

Randolph- Sheppard Act: Many Questions - Few Answers

Implementation of the Randolph -Sheppard Act (R-SA) and applicable regulations presented a real challenge in a recent full and open competition for Full Food Services for a Troop Dining Facility at Redstone Arsenal. The requirement was for the contractor to provide all management, administration, labor, uniforms, supplies, materials, and equipment necessary to operate a full service cafeteria for one base year plus four option years. The RFP was identified as a "best value" procurement to be awarded in accordance with the R-SA.

The problems stemmed from trying to assign a priority to the State Licensing Agency (SLA), representing a blind vendor, as required in the Randolph-Sheppard Act, 20 USC 107(e), and implementing regulations, 34 CFR 395.33, DODD 1125.3, AR 210-25 and, at the same time, compete the effort in compliance with acquisition laws and defense regulations pertaining to "best value" awards. (In this discussion, "SLA" is used interchangeably with "the blind")

Our RFP went on the street and proposals were received before issuance of DA Memo re Military Dining Facilities Contracts, dated 1 August 1997, in which Dr. Oscar addressed the issue and stated : "The procedures established to implement the Randolph - Sheppard Act differ significantly from those established for appropriated fund contracting actions which our contracting activities are required to follow. For instance, the FAR does not authorize the contracting officers to solicit on an unrestricted basis when a set-aside for small or small disadvantaged business is required by that Regulation; nor does the FAR allow waiver of competitive procedures in order to award a contract to an offeror whose offer, although within the competitive range, does not represent the best value." (emphasis added) Further he stated that he does not believe the intent of the R-SA was ever to cover food service mess halls and he is seeking to get the R-S Act amended to specifically exclude military troop dining facilities. For now he requires notification to the Office of the Deputy Assistant Secretary of the Army (Procurement) prior to release of a solicitation for military troop dining facility in order to exchange information and provide specific guidance.

By way of background information, the R-SA, 20 USC 107d-3, authorizes the operation of vending facilities on Federal property (which by definition includes cafeterias) and gives a priority to blind persons licensed by a state agency in order to provide them with remunerative employment. It requires the Secretary of Education to insure that the Rehabilitation Services Administration is the principal agency for carrying out the statutory requirements for the priority and requires him, (through the Commissioner of the Rehabilitation Administration) to make annual surveys of concession vending opportunities for blind persons on Federal property and to designate the State agency in each State which is authorized to issue licenses to blind persons for the operation of vending facilities on Federal property. It also requires the State licensing agency to give a preference to blind persons in need of employment when issuing licenses.

In addition, the Statute requires the Secretary of Education, through the Commissioner, to prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees "when he determines, on an individual basis, and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or not."

34 CFR 395 requires that an application for designation as a State licensing agency be submitted only by the state vocational rehabilitation agency providing vocational rehabilitation services to the blind under an approved State plan for such services. The state licensing agency is required to establish objective criteria for licensing qualified applicants, including a provision for giving preference to blind persons who are in need of employment. The criteria must assure that licenses will be issued only to persons determined by the State agency to be blind, be US citizens, and be certified by the state agency as qualified to operate a vending facility. Section 33 requires that a priority be given blind vendors when the Secretary determines that the effort can be provided at a reasonable cost, with high quality food. In order to establish the ability of the blind vendors to operate a cafeteria in such manner, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is planned. The CFR goes on to say that if the proposal from the State agency is judged "within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award" the Secretary shall be consulted to determine that such operation can be provided at a reasonable cost, with high quality food.

The words in the CFR in quotations above are not clear in the context of FAR 15. It is tempting to read the phrase "ranked among those proposals which have a reasonable chance of being selected for final award" as an inartful explanation of "being within the competitive range". However, a decision by the U.S. Department of Education, Matter of Mississippi Department of Rehabilitation Services vs. U.S. Department of the Air Force, Arbitration Case No. R-S/94-3, 27 Mar. 97, interpreted the words to impose a specific 2 part test as follows - a "judging" criterion which requires that the offer from the blind be "judged" competitive and a "ranking" criterion which requires that the blind proposal be "ranked among" those proposals which contend for final award.

To add to the confusion, the second part of the phrase does not appear in DODD 1125.3 or AR 210-25. Both simply require award to the blind if the offer is within the competitive range. There is no mention of the ranking business found in the CFR and while there are 2 exceptions to award when in the competitive range, neither of them applied in our situation (and probably rarely will apply). For general information, the exceptions are when the on-site official determines that award to the State Licensing Agency would adversely

affect the interests of the U.S. and the Secretary of Education approves the determination OR when the on-site official determines, after conferring with HQDA and the Secretary, HEW, agrees, that the blind vendor does not have the capacity to operate a cafeteria in such a manner as to provide good service at a comparable cost and of comparable high quality as that available from other providers of cafeteria services. (See Delegation of Authority Randolph-Sheppard Act, SARDA-96-5, 18 Jun 1996 which authorizes the PARC to act for OASA(RDA) in certain dealings with the installation commander)

Certainly offers properly included in the initial competitive range may not end up "ranked" among those which have a reasonable chance for final award, however those words are to be interpreted. As we well know, FAR 15.609 only requires the Contracting Officer to include those offers in the range that have a reasonable chance for award and when there is doubt, put them in. When the initial range is established nothing more is known about the merits of the proposals than that they have a reasonable chance for award. Clearly no conclusion concerning "best value" can be reached.

After the Contracting Officer makes the initial competitive range determination, he is left with an array of offers, some of which likely have Technical and Management deficiencies or disadvantages which ordinarily would be the subject of discussions and which may impact the proposed Cost. The KO could proceed with discussions and the evaluation (ratings) and then make a second competitive range determination. Presumably this would result in a group of offerors which are on equal footing, i.e. each has a proposal which has no deficiencies, has corrected disadvantages and is priced on that basis.

If the SLA is in this second range it would seem that the Contracting Officer is more justified in making the award to it than he was earlier. By being included in this second range, established after discussions, he could more reasonably determine that the offer was "ranked among those proposals which have a reasonable chance for award." (Of course, this presumes that the price is found to be fair and reasonable.)

However the KO, ever mindful of the pressures of ALT/PALT, may be reluctant to proceed this far in light of the words in the AR which simply require the SLA to be in the competitive range. This position is understandable. Continuing the competitive, "best value" process is very time consuming with no assurance that the outcome (i.e. the competitive range) will or should change after the added time and effort. On the other hand, what possible value can there be in expending the time and effort required to plan for and initiate a competition acquisition and then ending it just as an initial competitive range is determined? The only exception that comes to mind is when the Contracting Officer anticipated award without discussions and is in a position to do that - aside from any R-SA considerations.

It seems that the Randolph-Sheppard implementing instructions require the interruption of a statutorily created process, designed

for the sole purpose of identifying the proposal offering the "best value" to the Government, for a totally different statutory purpose - priority to the blind. These conflicting objectives are so difficult to achieve that it may become particularly important to consider carefully the sole source avenue of "direct negotiations" with the SLA as provided in the implementing regulations, see AR 210-25 (b)(2). This is permissible when the on-site official (HCA) with concurrence of HQDA, has determined that the SLA, through its blind licensee, can provide the cafeteria services required at a reasonable cost, with food of a high quality comparable to that available from other providers of cafeteria services.

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