U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: JW Mills Management, LLC

File: B-420416

Date: March 24, 2022

Matthew E. Feinberg, Esq., Katherine B. Burrows, Esq., and Anna G. Sullivan, Esq., Piliero Mazza PLLC, for the protester.
Robert McCall, Esq., and Avetana Lovato, Esq., Department of the Navy, for the agency.
Michael P. Grogan, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging solicitation's inclusion of Randolph-Sheppard Act preference is sustained because the statutory preference applies to the "operation" of a cafeteria and the solicitation's requirements do not contemplate the types of activities and level of control to constitute the operation of a cafeteria.

DECISION

JW Mills Management, LLC, a Historically Underutilized Business Zone (HUBZone) small business of Moorpark, California, protests the terms of request for quotations (RFQ) No. N0024422R0008, issued by the Department of the Navy, for food service attendant services. The protester challenges the agency's decision to issue the solicitation with a preference pursuant to the Randolph-Sheppard Act (RSA). The protester argues that the agency acted contrary to applicable law and regulation when it applied the preference because the work contemplated by the solicitation is not for the operation of a cafeteria.

We sustain the protest.

BACKGROUND

The Navy issued the solicitation on December 3, 2021, pursuant to the procedures in Federal Acquisition Regulation (FAR) parts 12 and 15, as a set-aside for HUBZone small business concerns, seeking food service attendant (FSA) services for dining facilities located at Naval Base Ventura County, California. Agency Report (AR) Tab 2,

RFQ at 3.[1] The contractor would provide personnel, supervision of those personnel, and any items and services necessary to perform the services outlined in the performance work statement (PWS), to include cashier, food service attendant,[2] scullery, and housekeeping services. *Id*. The solicitation further stated the two dining facilities (or galleys) staffed through the contract would remain under the operational control of a food service officer (FSO)--a military service member. *Id*. The FSO would be responsible for inventory, maintaining the facilities' equipment, ordering and supplying food, establishing the menus, and food preparation and storage. *Id*. The solicitation advised, "In form and fact [the] FSO operate[s] the galleys." *Id*. The RFQ anticipated the award of a single fixed-price contract with a 16-month base period and four 1-year option periods. *Id*. at 4.

The solicitation provided for award on a best-value tradeoff basis, considering three factors: (1) technical; (2) past performance; and (3) price.[3] *Id*. at 76-77. The solicitation also included a provision that gave priority to state licensing agencies (SLAs) pursuant to the RSA:[4]

> The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered, unless preempted by application of the State Licensing Authority (SLA) priority under the Randolph-Sheppard Act. If the SLA is within the competitive range, is found to be technically acceptable, has a neutral or better past performance rating, offers a price determined to be fair and reasonable, and is deemed a responsible contractor, the SLA priority will pre-empt award to the Best Value Offeror. If an SLA submits an offer that is in the competitive range, the Contracting Officer may initiate discussions solely with the SLA for the purpose of facilitating an award to the SLA without further consideration of the other offers. The SLA may be included in the competitive range even if it is not the lowest priced.

Id. at 77

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[1] Our citations to the record correspond to the Adobe PDF document page numbers.

[2] Food service attendant services include a variety of tasks: packing box lunches and picnic rations; distributing food on the serving line; replenishing food, condiments, and beverages; cleaning tables and food/beverage spills; filling racks with used trays and dishes; and moving the same to the scullery room for cleaning. RFQ at 17-18.

[3] The technical factor had two subfactors: technical understanding and staffing plan. RFQ at 78.

[4] As will be discussed below, state licensing agencies (SLAs) execute the RSA program in a given state, acting under the auspices of the Department of Education's (DOE) state vocational rehabilitation programs. *See generally* 20 U.S.C. § 107d-3(e); 34 C.F.R. § 395.1.

The protester, the incumbent contractor and a non-RSA vendor, timely filed this protest on December 15, challenging the Navy's application of the RSA preference in the solicitation.[5]

DISCUSSION

JW Mills contends the Navy erred in applying the RSA preference to the solicitation. In this regard, the protester argues the RSA and its implementing regulations apply when a blind vendor operates a dining facility, which requires control or management over the facility as a whole. Because, JW Mills asserts, the instant solicitation merely requires a contractor to perform ancillary tasks in support of the dining facilities' overall functions, which do not involve control or management of the cafeterias, the solicitation should not be subject to the RSA. Protest at 20-21; Comments at 23-27.

In response, the Navy argues the scope of work for this solicitation requires more than the performance of discrete tasks, but instead, tasks necessary for the proper functioning of the cafeterias. As a result, the contracting officer's decision to apply the RSA preference was reasonable. Memorandum of Law at 13-18. The Navy also contends the majority of court and arbitration decisions reviewing this issue support its position. *Id*. at 4-7. Both parties aver that the statutory, regulatory, and available interpretative guidance supports their respective positions. For the reasons that follow, we find that the Navy erred by including the RSA preference in the solicitation because the solicitation's requirements are not for the operation of a cafeteria and we therefore sustain the protest on this basis.

Statutory and Regulatory Background

Congress enacted the RSA in 1936 for the purpose of training and employing qualified

[5] The protest follows from an earlier protest with our Office filed by JW Mills, challenging the agency's decision to enter into direct negotiations, pursuant to the RSA, with the California Department of Rehabilitation (CDOR)--California's SLA under the RSA--for the award of the contract. *See generally* 34 C.F.R. § 395.33(d) (providing that an agency "may afford priority in the operation of cafeterias by blind vendors on Federal property through direct negotiations with State licensing agencies" if the agency determines that "such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees[.]"). During the course of that protest, the Navy decided that direct negotiations with the CDOR would not result in a contract for services at a reasonable cost, and consequently, cancelled the underlying solicitation. As a result, our Office dismissed JW Mills's protest as academic. *JW Mills Management, LLC*, B-420188, Nov. 29, 2021 (unpublished decision).

blind individuals to operate vending facilities in federal buildings.[6] Pub. L. No. 74-732, 49 Stat. 1559 (1936) (*codified as amended* at 20 U.S.C. §§ 107-107f). In 1974, Congress amended the RSA, establishing a clear federal-state relationship; while the RSA is under the authority of and administered by the Department of Education (DOE), the states participating in the program are primarily responsible for program operations through the SLAs. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat 1617. The 1974 amendments also broadened the applicability of the RSA to vending machines, snack bars, and cafeterias.[7] *Id*. at § 207 (*codified* at 20 U.S.C. § 107e). The RSA specifies the Secretary of the DOE has the authority to prescribe regulations to implement the RSA. 20 U.S.C. § 107(b). As relevant to this protest, DOE's implementing regulations provide:

> Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise.

34 C.F.R. § 395.33(a).

To better understand the history of the application of the RSA to the types of services at issue in this solicitation, we briefly discuss another statutory preference, the Javits-Wagner-O'Day Act (JWOD Act). Passed in 1938, and amended in 1974, the JWOD program provides jobs for individuals with disabilities (to include those who are vision impaired). 41 U.S.C. §§ 8501-8506. The AbilityOne program, which is administered by the Committee for Purchase from People Who Are Blind or Severely Disabled (Committee), implements the JWOD Act by providing employment opportunities, through the award of federal contracts, for people who are blind or have other severe disabilities. 41 C.F.R. § 51-1.3. The JWOD Act grants the Committee the exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified non-profit agencies for the blind or disabled under the AbilityOne program.[8] 41 U.S.C. §§ 8502(a), 8503(a); *see* FAR subpart 8.7. Federal agencies are required to obtain all supplies and services that are on the Procurement List from a central nonprofit

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[6] By later amendment, the RSA broadened the applicability of the RSA to federal "properties." Pub. L. No. 83-565, 68 Stat. 663 (1954).

[7] Federal courts have held that military dining facilities are "cafeterias" under the RSA. *See NISH v. Cohen*, 247 F.3d 197 (4th Cir. 2001); *NISH v. Rumsfeld*, 348 F.3d 1263 (10th Cir. 2003).

[8] References herein to AbilityOne are to the program, as administered by the Committee.

agency, or its designated AbilityOne participating nonprofit agencies. 41 U.S.C. § 8504(a); FAR 8.705-1(a). As relevant to this discussion, the Procurement List includes a variety of products and services, to include, janitorial and food service attendant services.[9] FAR 8.703.

The RSA and JWOD Act programs potentially overlap to the extent both provide a preference to blind vendors for certain categories of work performed at a military cafeteria. *See generally Contracting for Military Food Services Under the Randolph-Sheppard and Javits-Wagner O'Day Programs*, GAO-08-03, at 6 (Oct. 30, 2007). This potential for overlap has spurred questions about which program to apply in a particular circumstance. These questions have, in turn, received attention from Congress, both the Departments of Defense and Education, the federal courts, and the DOE arbitration panels tasked with hearing certain complaints arising from the RSA.[10] Accordingly, while our effort in the instant protest is to decide whether the tasks required by the solicitation concern the operation of a cafeteria under the RSA's statutory and regulatory framework (thus requiring the application of the RSA preference), an examination of the laws and regulatory guidance concerning how the RSA and the JWOD Act have applied to contracts related to the operation of military cafeterias informs our analysis.

Section 848 of the National Defense Authorization Act (NDAA) for Fiscal Year 2006 (2006 NDAA) required the Department of Defense (DOD), DOE, and AbilityOne to issue a joint policy statement concerning the application of the RSA and the JWOD Act to "address the application of those Acts to both operation and management of all or any part of a military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces[.]" National Defense Authorization Act for Fiscal Year 2006 § 848, Pub. L. No. 109-163, 119 Stat. 3136, 3395.

The joint policy statement, issued on August 29, 2006, expressed a "no-poaching" policy, and encouraged Congress to enact the same into law. The no-poaching policy provided that existing contracts would remain governed by the procurement preference already in place for those contracts; that is, the RSA would apply for existing contracts related to the operation of a military dining facility, and the JWOD Act would apply for military dining facility support services on the procurement list. Protest, exh. D, *Application of the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facility Contracts* (Joint Policy

[9] The protester's position is not that the JWOD Act should apply to the Navy's solicitation, but only that the application of the RSA is inappropriate. Comments at 22-23.

[10] The RSA provides that DOE will convene an arbitration panel to hear an SLA's complaint regarding a federal agency's compliance with the RSA. 34 C.F.R. § 395.37. The panel's decisions are final and binding, subject to appeal and review. 34 C.F.R. § 395.37(b); *see also* 20 U.S.C. §§ 107d-1, 107d-2.

Statement), Aug. 29, 2006. Additionally, the joint policy statement sought to establish "bright-line" rules for when the RSA and JWOD Act would apply. The statement provides that the RSA would apply to contracts when the contractor will exercise management responsibility and day-to-day decision-making for the overall functioning of the dining facility, and the JWOD Act would apply when DOD requires dining support services (such as 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), but where DOD personnel are exercising overall functional and management responsibilities. *Id*. While the no-poaching provision was enacted into law, the bright-line rules concerning the application of the two preferences were not.[11]

We note three other developments related to the application of the RSA to military cafeteria contracts. First, the Joint Explanatory Statement (JES) to the 2015 NDAA adopted the bright-line rules articulated in the 2006 joint policy statement, by drawing a clear distinction between the application of the RSA and the JWOD Act. Joint Explanatory Statement to accompany H.R. No. 3979, National Defense Authorization Act for Fiscal Year 2015 (2014), 160 Cong. Rec. H7894-H8037 (2014) at 91-92. The JES states that while Congress previously sought to resolve the "lack of regulatory guidance" on the application of the RSA and JWOD Act thorough the joint policy statement requirement and the enactment of the no-poaching provision, "without complementary regulations to implement the Joint Policy Statement, confusion remains on when to apply the two acts, particularly with regard to new contracts[.]" *Id*. As such, the JES provided, "[T]he [RSA] applies to contracts for the operation of a military dining facility, or full food services, and the [JWOD] Act applies to contracts and subcontracts for dining support services, or dining facility attendant services, for the operation of a military dining facility." *Id*. The JES also directed DOD to prescribe implementing regulations for the application of the two statutes. *Id*.

Second, in 2016, in response to the JES, DOD issued a proposed final rule, amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the bright-line rules in the JES concerning when the RSA and JWOD Act would apply. *Food Services for Dining Facilities on Military Installations*, 81 Fed. Reg. 36506 (Jun. 7, 2016); Protest, exh. G, DFARS Case 2015-D012. The proposed rule defined several key terms (such as "operation of a military dining facility," "dining support services," and "mess attendant services") and provided that the RSA applied to contracts for the operation of a military dining facility (also known as full food services), while the JWOD Act applies to contracts for dining support services (including mess attendant services). *Id*. at 285. However, in 2019, the proposed DFARS rule was withdrawn because DOE

[11] National Defense Authorization Act for Fiscal Year 2007 § 856(a), Pub. L. No. 109-364, 120 Stat. 2083, 2347 (2006) (providing (1) the RSA 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[;]" and (2) the JWOD Act does not apply to an existing DOD contract entered into with an SLA under the RSA for the "operation of a military dining facility.").

notified DOD that the joint policy statement of 2006, which was signed by DOE, DOD, and the precursor to the AbilityOne program, “no longer reflects the position of the Department of Education.” Protest, exh. H, Off. of Info. & Reg. Affs., Off. of Mgmt. & Budget, RIN No. 0750-AI78 at 291.

Third, on March 5, 2018, the Secretary of Education delivered a letter to Representative Peter Sessions, expressing her views concerning the applicability of the RSA. Protest, exh. I, Secretary of Education Letter to Rep. Sessions, Mar. 5, 2018. The Secretary explained:

> [T]he Randolph-Sheppard Act priority applies when the Department of Defense solicits a contract for the operation of a cafeteria on a military base. There has been some dispute over the types of contracts to which the priority applies. Defense Department regulations distinguish between "full food service" and "dining facility attendant" contracts. Under "full food service" contracts, the vendor manages the entire operation of the cafeteria, including food preparation. Under "dining facility attendant" contracts, the vendor manages those aspects of the cafeteria besides food preparation because military personnel prepare the food. The Education Department believes that the Randolph-Sheppard Act priority applies to both types of cafeteria contracts.

Id. at 293. In support, the Secretary explained that nothing in the RSA required a vendor to manage or direct the working of a cafeteria, and a “vendor can be said to ‘manage’ the cafeteria, even if the vendor is not preparing the food.” *Id*. The Secretary cautioned that “[s]ome contracts may be limited to discrete tasks so as not to entail overall ‘operation’ of the cafeteria, but that characterization would not apply to all ‘dining facility attendant’ contracts.” *Id*.

Application of the RSA to the Navy’s Contract

With this information to help establish the statutory, regulatory, and policy framework, we turn to the specific issue in this protest, that is, whether the Navy acted consistent with the RSA when it applied the RSA preference to the current solicitation for FSA services. In the protester’s view, the Navy’s inclusion of the preference was improper because the types of services required by the PWS do not concern the operation of a cafeteria, and the import of the legislative and regulatory history would support its view. In response, the Navy contends that neither Congress nor DOE have demonstrated an intent to narrowly read the scope of the RSA. Thus, the Navy argues there is no basis to conclude that the FSA services do not fall within the definition of operation of a cafeteria as the phrase is used in the RSA. Moreover, the agency points to federal caselaw and DOE arbitration panel decisions that have determined that the types of services at issue here are, in fact, covered by the RSA. As such, the Navy concludes that the contracting officer’s application of the preference should not be disturbed.

Our analysis begins with the interpretation of the relevant statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our

analysis begins with the 'language of the statute.'"). In construing the statute, "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2001) (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Our Office likewise applies the "plain meaning" rule of statutory interpretation. *See, e.g., Oracle America, Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180 at 16.

Applying these principles to the language of the RSA statute, we conclude the plain language does not support the agency's position. As noted above, the RSA's statutory preference applies to the "operation of vending facilities on Federal property." 20 U.S.C. § 107(b). While the statute does not specifically define "operation," the plain meaning of such a term connotes some degree of control, management, or administration of the vending facility. In this solicitation, the tasks to be performed are in support of the cafeterias, but do not, in and of themselves, involve operating the cafeterias. Indeed, reasoning by analogy, if a contractor was performing janitorial services at a government facility, it could hardly be construed that the firm was "operating" the facility. Similarly, here, the PWS only asks the contractor to perform cashier, FSA, scullery, and housekeeping services, whereas the solicitation expressly provides that the Navy (through the FSOs) will operate the cafeterias (by retaining control of the overall management and day-to-day operations of the cafeterias). RFQ at 3. In such circumstances, we believe the solicitation does not involve the "operation" of a vending facility.

We believe this interpretation is also consistent with the RSA's implementing regulations. Title 34 section 395.33(a) of the Code of Federal Regulations provides that, "Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded" when DOE determines "that such [an] operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided. . . ." Implicit in this phrasing is not only that the contractor will have some degree of management or control over the cafeteria, but also that it will do so in relation to providing food. *See also* 34 C.F.R. § 395.33(b) (providing that "[i]n order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services[,]" SLAs may respond to cafeteria contracts).

In the Navy's solicitation, the contractor does not exercise management or control over providing food, but, at best, performs ancillary tasks in relation to providing food. *See* RFQ at 17-18 (requiring the contractor to pack/prepare box lunches and picnic rations, distribute and replenish food on the serving line, etc.). In such circumstances, we do

not believe the priority described in the RSA's implementing regulations applies to the instant solicitation.[12]

The parties both advance arguments suggesting that the statutory and regulatory history discussed above supports their positions. However, the referenced legislation, reports, and other materials do not advance a binding (or otherwise dispositive) interpretation of the RSA's application, and, in our view, provide no basis to deviate from a plain reading of the statute and implementing regulations.

For example, JW Mills contends that the 2006 and 2007 NDAAs, the 2006 joint policy statement, the proposed DFARS rule, and the 2015 JES all support its contention that the RSA should not apply to FSA service contracts, like the one at issue here. Comments at 6-12. While we agree with the protester's ultimate position, we do not agree these materials help to clarify the RSA's scope or provide a clear interpretive lens for analyzing FSA service contracts. Indeed, neither the 2006 nor the 2007 NDAA manifest a clear congressional intent to either limit or broaden the application of the RSA, at least prospectively.[13] The bright-line rule advanced in the 2006 joint policy statement and in the proposed DFARS rule similarly do not aid in our interpretation.

We reach this conclusion because it is DOE, not DOD, which is charged with promulgating implementing regulations concerning the RSA, and DOE has expressly provided that the views espoused in the joint policy statement and the proposed DFARS rule do not reflect the agency's views. *See* Protest, exh. H, Off. of Info. & Reg. Affs.,

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[12] We note that some DOE arbitration panel decisions suggest the governing regulation is not found at 34 C.F.R. § 395.33(a), but instead, § 395.33(c). In this regard, the operative phrase, it is argued, is not whether a solicitation's tasks require the "operation of cafeterias" (per § 395.33(a)), but instead, whether such tasks "pertain[] to the operation of cafeterias" (per § 395.33(c)). *See Georgia Vocational Rehab. Agency v. U.S. Dep't of Defense*, R/S 13-09 (2016); *California Dep't of Rehabilitation v. U.S. Dep't of the Navy*, R/S 15-20 (2018). We believe this analysis, which would presumably broaden the application of the RSA (*i.e.,* operation of versus *pertaining to* the operation of), is misplaced. *See SourceAmerica v. United States Dep't of Educ.*, 368 F. Supp. 3d 974 (E.D. Va. 2019), *aff'd in part, vacated in part, remanded sub nom*. *Kansas by & through Kansas Dep't for Child. & Fams. v. SourceAmerica*, 826 F. App'x 272 (4th Cir. 2020) (rejecting the application of 34 C.F.R. § 395.33(c) as controlling the analysis because such a reading would "override the statutory text or broaden the scope of the RSA's preference."); *Washington State Dep't of Servs. for the Blind v. United States*, 58 Fed. Cl. 781 (2003) (finding 34 C.F.R. § 395.33(c) to be a "transitional provision intended to assist in the implementation of RSA rather than to mandate the application of RSA to all contracts relating in any way to the operation of cafeterias on federal property[.]").

[13] Again, the 2007 NDAA codified the no-poaching provision for contracts awarded as of the date of enactment. *See* National Defense Authorization Act for Fiscal Year 2007 § 856(a), Pub. L. No. 109-364, 120 Stat. 2083, 2347 (2006).

Off. of Mgmt. & Budget, RIN No. 0750-AI78. While the 2015 JES does express a clear position concerning the application of the two statutory preferences (with the JWOD Act, not the RSA, applying to contracts for dining support services and dining facility attendant (DFA) services at a military dining facility), such a policy statement--while arguably serving as some evidence of legislative intent--does not carry the force of law. *See SourceAmerica v. U.S. Dep't of Educ.*, No. 1:17-cv-893, 2018 WL 1453242 at 10 n.13 (E.D. Va. Mar. 23, 2018) (noting that the JES lacks the force of law because the statement did not go through the process of bicameralism and presentment, despite, by its own terms, that it shall "have the same effect with respect to the implementation of [the 2015 NDAA] as if it were a joint explanatory statement of a committee of conference.").

Similarly, we do not agree with the agency's position that the Secretary of Education's 2018 letter mandates a broad reading of the statute, requiring the application of the RSA's preference to the type of services at issue in this procurement. In this regard, the Secretary's letter does advance an expansive application of the RSA to DFA contracts--where the vendor manages those aspects of the cafeteria besides food preparation because military personnel prepare the food. *See* Protest, exh. I, Secretary of Education Letter to Rep. Sessions, Mar. 5, 2018. However, the Secretary's letter is of limited interpretive value; the letter is not a product of formal rulemaking, is addressed to an individual Member (rather than a committee of jurisdiction), and, as one federal court noted, "there is insufficient information in the letter to evaluate the thoroughness of the consideration [of the issue]." *Dep't of Hum. Servs., Div. of Vocational Rehab., Hoopono-Servs. for the Blind v. United States Dep't of Educ., Rehab. Servs. Admin.*, 541 F. Supp. 3d 1137, 1148 (D. Haw. 2021).

Indeed, the Department has not uniformly adopted such an interpretation and taken positions in litigation arguing that the letter should not be given deference. *See Brief of Defendants-Appellees, Cross-Appellants at *18-19, 35*, *State of Kansas v. SourceAmerica, et al*, No. 19-1452(L), 19-1514 XAP, 2019 WL 3886754 (4th Cir. 2019), ("The Secretary has not exercised her statutory rulemaking authority to address whether the RSA applies to [dining facility attendant] services contracts. [I]t would be incongruous to accord deference to a letter sent to a single Member of Congress; it is not an opinion letter issued to the public or internal agency guidance directed at future arbitration panels. Nor is it a response to a formal inquiry from Congress."); *SourceAmerica v. United States Dep't of Educ.*, 368 F. Supp. 3d 974, 994-995 (E.D. Va. 2019), *aff'd in part, vacated in part, remanded sub nom. Kansas by & through Kansas Dep't for Child. & Fams. v. SourceAmerica*, 826 F. App'x 272 (4th Cir. 2020) (noting that in response to litigation concerning a solicitation incredibly similar to the solicitation at hand, the "DOE has unequivocally stated its litigation position that the RSA does not apply . . .").

Even if we were to accept the Navy's position that the Secretary's letter should be entitled to deference,[14] such a conclusion would not change our analysis. Indeed, the Secretary's letter provides that a contractor must "manage" or "direct the working" of a cafeteria to be considered to be operating the galley. Protest, exh. I, Secretary of Education Letter to Rep. Sessions, Mar. 5, 2018. Here, however, the agency's own solicitation provides that the Navy will (through the FSO) retain "operational control" of the cafeterias and will, in "form and fact" operate the galleys. RFQ at 3. Even without the solicitation expressly providing that the Navy will operate the cafeterias, given the responsibilities of the FSO in managing and directing the workings of the cafeteria, we conclude the discrete tasks to be performed by the contractor do not rise to the level of operating the cafeteria. *See* Protest, exh. I, Secretary of Education Letter to Rep. Sessions, Mar. 5, 2018 ("Some contracts may be limited to discrete tasks so as not to entail overall "operation" of the cafeteria, but that characterization would not apply to all 'dining facility attendant' contracts."). Accordingly, without clear direction from Congress or DOE concerning the RSA's applicability in FSA-like contracts, we cannot conclude that the legislative, regulatory, and policy guidance addressed by the parties in the record requires something other than a plain reading of the RSA and its implementing regulations.

We acknowledge that federal courts have grappled with the applicability of the RSA to military cafeteria contracts, in a variety of different factual contexts, and have reached mixed results.[15] Likewise, arbitration panels convened under DOE's RSA regulations

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[14] Courts differ on how much, if any, deference the Secretary's letter warrants. *Compare SourceAmerica v. United States Dep't of Educ.*, 368 F. Supp. 3d 974 (E.D. Va. 2019), *aff'd in part, vacated in part, remanded sub nom. Kansas by & through Kansas Dep't for Child. & Fams. v. SourceAmerica*, 826 F. App'x 272 (4th Cir. 2020) (finding that the letter is not entitled to deference) *with Texas Workforce Comm'n v. U.S. Dep't of Educ.*, 973 F.3d 383, 390 (5th Cir. 2020) ("Although the Secretary's letter does not carry the force of law, we find it presents a 'reasonable interpretation' of the [RSA], such that it is persuasive and is therefore 'entitled to respect.'").

[15] *Compare Washington State Dep't of Servs. for the Blind v. United States*, 58 Fed. Cl. 781 (2003) (upholding the Army's decision not to apply the RSA to a dining facilities attendant contract, where military personnel would be responsible for preparing the food and the contractor would provide other services, such as washing dishes) *with Mississippi Dep't of Rehab. Servs. v. United States*, 61 Fed. Cl. 20, 29-30 (Fed. Cl. 2004) (requiring the application of the RSA to a contract for where the contractor would prepare and serve food, along with cashier, sanitation, and housekeeping services) *and Tex. Workforce Comm'n v. U.S. Dep't of Educ.*, 354 F. Supp. 3d 722, 739 (W.D. Tx. 2018), *aff'd by Tex. Workforce Comm'n v. U.S. Dep't of Educ., Rehab. Servs. Admin.*, 973 F.3d 383, 390 (5th Cir. 2020) (concluding that the RSA applies to an FSA-type contract for custodial services because such services are integral to the operation of a cafeteria) *with Dep't of Hum. Servs., Div. of Vocational Rehab., Hoopono-Servs. for the Blind v. U.S. Dep't of Educ., Rehab. Servs. Admin.*, 541 F. Supp. 3d 1137 (D. Haw.

have addressed similar issues, tending to favor a broader application of the RSA to FSA service contracts.[16] However, in our view, based on a plain reading of the RSA statute and implementing regulations, the work required in the instant solicitation for FSA services does not constitute the "operation" of a cafeteria per the meaning of the RSA.[17] As such, we conclude the Navy's inclusion of the RSA preference in the solicitation was improper and we therefore sustain the protest.[18]

RECOMMENDATION

For the reasons discussed above, we recommend the agency amend the solicitation to remove the RSA preference from the solicitation. Additionally, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protesters should submit their claims for costs, detailing and certifying the time expended and costs incurred, to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel

2021) (upholding arbitration panel's ruling that RSA did not apply to a contract for DFA services where contractor would merely be performing janitorial services).

[16] *See e.g., California Dep't of Rehabilitation v. U.S. Dep't of the Navy*, No. R/S 15-20 (2018) (in addressing a nearly identical solicitation, panel concluded RSA applied to FSA services); *Kansas Dep't of Children and Family Servs. v. U.S. Dep't of the Army*, No. R/S 15-15 (2017) (solicitation for custodial services at military cafeteria required the application of the RSA because such tasks "constitute an integral element of providing food services at a military cafeteria facility[.]"); *but see Hawaii Dep't of Human Servs. v. U.S. Dept. of the Army*, No. R/S 16-07 (2017) (concluding that DFA services are not covered by RSA when there is no primary food component to the work).

[17] *See SourceAmerica v. United States Dep't of Educ.*, 368 F. Supp. 3d 974 (E.D. Va. 2019), *aff'd in part, vacated in part, remanded sub nom. Kansas by & through Kansas Dep't for Child. & Fams. v. SourceAmerica*, 826 F. App'x 272 (4th Cir. 2020) (adopting a plain meaning analysis of the RSA statute and implementing regulations).

[18] We note that in prior litigation, the Navy adopted the position advanced by JW Mills here that the RSA should not apply to FSA contracts. *See California Dep't of Rehabilitation v. U.S. Dep't of the Navy*, No. R/S 15-20 (2018). However, in response to that arbitration panel's decision--which concluded that the RSA applies to a solicitation nearly identical to the instant solicitation--the Navy included the RSA preference in this RFQ. Contracting Officer's Statement at 1-2.