



Section 848 of the National Defense Authorization Act for Fiscal Year 2006: Application of the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facilities Contracts

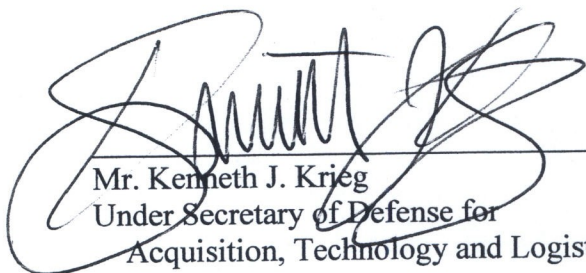
Joint Report to Congress

August 29, 2006

Department of Defense
Department of Education
Committee for Purchase From People Who Are
Blind or Severely Disabled

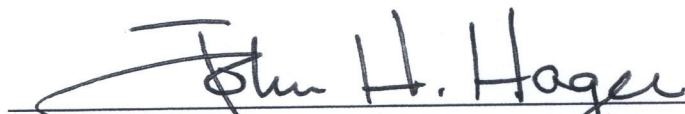
Pursuant to section 848 of the National Defense Authorization Act of Fiscal Year 2006, the Department of Defense (DOD), the Department of Education (ED), and the Committee for Purchase From People Who Are Blind or Severely Disabled (CFP) submit this report to Congress which provides a joint policy statement for the application of the Javits-Wagner-O'Day (JWOD) program and the Randolph-Sheppard Act (R-SA) program to the operation and management of military dining facilities.

Department of Defense:


Mr. Kenneth J. Krieg
Under Secretary of Defense for
Acquisition, Technology and Logistics


9/1/06
Date

U.S. Department of Education:


Mr. John H. Hager
Assistant Secretary for Special Education and
Rehabilitative Services

8/31/06
Date

Committee for Purchase From People Who Are Blind or Severely Disabled:


Mr. Andrew D. Houghton
Chairperson

8-31-2006
Date

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.

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.
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.
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.

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.

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.

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 who 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.

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.

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.

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.

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 1 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.

Attachment 1 to the Section 848 Joint Report to Congress

SEC. ____ . CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES.

(a) 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 enactment of this section, were on the Procurement List established under section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47).

(b) INAPPLICABILITY OF THE JAVITS-WAGNER-O'DAY ACT TO CONTRACTS FOR THE OPERATION OF A MILITARY DINING FACILITY.--(1) 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 as of the date of enactment of this section 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.

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

(c) DEFINITIONS.

(1) In this section, 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) In this section, 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.

Section-by-Section Analysis

This section would help to protect both Javits-Wagner-O'Day Act (JWOD) and Randolph-Sheppard Act (R-SA) beneficiaries by treating military dining facility contracts entered into as of the date of enactment of this section under both Acts in a mutually exclusive manner for DoD procurement purposes. This will also simplify Department of Defense (DoD) contracting by clarifying the application of the JWOD and R-SA programs to current military dining facility in a more effective way than the similar language in the FY04, FY05, and FY06 National Defense Authorization Acts.

Under this section, those contracts that are currently performed by R-S sources will remain in the R-S program and those that are currently performed by JWOD sources will remain in the JWOD program. When the current R-S contracts expire, they will continue to be available for State licensing agencies to assert a "priority" for the prime contract.