

- It should be noted that State R-SA agencies do not have authority to provide military dining support services as limited contractual services. The R-SA role in military food service is for the operation of an (entire) military dining facility (cafeteria), for which these agencies have a procurement priority. JWOD providers furnish a wider range of goods and services, preferentially purchased by the government after the government's requirements have been specified and the CFP assesses cost and supply chain factors and adds the goods or services to the Procurement List. JWOD providers may serve as food service prime contractors or providers of support services. These current statutory differences are mentioned for clarity and context, because there are indications that they may not be uniformly understood. The policy report did not compare or address differences in statutory authority because those differences are not matters of administrative policy.

5. In accordance with FAR Part 8, if dining support services are on or will be placed on the Procurement List, any State licensing agency that is awarded a contract for operation of that military dining facility under the R-SA shall award a subcontract for those services.

## Analysis

- Section 5 reflects no change in policy. It restates an existing requirement that may not have been well-understood or honored in all cases where a State R-SA agency, (or any prime contractor), is operating a military dining facility. If appropriate support services are on the Procurement List in the geographic area of the contract, any prime contractor (including all commercial contractors and R-SA State agencies) is obligated to subcontract for those services. FAR Part 8, which explains the effect of the Procurement List, and 41 CFR Chapter 51, which directs subcontracting to JWOD non profit agencies, apply to all contractors entering into Federal appropriated fund prime contracts.

6. In order to promote economic opportunities for blind vendors and to increase the number of blind persons who are self-supporting, the R-SA requires that State licensing agencies provide blind persons education, training, equipment and initial inventory suitable for carrying out their licenses to operate vending facilities in federal buildings. The Parties believe that the R-SA program should encourage to the maximum extent possible the employment of people who are blind. Accordingly, through its rule-making procedures ED will encourage State licensing agencies that assert the R-SA “priority” for a multi-facility contract for operation of military dining facilities to assign at least one blind person per military dining facility in a management role.

## Analysis

- The general statement of policy in Section 6 is consistent with the intent and first authorized purpose of Section 107(a) of the R-SA, which is to provide blind persons with remunerative employment. The number of blind individuals employed through the R-SA has been declining. The parties would like to see the number increase.

- Department of Education regulations governing the R-SA program require State agencies to provide training programs for blind individuals, including upward mobility training for all blind licensees. R-SA State agencies are in all cases the same agencies funded by the Department of Education to provide vocational rehabilitation services, i.e., employment services and training services, to individuals who are blind, to assist them in obtaining an employment outcome.

- DoD has noted that blind vendors are often not identifiable or discernibly active participants in the performance of military dining facility contracts, particularly multi-site contracts, awarded under the R-SA priority. Section 6 is designed to promote employment for a larger number of blind individuals and to help ensure that work is performed by blind individuals in operating military dining facilities.

7. The DOD shall continue to be able to use the “Marine Corps model” for regional contracts for operation of military dining facilities at several installations or across State lines. In this model, the DOD may designate individual dining facilities for subcontract opportunities under the Small Business Act, JWOD or other preferential procurement

programs, and may designate some facilities in which military food service specialists may train or perform cooking or other dining support services in conjunction with contractor functions. State licensing agencies are eligible under the R-SA to bid on contracts based upon this model.

## Analysis

- Section 7 does not change existing policy. When the Marine Corps re-competes its food service contracts, the solicitation(s) will be subject to the R-SA. The contracts now in effect were competed subject to the R-SA.

- As noted previously, the military departments have the authority to define their food service requirements and make procurement decisions to support the readiness of the Armed Forces. The parties recognize that contracts involving food services in more than one State would require cooperation between or among R-SA agencies, because the statute specifies that administering agencies are agencies of State government, i.e., those agencies in all cases funded by the Department of Education to provide vocational rehabilitation services. This is a structural feature of the program. Such coordination is certainly possible and allowable. There is no Federal bar to a State vocational rehabilitation agency providing services to a resident of another State, but the question of multi-state or cross-State operations in the R-SA has not been carefully considered.

8. METHOD OF AFFORDING THE RANDOLPH-SHEPPARD "PRIORITY."— Defense Department contracts for the operation of a military dining facility must be awarded as the result of full and open competition, unless there is a basis for direct negotiations (e.g., the only source available to provide the services is a State licensing agency, or an exception to the Competition in Contracting Act applies). When competing such contracts, contracting officers shall afford State licensing agencies a priority under the R-S Act when (1) the State licensing agency has demonstrated that it can provide such operation at a fair and reasonable price, with food of high quality comparable to that available from other providers of cafeteria services and comparable to the quality and price of food currently provided to military service members; and (2) the State licensing agency's final proposal revision, or initial proposal if award is made without discussions, is among the highly ranked final proposal revisions with a reasonable chance of being selected for award. In

this context, the term “final proposal revision” is a reference to the description in FAR Subpart 15.307. The term “fair and reasonable price” means that the State licensing agency’s final proposal revision does not exceed the offer that represents the best value (as determined by the contracting officer after applying its source selection criteria contained in the solicitation) by more than five percent of that offer, or one million dollars, whichever is less, over all performance periods required by the solicitation.

## Analysis

- Section 8 restates as policy a combination of statutory and regulatory provisions and references the language now used in DoD to describe what had been commonly or historically termed the “competitive range” from which competing contract proposals would be selected. The parties intend to develop consistent and complementary regulatory language so that DoD and ED policy officials, DoD contracting officers, and R-SA entities will have a clear, shared understanding of how the R-SA priority is to be afforded. The Department of Education is expected to be able to regulate more promptly than DoD because amending DoD procurement regulations is a complicated task.

- The “fair and reasonable price” cost criteria of one million dollars, or five percent, whichever is less, is new policy agreement. Food service costs are a major operational cost for base commanders. DoD is under heavy budget pressure. There are hundreds of JWOD entities, commercial food service contractors and 8(a) firms. This is a large potential universe of food service providers and the direct and indirect competition for military business contributes to the containment of DoD’s costs. In contrast, the powerful R-SA priority is afforded to a single agency of government in each State. The combination of a monopoly service provider coupled with a powerful statutory priority does not foster cost containment. Typically, a State R-SA agency will partner with a commercial food service company in order to pursue military dining facility contracts. The agency may be approached by commercial food service company interested in military dining facility contracts, or the agency will select a commercial food service company

with which to pursue military contracts. Either way, the commercial food service company provides the institutional food service staff, experience, and expertise DoD demands, and prepares the complex DoD contract proposals on behalf of the State. Because only the proposal submitted by the State R-SA agency has the statutory priority, other offerors may be discouraged from competing. This does not support cost containment. If multiple offerors are competing, DoD contracting officers may be faced with threats of arbitration, litigation, and delay if the State R-SA proposal is not accepted, even if costs are high. Presently, there is no clear yardstick to support decision-making.

- DoD is understandably concerned about costs. However, the parties have agreed to give proposals submitted by R-SA entities the specified financial advantages not given to any other offerors, to honor the priority and to make application of the priority a clear matter for DoD contracting officers. The priority is in all non-financial respects unqualified and preserved. The parties have agreed that the additional costs DoD would incur in contracting with State R-SA agencies would be deemed “fair and reasonable” up to levels of one million dollars, or five percent, whichever is less. The parties agree that this approach, when incorporated in regulation, would likely be given substantial deference if litigated, particularly as it has been agreed upon as part of joint process undertaken at statutory direction.

9. The contracting officer may award to other than the State licensing agency when the head of the contracting activity determines that award to the State licensing agency would adversely affect the interests of the United States and the Secretary of Education approves the determination in accordance with the R-SA.

## Analysis

- There is no policy change in Section 9. Section 107(b) of the R-SA, and the Department of Education’s regulations governing the R-SA state that the Secretary of Education must approve a determination submitted by an agency that awarding to a State R-SA agency would

adversely effect the interests of the U.S. (*see* 34 CFR Sec 395.30 (b)). It should be noted that the Secretary of Education has never received a DoD request to approve a determination of adverse interest to the U.S. The parties agreed, when updating regulations, to clarify what criteria the contracting officer would use to determine if awarding to a State Licensing Agency is not in the best interests of the U.S. DoD has expressed the view that the contracting officer would make such a determination only in very unusual circumstances and in instances that pertain to national security.

10. The Parties will promptly implement complementary regulations reflecting the joint policy herein. In addition, the Parties believe that statutory changes as described in Attachment I will implement the joint policy regarding "no poaching." We believe these actions will significantly clarify and improve the application of JWOD and R-SA to military dining facilities contracts.

#### Analysis

- Regulations are needed to implement the policy agreements reached. The "no poaching" language has been changed in the NDAA FY07.

End Analysis

## Appendix L—Legislative Proposal: Enact Joint Policy Recommendations

### SEC. \_\_. CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES.

(a) GENERAL.—Title 10, United States Code, Chapter 141, is amended by inserting the following section after section 2396:

#### “§ 2397. CONTRACTING FOR MILITARY DINING HALL SERVICES AND OPERATION OF MILITARY DINING FACILITIES.

“(a) NEEDS OF THE DEPARTMENT.—The defining of requirements and the making of procurement decisions concerning contracting for military dining support services and the operation of a military dining facility shall be within the discretion of the Secretary concerned, who shall ensure the procurement decision supports the readiness of the armed forces.

“(b) DEFINITIONS.—In this section—

“(1) The term “military dining facility” means a facility owned, operated, leased, or wholly controlled by the Department of Defense and used to provide dining services to members of the armed forces, including an entire cafeteria, a military mess hall, a military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the armed forces;

“(2) The term “operation of a military dining facility” means the exercise of management responsibility and day-to-day decision-making by a contractor for the overall functioning of a military dining facility, including responsibility for its

staff and subcontractors. In the context of Department of Defense contracting, the term “operation of a military dining facility” means “operation of a cafeteria” as used in the Randolph-Sheppard Act (20 U.S.C. 107d-3(e)). The Department of Defense role in a contract for the operation of a military dining facility is limited to contract administration functions described in FAR Part 42 (48 CFR 42). The term “operation of a military dining facility” does not refer to dining support services in a military dining facility where DoD food service specialists exercise management responsibility and day-to-day decision-making over any part of the facility, including the dining facility staff, ordering subsistence items required for meal preparation, the preparation of meals, the serving of meals, or dining facility clean-up;

“(3) The term “dining support services” means any food preparation services, food serving, ordering or inventory of food, meal planning, cashiers, mess attendant services, or other services that support the operation of a military dining facility;

“(4) The term “Procurement List” refers to the list of requirements that have been reserved for award to nonprofit entities that is established under the authority of section 2 of the Javits-Wagner-O’Day Act (41 U.S.C. 47 *et seq.*);

“(5) The term “State licensing agency” refers to any agency designated under section 2(a)(5) of the Randolph-Sheppard Act (20 U.S.C. 107a (a)(5)); and

“(6) The term “Secretary concerned” has the meaning given that term in section 101(a)(9) of this title.

“(c) SERVICES PURCHASED PURSUANT TO THE JAVITS-WAGNER-O’DAY ACT.—

The Randolph-Sheppard Act (20 U.S.C. 107 *et seq.*) does not apply to any requirement for services described in paragraphs (1) and (2).



“(1) Any dining support services for a military dining facility; and

“(2) Operation of a military dining facility that was provided by a qualified nonprofit agency in compliance with section 3 of the Javits-Wagner-O’Day Act as of the date of enactment of this Act.

“(d) SUBCONTRACT REQUIREMENTS.—If dining support services for a military dining facility are on or will be placed on the Procurement List, any State licensing agency that is or has been awarded a contract for operation of that military dining facility under the Randolph-Sheppard Act shall award a subcontract for those services as prescribed by the Procurement List.

“(e) SERVICES PROCURED PURSUANT TO THE RANDOLPH-SHEPPARD ACT.—Except as provided in subsections (c) and (d), the Javits-Wagner-O’Day Act (41 U.S.C. 46 *et seq.*) does not apply at the prime contract level to any contract entered into with a State licensing agency under the Randolph-Sheppard Act for operation of a military dining facility.

“(f) MINIMUM STANDARDS.—The official identified in the Office of Federal Procurement Policy Act (41 U.S.C. 421) responsible for Defense procurement policy shall issue procurement regulations setting standards for qualifying a State licensing agency’s offer in response to a solicitation for operation of a military dining facility to be entered into the competitive range and judged suitable for award of a contract. At a minimum, such regulations shall require the State licensing agency to:

“(1) limit executive compensation so that no employee or executive officer of a State-licensed blind vendor or business entity performing a contract or contracts for operation of a dining facility or facilities may be compensated by

that vendor or entity at a rate exceeding Executive Schedule Level I established in Section 5312 of Title 5, United States Code; and

“(2) conduct a training and mentorship program to include, at a minimum, formal education and on-the-job training and a regular graduation for as many blind vendor trainees as can be funded with the set-aside or other fee charged by the State, but not less than one blind vendor per military dining facility.

“(g) METHOD OF AFFORDING RANDOLPH-SHEPPARD PRIORITY.—(1) When a Military Department elects to contract for operation a military dining facility on a military installation, a State licensing agency may receive a priority to operate such facility when the State licensing agency can provide such operation at a reasonable price with food of a high quality comparable with that available from other providers of cafeteria services and comparable to the quality and price of food currently provided to military service members, whether by an existing contract or otherwise. The Randolph-Sheppard Act does not create a federal procurement set-aside for the operation of military dining facilities. Defense Department contracts for the operation of a military dining facility must be awarded as the result of full and open competition, unless there is a basis for direct negotiations (e.g., the only source available to provide the services is a State licensing agency, or an exception to the Competition in Contracting Act applies).

“(2) Determining the reasonable costs and quality of food justifying award of a contract to a State licensing agency:

“(A) Except as provided in subparagraph (C) below, the priority will be afforded if the following conditions are satisfied:

“(i) The State licensing agency’s final proposal revision is among the highly ranked final proposal revisions with a reasonable

chance of being selected for award. In this context, receipt of final proposal revisions is a reference to that term as described in Federal Acquisition Regulation (FAR) Subpart 15.307;

“(ii) The State licensing agency can provide cafeteria services at a fair and reasonable price, with food of high quality comparable to that available from other providers of cafeteria services and comparable to the quality and price of food currently provided to military service members;

“(iii) The term “fair and reasonable price” means that the State licensing agency’s final proposal revision does not exceed the lowest price acceptable offeror’s final proposal revision by more than five percent of that lowest price acceptable offer, or one million dollars, whichever is less, over all performance periods required by the solicitation; and

“(iv) In evaluating the “quality” of the services proposed by the State licensing agency, the contracting officer may consider such things as sanitation practices, menu variety, personnel, staffing (e.g., the State licensing agency plan to employ blind and severely disabled workers pursuant to the criteria established for contracts under the Javits-Wagner-O’Day Act, and training programs to include formal education and on-the-job training), and transparency of accounting practices (e.g., explanation of vendor and subcontract profit or fee; explanation of State set-aside fees; executive compensation plans).

“(B) The contracting officer has the discretion make no award or to award to other than the State licensing agency when the head of the contracting activity determines that award to the State licensing agency would adversely affect the interests of the United States and the Secretary of the Military Department concerned approves the determination.

“(h) The procurement decisions of a military department, including whether to issue a solicitation or whether to award a contract subject to the Randolph-Sheppard Act, are procurement decisions subject to the exclusive bid protest authority of the Government Accountability Office under the Competition in Contracting Act (31 U.S.C.

3551 *et seq.*) and shall not be subject to arbitration or litigation under the Randolph-Sheppard Act.”

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 141 of such title is amended by inserting after the item relating to section 2396 the following new item:

“2397. Contracting for Military Dining Hall Services and Operation of Military Cafeterias.”

(c) CONFORMING AMENDMENTS.—

(1) Section 107d-1 of title 20, United States Code, is amended by inserting at the end the following new subparagraph (c):

“(c) Paragraphs (a) and (b) in this section shall not apply to “operation of a military dining facility as that term is defined in section 2397 of title 10.”

(2) Section 107d-3(e) of title 20, United States Code, is amended after “cafeterias” by inserting “(other than operation of military dining facility as that term is defined in section 2397 of title 10)”.

### Section-by-Section Analysis

This proposal implements the joint policy developed by the Department of Defense (DoD), the Department of Education (ED), and the Committee for the People Who Are Blind or Severely Disabled (CFP) in response to Section 848 of the National Defense Authorization Act of Fiscal Year 2006 (Public Law 109-163). This proposal clearly defines which DoD food service requirements are subject to the R-S Act and which DoD food service requirements are covered by the JWOD Act.

This proposal unequivocally assigns to blind vendors under the R-S Act all prime contract opportunities to operate military dining facilities where the Government is contracting for such services, subject to grand-fathering of any such contracts currently being performed by JWOD workers as of the date of enactment.

This proposal protects the jobs of blind or severely disabled workers for services identified on the JWOD Procurement List. The R-S Act does not address jobs of blind or severely disabled workers for specific services supporting a cafeteria operation.

This proposal clearly defines how DoD is to afford the R-S Act "priority" to assure comparable quality and a fair and reasonable price. This proposal establishes standards for accountability, transparency and cost controls necessary for an appropriated funds procurement program.

This proposal will have no impact on any other agency because only DOD uses appropriated funds to purchase services from State licensing agencies under the R-S Act. Also, this proposal will have no effect on nonappropriated fund vending concessions to which the R-S Act applies.

Section (a) of this proposal codifies the governing law as section 2397 of title 10, United States Code. Section (b) makes a clerical change to add the new Section 2397 to the table of sections contained in Title 10, Chapter 141.

Section (c) makes conforming amendments to title 20. Section 107d-1 of title 20 is amended to conform to the new section 2397(h) of title 10, making bid protests under the Competition in Contracting Act the exclusive review for contracts for operation of a military dining facility. Section 107d-3(c) of title 20 is amended to conform to the new section 2397(j) of title 10, requiring the Director of Defense Procurement and Acquisition Policy to issue regulations under the OFPP Act with regard to appropriated fund contracts for operation of a military dining facility and dining support services. Through these amendments and section 2397, DoD becomes responsible for administering the DoD R-S Act program using appropriated funds and applying the unique standards of the proposed new section 2397 of title 10. DoEd will remain responsible for all other federal agency programs using nonappropriated funds. DoD has amply demonstrated its commitment to both the JWOD and R-S Act programs. Additionally, DoD has a core capability in education and training. The current situation of bifurcated

responsibilities between DoD and DoEd has not resulted in efficient oversight. Therefore, the administrative responsibility for R-S contracts using Defense appropriations must be consolidated in just one federal agency: DoD.

Subsection (a) of the proposed new section 2397 of title 10 ensures the military mission is given first priority in contracting decisions. Priorities for blind vendors and employment preferences for blind and disabled workers come into play only after the DoD has determined that the dining facility need not be operated directly and has determined that the military mission permits contracting in whole or in part.

Subsection (b) of section 2397 provides definitions, including "operation of a military dining facility." This definition equates to the definition informally used by DoD for almost 20 years, in coordination with the Department of Education and the Committee for Purchase from People Who Are Blind or Severely Disabled. The definition of "operation of a military dining facility" focuses on the management and day-to-day decision-making that are at the heart of operating an establishment where customers are served and the operator bears the risk of his entrepreneurial decisions. This definition recognizes that it is the mission of DoD to operate its own dining halls and have military members who are trained and capable of making decisions for food services in deployed settings. By dividing DoD dining facilities into those DoD operates and those it does not, this definition resolves the confusion that exists in recognizing the difference between JWOD and R-S Act contract opportunities.

Subsection (c) of section 2397 protects the jobs of blind or severely disabled workers for services on the Procurement List. The Procurement List is the objective standard identifying specific jobs to be performed by blind or severely disabled workers.

Subsection (d) requires R-S Act prime contractors to comply with the same rules all commercial offerors must meet regarding subcontracts with agencies that employ blind and severely disabled workers when those jobs are placed on the Procurement List.

Subsection (e) protects prime contract opportunities for the R-S Act program. This applies to R-S Act contracts and follow-on contracts. Therefore, the R-S Act program will enjoy the same degree of protection provided for the JWOD Procurement List. JWOD sources will be limited to providing support services (e.g., food preparation, cooking, custodial, and cashiers) when an R-S Act source has the prime contract.

Subsection (f) requires the Director of Defense Procurement and Acquisition Policy (the official identified in the Office of Federal Procurement Policy, 41 U.S.C. 421(d)) to issue procurement regulations for DoD establishing minimum standards of accountability, transparency, cost controls and actual education and training for blind persons operating cafeterias under the R-S Act. The minimum standards will include requiring States to train and assign at least one blind person in a cafeteria management role per military dining facility in contracts under the R-S Act. Doing so will best serve the public policy objective of expanding opportunities for blind persons to be trained and employed as cafeteria managers. The cap on executive compensation follows the example in past Department of Defense Appropriations Acts

for other types of contracts, setting maximum compensation at the same level as the Secretary of Defense and other cabinet level officers. This is considered fair and reasonable executive compensation for R-S vendors and their commercial partners since DoD provides the food, menus, customers, facilities, utilities, equipment, security, and trash removal. The DoD bears the risk of loss from food waste and food spoilage. The DoD is responsible for the cost of correcting customer complaints. Therefore, it is reasonable to cap the executive compensation and profit associated with these R-SA contracts.

Subsection (g) explains the mechanics of how the priority under the R-S Act will be afforded in DoD source selections, consistent with the Federal Acquisition Regulation (FAR). Subsection (g) incorporates into the proposed new section 2397 the standards currently found in Department of Education regulations with regard to comparing the cost and quality of the State licensing agency's offer with that available from other market sources. In Subsection (g)(2)(A)(iii) DoD seeks a cap on the dollar differential it is required to pay under this preferential program. In days of a stressed military budget and contingency operations, DoD cannot afford to shift precious Defense appropriations to State educational programs when those funds are needed to purchase supplies and services directly for Soldiers, Sailors, Airmen, and Marines.

Subsection (h) of the proposed new section 2397 normalizes the review of procurement decisions under the Competition in Contracting Act (CICA). Currently, DoD's procurement decisions regarding contracts for operation of a military dining facility can be subjected to bid protests to the GAO under CICA, protests to the Court of Federal Claims (COFC) under CICA, arbitration under the R-S Act, and litigation in federal District Courts under the R-S Act. This results in duplicative jurisdiction over the same subject matter, allowing appeals to the Court of Appeals for the Federal Circuit (CAFC) from COFC decisions as well as appeals to any of the numbered Circuit Courts reviewing decisions of the district courts. The GAO and COFC have unique expertise in reviewing federal agency procurement decisions using appropriated funds. Other than the recent foray into R-S Act contracts, the district courts have little or no expertise reviewing appropriated fund contracting, because exclusive jurisdiction was consolidated under CICA and vested in GAO and COFC/CAFC. The R-S Act created an arbitration process because GAO and COFC/CAFC have no jurisdiction over nonappropriated fund concession arrangements under the R-S Act. The R-S Act arbitration process and review by federal district courts was meant to fill a gap with respect to nonappropriated fund concessions. There is no gap with respect to appropriated fund contracts: CICA vested that jurisdiction exclusively in GAO and COFC/CAFC. DoD seeks relief from duplicative fronts of litigation with potentially different jurisdictional and procedural rules with respect to DoD appropriated fund contracts.

This proposal is needed because only a statutory change will assure finality in resolving the long-standing confusion of when to apply the JWOD and R-SA programs to the operation and management of military dining facilities.. The proposed new section of law will provide clear, fair guidance for all parties affected by contracting for military dining facility operation and dining support services.

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# Appendix M—Management Comments



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MAR 18 2008

## MEMORANDUM FOR DEPUTY ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS AND EVALUATIONS

THROUGH: DIRECTOR, ACQUISITION RESOURCES AND ANALYSIS

YB  
3/19/08

SUBJECT: Response to DoDIG Draft Report on "DoD Assessment of Contracting with Employers of Persons with Disabilities" (Project No. D2007-DIPOE1-0109.00)

This is to provide the USD(AT&L) response to the recommendations in the subject draft report.

**Recommendation 1:** Establish a Federal Acquisition Regulation (FAR) to govern the R-SA contracting process. (OPR: DoED; OCR: OUSD(AT&L)/DPAP).

**Response:** Concur. We agree that a procurement regulation is needed to address the Randolph-Sheppard Act (R-SA) in DoD contracting. The appropriate place to incorporate the R-SA as applied to military dining facility contracts is in the Defense Federal Acquisition Regulation Supplement (DFARS). Accordingly, the following revision to this recommendation is offered for your consideration. "Establish a Defense Federal Acquisition Regulation Supplement (DFARS) rule to govern DoD's contracting process under the R-SA. (OPR: OUSD(AT&L)/DPAPSS; OCR: OFPP)."

**Recommendation 2:** Pending publication of a federal acquisition regulation to govern the R-SA contracting process, ensure compliance across DoD with the provisions of NISH vs. Rumsfeld. (OPR: OUSD(AT&L)/DPAPSS).

**Response:** Concur. The decision in the stated case made the distinction of when the R-SA and JWOD Act applied to military dining contracts. For the longer term, the DFARS rule resulting from recommendation one will address the Court's decision. DoD has already addressed the Court's decision in the short-term. Specifically, I issued a memorandum to DoD procurement officials on March 16, 2007, to implement section 856 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163) which enacted and addresses the applicability of the JWOD Act and the R-SA to the operation of military dining facility contracts and military dining support services. Based on the above, recommendation number two is not necessary.



**Recommendation 3:** Continue to monitor the “per meal” costs associated with the various types of military dining facility contracts. Take appropriate steps to mitigate contracts and costs that are out of the competitive range, while considering appropriate “quality” offsets. Provide USD(AT&L) an impact statement in FY 2009. (OPR: OUSD(AT&L)/DPAPSS; OCR: CFP, DoED).

**Response:** Concur. We agree that monitoring of the contract performance is important, however, monitoring the “per meal” cost may not achieve the desired outcome given that there are different types of contracts and requirements needed to fulfill military operations at the various DoD installations. Also, the “per meal” costs will vary due to the Service Contract Act that may result in increased wages in a given State. It is DoD policy to compete requirements at every opportunity which results in fair and reasonable prices. In discussions with offerors, a contracting officer may request cost or pricing data or other supporting information to determine price reasonableness. Accordingly, the following revision to this recommendation is offered for your consideration. “Issue policy reminding DoD contracting officers to obtain appropriate cost or pricing data and supporting information in order to determine whether any offer for a military dining facility solicitation presents a fair and reasonable price, as required by 10 U.S.C. 2306 and FAR Subpart 15.4, regardless of whether contracts are awarded through competitive procedures or without full and open competition. Request a R-SA field be added to the Federal Procurement Data System-Next Generation to allow for reporting of R-SA contract actions. (OPR: OUSD(AT&L)/DPAPSS; OCR: OFPP).”

**Recommendation 4:** Issue appropriate procurement policy, regulations, and implementing procedures related to the R-SA and the award of contracts for military dining facility operations and services. (OPR: DoED; OCR: OUSD(AT&L)/DPAP).

**Response:** Concur. In November 2006, DoD opened DFARS case 2006-D064 to incorporate the joint policy statement into the Defense procurement regulations. However, in February 2007, the DoD Office of General Counsel determined the case could not proceed further without the Department of Education (DoED) publishing the updated R-SA regulations. In August 2007, the DoD and DoED agreed to a draft version of the R-SA regulations and internal coordination of the regulations was to begin at DoED. I am concerned that eighteen months have passed and the DoED has not revised the R-SA regulations that pertain to military dining contracts in accordance with the joint policy. DoD can no longer wait for DoED to complete their internal review process, and we are reviewing alternatives for issuing procurement guidance and proceeding with the DFARS case. We recommend the following revisions for your consideration. “Coordinate for formal publication for public comment and interagency coordination, appropriate policy and regulations to implement the joint report to Congress dated August 29, 2006, by the Department of Defense, the Department of Education, and the Committee for Purchase From People Who Are Blind or Severely Disabled. (OPR: OUSD(AT&L)/DPAPSS; OCR: DoED, CFP, OFPP).”

**Recommendation 5:** Issue arbitration policy and procedures that are transparent to both OSD, the Military Departments and the SLAs. (OPR: DoED; OCR: OUSD(AT&L)/DPAP).

**Response:** Concur. The Department of Education has arbitration policies and procedures in place that the Military Departments and State Licensing Agencies may request when arbitration is initiated. Accordingly, this recommendation is not necessary.

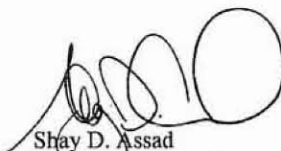
**Recommendation 6:** To resolve/clarify issues associated with contracting with employers of persons with disabilities, OUSD(AT&L) should forward a legislative change request to Congress. Appendices N1, N2, and N3 provide proposed legislative language under three separate scenarios. (OPR: OUSD(AT&L)/DPAP; OCR: DoED, CFP, Congress).

**Response:** Concur. For accuracy of the terminology, a revised recommendation is provided for your consideration. "To resolve/clarify issues associated with contracting with employers or sponsors of persons who are blind or have disabilities consistent with military mission and quality of life programs, USD(AT&L) should forward a legislative proposal to Congress. Appendices N1, N2, and N3 provide proposed legislative language under three separate scenarios. (OPR: OUSD(AT&L)/DPAPSS; OCR: OUSD(P&R), DoD ASD/Legislative Affairs, DoD ARA, DoD OGC, OMB)."

**Recommendation 7:** Congress should review the designation of the Department of Education as the executive agent for the Randolph-Sheppard Act and validate the status quo or determine if a procurement centric entity is more appropriate to manage R-SA activities. (OPR: Congress; OCR: DoED, OUSD(AT&L)/DPAP).

**Response:** Non-Concur. Based on discussions with your office on March 10<sup>th</sup>, we have agreed that this recommendation be withdrawn.

Thank you for the opportunity to provide comments on the draft report. My point of contact for this matter is Ms. Susan Pollack, (703)697-8336, susan.pollack@osd.mil.



Shay D. Assad  
Director, Defense Procurement,  
Acquisition Policy, and  
Strategic Sourcing



**THE JOINT STAFF  
WASHINGTON, DC**

Reply ZIP Code:  
20318

DJSM-1095-07  
26 December 2007

**MEMORANDUM FOR THE INSPECTOR GENERAL OF THE DEPARTMENT OF  
DEFENSE**

**Subject: Coordination on Draft Report "DOD Assessment of Contracting with  
Employers of Persons with Disabilities"**

1. Thank you for the opportunity to comment on the draft report.<sup>1</sup> The Joint Staff concurs in the draft as written.
2. The Joint Staff point of contact is Commander Bill Reich, USN; J-4/SVD; 703-571-9803.

**WALTER L. SHARP  
Lieutenant General, USA  
Director, Joint Staff**

**Reference:**

- 1 IG, DOD, memorandum, undated, "Report on the DoD Assessment of Contracting with Employers of Persons with Disabilities (Project No. D2007-DIP0E1-0109.00)"



DEPARTMENT OF THE ARMY  
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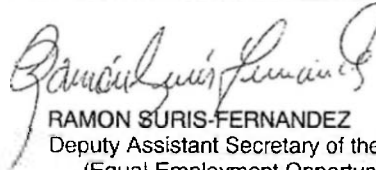
SAMR-EOCR

20 February 2008

MEMORANDUM FOR Assistant Inspector General for Inspections and Evaluations,  
Department of Defense (ATTN: LtCol Hammond), 400 Army Navy Drive, Arlington, VA  
22202-4704

SUBJECT: Report on the DoD Assessment of Contracting with Employers of Persons  
with Disabilities (Project No. D2007-DIP0E1-0109.00)

1. Reference DODIG memorandum dated 21 November 2007, subject as above, and  
OSD Control Tasker Control ID number 80211070, Army suspense, 20 February 2008.
2. This office was tasked by DACS-ZDV-HR to review and comment on the draft IG  
report with a direct reply to DoDIG. The Deputy Assistant Secretary of the Army for  
Equal Employment Opportunity and Civil Rights concurs with no comment.
3. Please direct any questions to Ms. Moya, Director for Programs for Individuals with  
Disabilities, at (703) 604-0616, DSN: 664-0616, or e-mail: [moyaer@hqda.army.mil](mailto:moyaer@hqda.army.mil).



RAMON SURIS-FERNANDEZ  
Deputy Assistant Secretary of the Army  
(Equal Employment Opportunity and Civil Rights)

Copy Furnished:  
DACs-ZDV-HR (Arvesta Roberson)





DEPARTMENT OF THE AIR FORCE  
WASHINGTON, DC

DEC 2 2008

OFFICE OF THE ASSISTANT SECRETARY

MEMORANDUM FOR DEPARTMENT OF DEFENSE INSPECTOR GENERAL  
ATTN: DEPUTY INSPECTOR GENERAL FOR AUDITING

FROM: SAFA/QC

SUBJECT: Air Force Response to Department of Defense Inspector General (DoDIG)  
Draft Report, Project No. D2007-DIP0E1-0109.00, DoD Assessment of Contracting  
With Employers of Persons With Disabilities

This is in reply to your memorandum requesting that the Assistant Secretary of the Air Force provide comments on the subject draft report dated November xx, 2007. Having reviewed the report we note there are no recommendations for immediate Air Force action, but rather that all acquisition related recommendations are directed to OUSD(AT&L). We have no comments in response to this report but will work with OUSD(AT&L) as it implements any policy or procedural changes resulting from the report.

Ms. Betsy Ann Matich, SAFA/QCP, commercial (703) 588-7026 or DSN 425-7026 is my point of contact for this report.

CHARLIE E. WILLIAMS, JR.  
Deputy Assistant Secretary (Contracting)  
Assistant Secretary (Acquisition)

**Meyer, Stanley E., OIG DoD**

---

**From:** Black, Michael K CIV [michael.k.black@navy.mil]  
**Sent:** Thursday, December 06, 2007 5:59 PM  
**To:** Meyer, Stanley E., OIG DoD; Crystal Focus  
**Cc:** Caplan, Morris Officer NAVSUP NAVSUPHQ; Cooper, Diana AAUSN-NAVIG; Davis, Celinda K CIV NAVSUPHQ  
**Subject:** DRAFT DODIG AUDIT REPORT ON THE DOD ASSESSMENT OF CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES (PROJECT NO. D2007-DIPOE1-0109.00)

Mr. Meyer;

NAVSUP is providing a negative response (no comments) to the subject draft audit report.

Please call or e-mail if you have questions. Thank you.

VR;  
Michael K. Black  
Deputy Inspector General/Director of Audits Office of the Inspector General Naval Supply  
Systems Command (SUP-91A)  
Voice: (717) 605-7246/DSN 430-7246  
FAX: (717) 605-1102/DSN 430-1102  
E-Mail: michael.k.black@navy.mil



DEPARTMENT OF THE NAVY  
DEPUTY NAVAL INSPECTOR GENERAL FOR MARINE CORPS MATTERS/  
INSPECTOR GENERAL OF THE MARINE CORPS  
WASHINGTON, D.C. 20380-1775


IF ONLY REFER TO:  
5000  
CMC-IG  
20 Dec 07

From: Inspector General of the Marine Corps  
To: Inspector General, Department of Defense

Subj: REPORT ON DEPARTMENT OF DEFENSE ASSESSMENT OF CONTRACTING  
WITH EMPLOYERS OF PERSONS WITH DISABILITIES  
(PROJECT NO. D2007-DIPOE1-0109.00)

1. The Inspector General of the Marine Corps (IGMC) concurs without comment.
2. Coordination and review was made with HQMC-LB (Contracting), Point of contact Mr. John Martin.
3. The IGMC point of contact for this matter is Major Matt Green, Director, Readiness Division at commercial (703) 695-3090.

Very Respectfully,

  
R. DAVID HOLMGREN  
Deputy



## **Appendix N—Installations Visited**

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### **Department of the Army**

Fort Dix, New Jersey

Fort Lee, Virginia

Fort Lewis, Washington

Installations Management Command, Arlington, Virginia

### **Department of the Navy**

Commander, Navy Region Midwest, Great Lakes, Illinois

Commander, Navy Region Southwest, San Diego, California

### **Department of the Air Force**

McChord Air Force Base, Washington

McGuire Air Force Base, New Jersey

Vandenberg Air Force Base, California

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## Appendix O–Acronym List

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AMC	Air Mobility Command
AR	Army Regulation
BOS	Base Operating Support
CFP	Committee for Purchase from People Who Are Blind or Severely Disabled
COFC	Court of Federal Claims
COLS	Common Output Level Standards
CONUS	Continental U.S.
CRSA	Commissioner of Rehabilitative Services Administration (DoED)
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
DoDD	Department of Defense Directive
DoDIG	Department of Defense Inspector General
DoED	Department of Education
DoEDIG	Department of Education Inspector General
FAR	Federal Acquisition Regulations
GAO	General Accountability Office
GC	General Counsel
HUBZone	Historically Underutilized Business Zone
JWOD	Javits-Wagner-O'Day
NAF	Nonappropriated Fund
NDAA	National Defense Authorization Act
NIB	National Industries for the Blind
NPO	Nonprofit Organization
OGC	Office of General Counsel
OSD	Office of the Secretary of Defense
OSERS	Office of Special Education and Rehabilitative Services (DoED)
OUSD(AT&L)	Office of the Under-Secretary of Defense, Acquisition, Technology, and Logistics
R-SA	Randolph-Sheppard Act
SBA	Small Business Administration
SLA	State Licensing Agency

## **Appendix P–Report Distribution**

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### **Office of the Secretary of Defense**

Under Secretary of Defense (Acquisition, Technology, and Logistics)  
Under Secretary of Defense (Personnel and Readiness)  
Under Secretary of Defense (Comptroller) / Chief Financial Officer  
General Counsel of the Department of Defense  
Assistant Secretary of Defense (Legislative Affairs)  
Assistant Secretary of Defense (Public Affairs)

### **Department of the Army**

Secretary of the Army  
Chief of Staff, U.S. Army  
Inspector General, Department of the Army

### **Department of the Navy**

Secretary of the Navy  
Chief of Naval Operations  
Commandant of the Marine Corps  
Naval Inspector General  
    Deputy Naval Inspector General for Marine Corps Matters

### **Department of the Air Force**

Secretary of the Air Force  
Chief of Staff, U.S. Air Force  
Inspector General, Department of the Air Force

### **Combatant Command**

Inspector General, Joint Staff

### **Non-Defense Federal Organizations**

Office of Management and Budget  
Committee for Purchase from People Who Are Blind or Severely Disabled

## **Department of Education**

Inspector General  
Office of Special Education and Rehabilitative Services  
Rehabilitation Services Administration

## **Congressional Committees**

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member  
Senate Subcommittee on Defense, Committee on Appropriations  
Senate Committee on Armed Services  
Senate Committee on Homeland Security and Governmental Affairs  
House Committee on Armed Services  
House Committee on Oversight and Government Reform  
House Subcommittee on Defense, Committee on Appropriations  
Senate Committee on Health, Education, Labor and Pensions

## **The Mission of the OIG DoD**

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The Office of the Inspector General promotes integrity, accountability, and improvement of Department of Defense personnel, programs, and operations to support the Department's mission and to serve the public interest.

## **Team Members**

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The Joint Operations, Defense Agencies, and Service Inspectors General Division, Inspections and Evaluations Directorate, Office of the Deputy Inspector General for Policy and Oversight, Office of the Inspector General for the Department of Defense prepared this report. Personnel who contributed to the report include Stanley E. Meyer – Division Chief, Lieutenant Colonel Henri T. Hammond (USAF) – Team Leader, Commander Von W. Freeman (USN), and Beverly L. Cornish.

## **Additional Report Copies**

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Contact us by phone, fax, or e-mail:

Inspections and Evaluations directorate, Deputy Inspector General for Policy and Oversight

COM: 703.604.9130 (DSN664.9130)

FAX: 703.604.9769

E-MAIL: [crystalfocus@dodig.mil](mailto:crystalfocus@dodig.mil)

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